Atty No. 46279

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

THE HOPE CLINIC FOR WOMEN LTD.; ALLISON COWETT, M.D., M.P.H., Plaintiffs, v. BRENT ADAMS, Acting Secretary of the Illinois Department of Financial and Professional Regulation, in his official capacity; DANIEL BLUTHARDT, Director of the Division of Professional Regulation of the Illinois Department of Financial and Professional Regulation, in his official capacity; THE ILLINOIS STATE MEDICAL DISCIPLINARY BOARD, Defendants.	Case No. 09 CH 38661 Judge Daniel A. Riley In Chancery Preliminary Injunction Temporary Restraining Order

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiffs have provided abundant evidence that, absent action by this Court, the Parental Notice of Abortion Act of 1995 (the "Act") will cause minors in Illinois to suffer substantial and irreparable harm, including physical and emotional abuse, homelessness, forced childbirth, and medically risky delay in resolving their pregnancies. Plaintiffs submitted affidavits from experts from Illinois and around the country whose testimony demonstrates the serious and irreversible harms the Act imposes. These experts provide the Court with invaluable assistance in determining the issues in this litigation. Defendants have not contradicted, denied or countered a single fact, research study or opinion offered; they merely contend that this testimony is "not pertinent" to the issues before the Court. In fact, despite the vast evidentiary record, Defendants do not even

discuss the harms the Act will impose or the overwhelming evidence that demonstrates the Act cannot survive rational or reasonable basis review, let alone strict scrutiny.

As Plaintiffs explain in their opening brief, the Illinois Constitution provides protections for the right to privacy independent of those guaranteed by the federal Constitution. *See* Pls. Mem. at 16-34. For these reasons, and the reasons set forth below, Defendants have failed to show that the Act can survive constitutional scrutiny under the express Privacy Clause, as well as under Illinois' constitutional protections for substantive due process, equal protection, and gender equality. Nor have Defendants offered any proof that the 102 county courts and 23 judicial circuits of Illinois are prepared to implement the Act in accordance with federal constitutional requirements. In light of recent evidence that some Illinois courts are unaware of their obligations under the Act or are so confused by it that they cannot properly comply, there can be no question that the Act must be immediately enjoined. *See* Pls. Mem. at 34-37.[1]

ARGUMENT

I. INJUNCTIVE RELIEF IS NECESSARY TO PREVENT IRREPARABLE HARM.

Plaintiffs' motion for a temporary restraining order seeks to preserve the status quo that has existed in this state for decades, pending a preliminary injunction hearing on their constitutional claims. As such, they are "not required to make out a case which would entitle [them] to relief on the merits." *In re Estate of Wilson*, 373 Ill. App. 3d

[1] Defendants claim that Plaintiffs "fail to explain why [they]. . . never saw fit to join a single state law claim" during the course of the federal litigation over the Act. Defs. Resp. at 2. The hornbook answer is that the Eleventh Amendment bars federal courts from issuing prospective relief based on violations of state law. *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984). Likewise, Defendants err in contending that Plaintiffs' claims are collaterally estopped by *Zbaraz v. Madigan*, 572 F.3d 370 (7th Cir. 2009), as the claims raised in *Zbaraz* were different claims, under a different Constitution, and supported by a different record.

1066, 1076 (1st Dist. 2007); *see County of DuPage v. Gavrilos*, 359 Ill. App. 3d 629, 634 (2nd Dist. 2007); *Stanton v. City of Chicago*, 177 Ill. App. 3d 519, 524 (1st Dist. 1988). Instead, temporary relief is appropriate if this Court finds plaintiffs have raised even a "fair question" on the merits of the underlying claim. *See Buzz Barton & Assoc., Inc. v. Giannone*, 108 Ill. 2d 373, 382 (1985). Plaintiffs have raised far more than a "fair question" as to the merits of their claim.

A. The Illinois Privacy Clause Protects Bodily Integrity and Medical Decision Making, Including the Decision Whether to Terminate Pregnancy.

1. The Illinois Supreme Court Has Held the Privacy Clause to Protect the Fundamental Right to Decide to Terminate Pregnancy.

Defendants go to great lengths to deny that the Illinois Privacy Clause protects a woman's right to choose to terminate her pregnancy. *See, e.g.*, Defs. Resp. at 18 (Privacy Clause limited to search and seizure); 19 (limited to "invasions of one's physical person for purpose of gathering evidence: and "exposure to private records to public view"); 23-24 (limited to technological advancement and eavesdropping); 20 (does not protect conduct): 21 (abortion claim under Privacy Clause foreclosed). However, they have no rejoinder to the explicit holding of the Illinois Supreme Court in *Family Life League v. Department of Public Aid*, 112 Ill. 2d 449 (1986), that the Privacy Clause of Article I, Section 6, and the "certain remedies" provision in Article I, Section 12, of the Illinois Constitution secure as fundamental a woman's right to terminate her pregnancy. *Id.* at 454 (the "right of privacy guaranteed by the penumbra of the Bill of Rights of the United States Constitution was also secured by the drafters of the 1970 Constitution of the State of Illinois. Ill. Const. 1970, art. I, secs. 6, 12."). *Family Life League* is a repudiation of every argument Defendants make for excluding the applicability of the Privacy Clause to

reproductive freedom. Not only is Defendants' position surprising and, indeed, alarming, in light of *Family Life League*'s clear holding, it is even more so, in light of the fact that it was the Illinois Attorney General who urged the Illinois Supreme Court in *Family Life League* to reach this conclusion. *See Family Life League v. Dep't of Public* Aid, No. 62137, Brief of Defendants-Appellees Ill. Dep't of Public Aid and Gregory L. Coler, Director, at 15 (Ill. Sup. Ct.) (attached hereto as Exhibit A).

Defendants argue that *Family Life League* and *Village of Oak Lawn v. Marcowitz*, 86 Ill. 2d 406 (1981), "are impossible to square" with protection for abortion under the Privacy Clause, because in those cases, the Court "dispensed with the plaintiffs' case without performing an independent state law analysis, as it would need to do if Illinois' privacy right provided additional protections." Defs. Resp. at 20. However, in both instances, the Court disposed of the federal claim after concluding that the record did not demonstrate any infringement of the privacy right. *See Family Life League*, 112 Ill. 2d at 456 (no infringement of privacy right by release of public expenditures information where record devoid of evidence that harassment will ensue); *Village of Oak Lawn*, 86 Ill. 2d at 424 (upholding 24 hour waiting period where record devoid of evidence of burden). In the absence of any evidence, there was no reason to engage in a subsequent analysis under the Illinois Constitution. Here, by contrast, Plaintiffs have submitted extensive evidence of the privacy infringement that will result from the Act's enforcement.[2]

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[2] Defendants also seek to evade *Family Life League* by emphasizing Delegate Gertz's statement that the Privacy Clause "has nothing to do with the question of abortion." Defs. Resp. at 21. However, as Plaintiffs explained in their opening brief, Pls. Mem. at 19, n.6, no other delegate seconded this sentiment, and the delegates overwhelming rejected a proposal to restrict abortion. In doing so, the delegates intended to allow liberalization of abortion access by both legislative and judicial action. *See, e.g.*, 3 Sixth Illinois Constitution Convention, Record of Proceedings (hereinafter "Proceedings"), at 1505 (Delegate Weisberg, opposing the proposed abortion ban because "recent court decisions" across the country had struck down abortion restraints); *id.* at

In light of *Family Life League*, Defendants' numerous attempts to limit the scope of the Privacy Clause must fail. First, Defendants' own cases refute their argument that the Privacy Clause is merely "part and parcel of Illinois' search and seizure provision," Defs. Resp. at 18. Rather, the Illinois Supreme Court has repeatedly linked *only* the search and seizure provisions of Article I, Section 6 with the Fourth Amendment, while consistently addressing the Privacy Clause as a separate and independent constitutional right. *See, e.g., Lakisha M.*, 227 Ill. 2d 259, 279 (2008); *People v. Caballes*, 221 Ill. 2d 282, 317 (2006). As the drafters explained, the "new" concept of privacy was included in the search and seizure provision "by accretion." 3 Proceedings, at 1525 (statement of Delegate Gertz).

Defendants also assert that the privacy language only protects against "technological developments." Defs. Resp. at 22. But when asked whether this new privacy right would "go beyond the area of an electronic device," Delegate Gertz answered affirmatively: "All kinds of things might invade our dignity as human beings...I want to stem the tide." 3 Proceedings, at 1535. Subsequent cases have embraced this broad reading of the Privacy Clause. *See, e.g., In re May 1991 Will County Grand Jury*, 152 Ill. 2d 381, 391 (1992) (Privacy Clause "goes beyond" individual liberties guaranteed by the federal Constitution); *King v. Ryan*, 153 Ill. 2d 449, 464 (1992) (same); *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 451 (1997) (same). *See also* Pls. Mem. at 16-18.[3] Indeed, as Defendants concede, *see* Defs. Resp. at 19, 26, the

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1513 (Delegate Pappas, opposing it because "the entire spectrum of the highly personal and private matters" implicated by the proposal "should be left to the legislature and the courts").

[3] Defendants cite *Ill. State Employees Ass'n v. Walker*, 57 Ill. 2d 512, 522 (1974), to argue that the Privacy Clause protects against only "eavesdropping devices or other means of interception." Defs. Resp. at 23. However, *Walker*, decided a mere four years after the Privacy Clause was

Privacy Clause unequivocally protects against violations of *informational* privacy, as well. *See Kunkel v. Walton*, 179 Ill. 2d 519, 537 (1988) (medical information, including information pertaining to "reproductive choice," is "without question at the core" of the Privacy Clause); *A.G. Edwards, Inc. v. Secretary of State*, 331 Ill. App. 3d 1101, 1110-12 (5th Dist. 2002) (quashing a regulatory agency's subpoena for personal financial records under the Privacy Clause).

Finally, Defendants contend that the Privacy Clause does not protect against "interference with one's *conduct*." Defs. Resp. at 20 (emphasis in original). However, the Committee Report explained that the Privacy Clause would protect a "zone of privacy" that includes both "thoughts and *highly personal behavior*." 6 Proceedings, at 32 (emphasis added). That the Illinois Supreme Court has refused to extend constitutional protection to the possession of child pornography, *see People v. Geever*, 122 Ill. 2d 313, 316 (1988), or the decision not to wear a seatbelt, *see People v. Kohrig*, 113 Ill. 2d 384, 394 (1986) – the only examples cited by Defendants in support of their argument – in no way repudiates the clear statement of the Committee, let alone overrules *Family Life League sub silentio*.

Defendants' entire argument further misapplies the "limited lockstep" doctrine. First, they ignore that the Privacy Clause is unmatched in the language of the federal Constitution. While the federal Constitution has been interpreted to contain certain unwritten rights that may be similar to those guaranteed by the explicit Illinois Privacy Clause, *see, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965), the controlling question here is not whether the Illinois Constitution contains a functionally unique doctrine, but

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added to the Constitution, states only that "[n]ot all members of the court are convinced" the clause extends beyond surveillance. *Id.* at 523. Later cases clearly indicate that this narrow view has been repudiated.

whether it contains a textually unique "provision." *Caballes*, 221 Ill. 2d at 289 ("[A] provision may be unique to the state constitution and, therefore, must be interpreted without reference to a federal counterpart.").[4]

Second, contrary to Defendants' assertions, Defs. Resp. at 23-24, the limited lockstep doctrine accounts for state tradition and values as reflected in state cases and statutes, *Caballes*, 221 Ill. 2d at 314, including recent cases and enactments. *See, e.g., People v. Washington*, 171 Ill. 2d 475, 486 (1996) (in breaking lockstep, relied on recent judicial decisions); *People v. Kreuger*, 175 Ill. 2d 60, 76 (1996) (same).[5] Thus, long-overturned abortion restraints matter far less than the unwavering support for a woman's right to reproductive autonomy repeatedly guaranteed by the Illinois courts. *See, e.g., Family Life League*, 112 Ill. 2d at 449; *Stallman v. Youngquist*, 125 Ill. 2d 267 (1988); *In re Baby Boy Doe*, 260 Ill. App. 3d 392 (1st Dist. 1994). Moreover, Defendants' effort to dismiss as "more recent" the Consent by Minors to Medical Procedures Act, 410 ILCS 210/1 (2009), Defs. Resp. at 24, which since *1961* has permitted pregnant minors in Illinois to consent to all medical care without involving a parent or the court is utterly misguided. This legislative determination that pregnant teens can independently make

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[4] Contrary to Defendants' assertion that "'the Federal Constitution...include[d] all...concepts' covered by [Section 6]," Defs. Resp. at 22, Delegate Dvorak made clear that while the federal Constitution had been "judicially interpreted" to include similar concepts, the new Illinois Constitution was intended to be "very progressive and very thorough and very proper..." 3 Proceedings, at 1525.

[5] In addition, in both *Krueger* and *Washington*, the Court relied on decisions from other states interpreting their own Constitutions in deciding whether to depart from federal law in Illinois. *Washington*, 171 Ill. 2d at 489; *Krueger*, 175 Ill. 2d at 76. Indeed, while Defendants dismiss as irrelevant the New Jersey Supreme Court's decision in *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620 (N.J. 2000), because New Jersey "adopts a looser lockstep approach," Defs. Resp. at 16, the Illinois Supreme Court in *Krueger* relied on decisions from the New Jersey high court in departing from federal law regarding a good-faith exception to the exclusionary rule. *Krueger*, 175 Ill. 2d at 76.

important and life altering decisions demonstrates that the Parental Notice Act's restrictions are irrational.

2. The Act's Infringement of this Fundamental Right Does not Survive Scrutiny.

Defendants assert that the Act is merely subject to a "reasonableness" review under the Privacy Clause. *See* Defs. Resp. at 25-29. As Plaintiffs demonstrated in their opening brief, infringements of a fundamental right, such as the right to reproductive autonomy, are subject to strict scrutiny. Pls. Mem. at 16-23. However, even if the Act were to be judged under a reasonableness review, the Act fails. Contrary to Defendants' characterization, *see, e.g.*, Defs. Resp. at 26-27, the reasonableness test the Illinois Supreme Court has applied in its privacy cases is robust. There is "a continuum of privacy protections . . . depending on the degree of intrusiveness" of the government's action. *Caballes*, 221 Ill. 2d at 322. "[B]alancing the need for official intrusion against the constitutionally protected interest of the private citizen," *Will County Grand Jury*, 152 Ill. 2d at 392, Illinois courts have routinely invalidated state action that is far less invasive than the Act here. *See, e.g.*, *Kunkel*, 179 Ill. 2d at 537-40 (striking down statute requiring personal injury plaintiffs to disclose medical information to opposing party's attorneys); *King v. Ryan*, 153 Ill. 2d 449, 464-65 (1997) (striking down statute authorizing breathalyzer test of individual involved in motor vehicle accident); *A.G. Edwards*, 331 Ill.App.3d at 1110-12 (striking down subpoena by Department of Securities for the State of Illinois for brokers' financial information).[6]

[6] The New Jersey Supreme Court engaged in a similar balancing of rights and interests in concluding New Jersey's parental notice law violated its state constitutional right to equal protection. *Farmer*, 762 A.2d at 631, 642.

Moreover, where the Court has identified a "compelling" privacy interest under the Privacy Clause, the scrutiny applied is even more exacting. For example, in *In re a Minor*, 149 Ill. 2d 247 (1992), the Illinois Supreme Court upheld a statute allowing a court to prohibit the disclosure of the identities of minor victims of abuse. In so doing, the Court recognized that—*under the Privacy Clause*—minor victims had a "*compelling interest*" in protecting their identities from disclosure. *Id.* at 255-56 (emphasis added). After weighing the interests in favor of disclosure, the Court concluded there was "no compelling interest" that outweighed the minor's interest in privacy. *Id.*

Certainly, the privacy interest at stake here – the fundamental right to decide, without interference and free from threats, coercion and abuse, whether to continue a pregnancy – is compelling. *See Family Life League*, 112 Ill. 2d at 454; *Baby Boy Doe*, 260 Ill. App. 3d at 399; *cf. Stallman,* 125 Ill. 2d at 279-80 ("Judicial scrutiny into the day-to-day lives of pregnant women would involve an unprecedented intrusion into the privacy and autonomy of the citizens of this State.").

But whether the test is robust reasonableness or something more exacting, Plaintiffs here meet it. In response to the substantial evidence submitted by Plaintiffs demonstrating the lack of justification for the Act's requirements, *see* Pls. Mem. at 28-34, Defendants have submitted not a single fact. Rather, their only attempt to show a justification is to cite "findings" from federal courts. Defs. Resp. at 27-29. This cannot suffice. Even when the governing standards are the same, and here they are not, Illinois courts do not blindly defer to federal courts' analysis of constitutional claims. *See, e.g.*, *Committee for Educational Rights v. Edgar*, 174 Ill. 2d 1, 32-40 (1996) (performing extensive independent analysis of state equal protection claim despite fact that the United

States Supreme Court had recently upheld a similar statutory scheme under the federal equal protection clause). Rather, this Court has an obligation to conduct an examination of the facts and independently analyze the claim. *See id.* This is all the more true where, as here, the Plaintiffs have submitted extensive evidence in support of their claim that did not exist at the time of the federal decisions.[7]

B. The Act Violates the Illinois Due Process Clause.

As Defendants acknowledge, the Illinois Supreme Court in *Washington* departed from lockstep in interpreting the substantive component of the Illinois Due Process Clause. *See* 171 Ill. 2d at 485-89, cited in Defs. Resp. at 33. The Court reasoned in significant part that the U.S. Supreme Court decision on point was insufficiently protective of the important right at issue, and had "overlooked" an essential reason for protecting that right. *Id.* at 488-89; *see also Caballes*, 221 Ill. 2d at 301 (explaining that *Washington* departed from lockstep because it would have been "fundamentally unfair" to deprive defendant of the right asserted). Here, it is similarly appropriate for this Court to break lockstep. The Illinois Constitution expressly protects privacy, while the U.S. Constitution does not. Therefore, the privacy protection under the Illinois Constitution is stronger and more expansive than the privacy safeguards of the U.S. Constitution.

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[7] Moreover, only one of the cases cited by Defendants considered the *irrationality* of a legislative scheme that permits pregnant minors to consent to all medical procedures, without parental notification, except abortion. *See H.L. v. Matheson*, 450 U.S. 398, 412-13 (1981). In that case, the state asserted that placing restrictions in the path of minors who choose abortion was justified by its interest in promoting childbirth, an interest neither the legislature nor the Defendants have asserted here. Indeed, if the state did assert an interest in making it more difficult for teens to get an abortion so that they will instead carry to term, the Act would clearly violate the state constitutional guarantees to privacy, substantive due process, and gender equality. The only other justification asserted by the *Matheson* court, that childbearing carried few if any of the "potentially grave emotional and psychological consequences" of the decision to abort, was unsupported by any record evidence of comparative safety – from a medical or psychological perspective. Moreover, it is flatly contradicted by the record in this case, including comprehensive research by the American Psychological Association. *See* Pls. Mem. at 31-32; *id.* Ex. C ¶ 11; *id.* Ex. I ¶ 26.

Under Illinois law, a fundamental right is protected under strict judicial scrutiny. *See, e.g., Boynton v. Kusper*, 112 Ill. 2d 356, 368 (1986). The Illinois Supreme Court has repeatedly struck down Illinois statutes under this exacting standard. *See, e.g., id.* (statute imposing marriage tax); *Wickham v. Byrne*, 199 Ill. 2d 309, 320-21 (2002) (statute mandating grandparent visitation); *In re H.G.*, 197 Ill. 2d 317, 330 (2001) (statute presuming parental unfitness).

It is not determinative, as Defendants suggest, that the debates and committee reports of the Constitutional Convention do not clearly indicate that the delegates intended the Illinois Due Process Clause to provide additional protection for abortion than was available under federal law. In *Washington*, the Illinois Supreme Court departed from lockstep even though "the Record of Proceedings of the Constitutional Convention does not reveal anything as to what the drafters intended for the Illinois protection different from the federal counterpart." 171 Ill. 2d at 485. Here, all that is clear from the Record of Proceedings is that the Delegates resoundingly rejected due process rights for "the unborn." 3 Proceedings, at 1523.[8]

C. The Act Violates the Equal Protection Clause.

"Equal protection requires that similarly situated individuals will be treated similarly unless the government can demonstrate an appropriate reason to do otherwise." *Maddux v. Blagojevich*, 233 Ill. 2d 508, 526-27 (2009). Defendants provide no factual basis for the Act's differential treatment of minors who carry to term and minors who

[8] Some opponents of this "unborn" language argued that the subject of abortion should be left to the legislature. *See* 6 Proceedings, at 131, 134 (Minority Report); 3 Proceedings, at 1504, 1505, 1513, 1517 (delegate statements). However, in context, they seem to suggest only that the "unborn" language would prevent the legislature from relaxing existing abortion restrictions. Indeed, the Minority Report expressed serious concern that inclusion of "the unborn" would infringe on "the rights of all persons to act in accordance with their own religious and moral convictions." 6 Proceedings, at 135.

choose abortion. Instead, Defendants mischaracterize a U.S. Supreme Court case, and urge this Court to blindly adopt the "findings" of a few federal courts that were based solely on speculation and are flatly contradicted by the evidence here. Illinois law dictates that this Court reject Defendants' suggestion.

Although "when conducting an equal protection analysis, [Illinois courts] apply the same standards under both the United States Constitution and the Illinois Constitution," *Wauconda Fire Prot. Dist. v. Stonewall Orchards, LLP*, 214 Ill. 2d 417, 434 (2005), when the classification affects fundamental rights, that standard is strict scrutiny. *See, e.g., In re K.L.P.*, 198 Ill. 2d 448, 467 (2002); *In re D.W.*, 214 Ill. 2d 289, 313 (2005); *Fumarolo v. Chicago Bd. of Educ.*, 142 Ill. 2d 54, 73 (1990); *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976). Here, as discussed in Plaintiffs' opening papers, and as Defendants do not dispute, the Act affects fundamental rights and classifies minors based on how they exercise those fundamental rights. Thus, strict scrutiny is the appropriate standard.

Neither *H.L. v. Matheson* nor *Planned Parenthood v. Bellotti* alters this conclusion. Although Defendants describe the U.S. Supreme Court's holding in *Matheson* as sustaining a parental notice statute "against a claim that the law violated equal protection," Defs. Resp. at 34-35, in fact, the plaintiff there alleged only that the challenged statute "violate[d] the *right to privacy* recognized in our prior cases . . . [such as] *Bellotti* [v. Baird, 443 U.S. 622 (1979)];" there was no equal protection claim.[9] 450 U.S. 398, 408 (1981) (emphasis added). That leaves only the First Circuit's decision in *Planned Parenthood v. Bellotti*, 641 F.2d 1006 (1st Cir. 1981), as support for Defendants'

[9] Indeed, in *Bellotti v. Baird*, the Supreme Court expressly declined to rule on the plaintiffs' equal protection challenge because it had already held the statute unconstitutional on other grounds. 443 U.S. at 650 n.30.

assertion that federal courts have "routinely rejected equal protection claims akin to plaintiffs' . . . using a rational basis standard." Defs. Resp. at 36. But there, the court chose not to employ strict scrutiny because it "consider[ed] [itself] bound by th[e] view" that under the federal Constitution, parental notice laws do not "impermissibly interfere with the exercise of a fundamental right." *Planned Parenthood v. Bellotti*, 641 F.2d at 1012. Here, because the Act infringes on fundamental rights protected by the *Illinois* Constitution, strict scrutiny is required.

In any event, even under lower level rationality review, the Act cannot stand. The unrebutted record evidence in this case, *see* Pls. Mem. at 28-34, overwhelmingly demonstrates that there is no reasonable, let alone compelling, basis for requiring parental notification for minors who choose abortion while not requiring the same of minors who continue their pregnancies. Among other things, the record shows that abortion is safer than continuing a pregnancy; that minors are capable of making informed decisions; and that all of the legislature's purported justifications apply with equal or greater force to minors who decide to continue a pregnancy and have a child. *See id.*; *see also People v. McCabe*, 49 Ill. 2d 338, 348 (1971) (holding that reason proffered for distinction between marijuana and other drugs – that marijuana use was likely to lead to use of other and harder drugs – was not sufficient to satisfy even rational basis equal protection review where the same effect could be attributed to other drugs); *cf. Jacobson v. Dep't of Public Aid*, 171 Ill. 2d 314, 325 (finding that distinction could not survive even rational basis review under the equal protection clause because the state interest "would be equally well served by" applying the restriction to both classes of individuals). Indeed, given the

undisputed harms of parental involvement, the Act is "directly at odds with the stated purpose" of the Act, and therefore must be struck down. *Jacobson*, 171 Ill. 2d at 328.

Faced with this evidence, Defendants merely point to a few cases that, relying on "assumptions" rather than facts, state that there are greater risks inherent in abortion than in carrying to term. *See, e.g.*, *Bellotti*, 641 F.2d at 1012 (accepting the "implict[] assum[ption] that a state may rationally conclude that the decision to have an abortion poses risks to the physical, mental health, or emotional well-being of a minor which are greater than the risks posed by the decision to bear a child").[10] Constitutional rights cannot be violated based on assumptions and intuition. *Even under rational basis review*, the determination of whether a classification is justified "require[s] an assessment of the relevant scientific, medical and social data found, including the voluminous materials assembled by the parties here, which are pertinent to support and to defeat the classification." *McCabe*, 49 Ill. 2d at 341-42; *see generally id.* at 341-50 (striking drug classification scheme after closely reviewing detailed evidence about the differences between various illegal drugs and finding that the data did not provide any reasonable basis for the differential classifications).[11] Where, as here, "the data presently available" demonstrates that there is no sufficient "basis for the described classification," the court must strike it down. *See id.* at 348 (refusing to rely on justification where evidence

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[10] Matheson is similarly unsupported by record evidence, 450 U.S. at 411 n.20, and as discussed *supra*, n.7, in rejecting plaintiff's privacy claim, the Court relied on state interests asserted neither by the General Assembly nor Defendants in support of the Act. *Id.* at 412-13.

[11] Nor do Illinois courts blindly defer to federal courts' analysis of constitutional claims even when the governing standards are the same. *See, e.g.*, *Committee for Educational Rights*, 174 Ill. 2d at 32-40 (performing extensive independent analysis of state equal protection claim despite fact that the United States Supreme Court had recently upheld a similar statutory scheme under the federal equal protection clause). Rather, this Court has an obligation to conduct an examination of the facts and independently analyze the claim. *See id.* This is all the more true, where, as here, the Plaintiffs have submitted extensive evidence in support of their claim that did not exist at the time of the federal decision.

supporting rationale for distinction "once broadly entertained, has recently encountered serious challenge"); *see also Maddux*, 233 Ill. 2d at 528 (noting that even under rational basis review, the court has "long acknowledged its duty to interpret the law and to protect the rights of individuals against acts beyond the scope of the legislative power" and "[i]f a statute is unconstitutional, courts are obligated to declare it invalid").

D. The Act Violates the Gender Equality Clause.

Defendants acknowledge that the Act imposes unequal burdens on a category of young women – those who seek abortion care – but assert that this unequal treatment is not "gender-based," Defs. Resp. at 36, and thus does not comprise discrimination "on account of sex" in violation of the Gender Equality Clause. Ill. Const. 1970 art. I, § 18. To the contrary, a gender-based stereotype is the sole basis for the Act's classification scheme, and such stereotype-based schemes plainly comprise discrimination "on account of sex."

To be sure, a statute that explicitly treats men and women differently discriminates "on account of sex" and violates article I, section 18. *See, e.g., In re Estate of Hicks*, 174 Ill. 2d 433, 439 (1996). But even in the absence of such explicit differentiation, a plaintiff can demonstrate gender discrimination so long as the disability it imposes on one group is on account of gender. Cases interpreting Article I, section 18, do not preclude such a theory.

The Gender Equality Clause "was intended to supplement and expand the guarantees of the equal protection provision of the Bill of Rights." *People v. Ellis*, 57 Ill. 2d 127, 133 (1974). Accordingly, it is useful to look to federal law as a baseline for the even greater protections of the Illinois Gender Equality Clause. A deprivation imposed on

an individual, whether by legislative action, policy, or the decision of a policymaker, because of that individual's failure to conform with prevailing gender stereotypes, is discrimination "on account of sex." The U.S. Supreme Court recognized in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989), that denying a woman a promotion to partnership on the basis that her behavior and appearance did not conform to gender stereotypes was discriminatory treatment "because of ... sex," actionable under Title VII of the Civil Rights Act of 1964. *See id.* at 235 (holding unlawful the denial to a female employee of a promotion because she was too "macho" and should "dress more femininely"). Federal courts have appropriately extended this principle to the Equal Protection Clause of the U.S. Constitution. *See, e.g.*, *Smith v. City of Salem, Ohio*, 378 F.3d 566, 572, 577 (6th Cir. 2004) (holding that Equal Protection and Title VII claims stated where male employee was suspended after he began exhibiting feminine appearance and mannerisms); *Back v. Hastings on Hudson Union Free School Dist.*, 365 F.3d 107, 119 (2nd Cir. 2004) (denying summary judgment on Equal Protection claim where female employee was denied tenure because she supposedly could not both "'be a good mother' and have a job that requires long hours").

Here, the Act similarly discriminates against young women seeking abortion care because their choice to terminate their pregnancies is inconsistent with the prevailing (and improper) gender-based stereotype that women should bear children and become mothers. The Act asserts that abortion has "serious and long-lasting" "medical, emotional, and psychological consequences," 750 ILCS 70/5 (2009), and apparently presumes that these consequences are absent when a pregnant minor carries an unwanted pregnancy to term. This perpetuates the stereotype that for women, childbirth is natural

and unremarkable, while choosing *not* to bear a child is unnatural and improper. Those young women who deviate from that stereotype – by choosing to terminate their pregnancies – suffer a deprivation of rights which is imposed "on account of sex."

Laws like the Act, which deprive young women of the ability to make the most fundamental decisions over their lives, undermine the guarantee of true equality promised by the Illinois Constitution. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 856 (1992) ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.").

II. FACIAL INVALIDATION IS PROPER HERE.

Defendants argue that not only does the Illinois Constitution lack greater protections for the right to abortion than the federal Constitution, it actually provides less protection than its federal counterpart. *See* Defs. Resp. at 12-14 & n.3 (arguing that this Court should apply the more restrictive "no set of circumstances" test despite fact that federal courts apply the more relaxed "large fraction" test when evaluating facial challenges to abortion restrictions); *see also Casey*, 505 U.S. at 895 (holding law requiring women to notify their husbands before having an abortion facially unconstitutional because it would operate as a substantial obstacle "in a large fraction of cases in which [it] is relevant").[12] Defendants have not, and indeed cannot, cite anything

[12] While Defendants note that "there is some disagreement" over whether *Casey's* 'large fraction' test remains vital, only the Fifth Circuit has held that Defendants' "no set of circumstances test" applies to facial challenges for abortion restrictions. *See, e.g., Cincinnati Women's Services, Inc. v. Taft,* 468 F.3d 361, 368 (6th Cir. 2006) (citing cases).

to support this novel proposition.[13] As demonstrated below, however, regardless of the test, Plaintiffs meet it.

As the U.S. Supreme Court has made clear, whatever the test, "the proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Casey*, 505 U.S. at 894 (giving example of this framework for analysis from outside abortion context). In this instance, that means the analysis begins by focusing on the minority of minors who do not want to notify a parent of their plan to have an abortion. *See id.* at 895 (explaining that in evaluating a law requiring that married women give their spouses notice of an intended abortion, the analysis begins by focusing on married women who do not wish to notify their husbands and who do not qualify for an exception).

Under the large fraction test, the Act is facially invalid if it infringes on the rights of a large fraction of those minors who do not want to notify their parents. The uncontroverted evidence in this case demonstrates that the Act does exactly that.[14] For example, the record includes data from a national study of teens in states without parental involvement laws showing that of those minors who did not involve a parent in their

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[13] Although the Defendants are correct in stating that there are no Illinois cases applying the large fraction test to an abortion restriction, Defendants fail to state that there also is no Illinois state court case applying the no set of circumstances test to an abortion restriction.

[14] Throughout this argument, Defendants repeatedly assert that Plaintiffs' claims are based on "hypotheticals" and "speculation," while at the same time ignoring the extensive evidence of harm Plaintiffs have presented. Defendants present no argument as to why, for example, the very real harms of being forced to carry to term, being abused, and being kicked out of the home when parents found out about minors' pregnancies and/or planned abortions that are documented in the record would magically not occur in Illinois were the law to go into effect here. Pls. Mem. Ex. B ¶¶ 27-29; *id.* Ex. D ¶¶ 19-23; *id.* Ex. G ¶¶ 15-16; *id.* Ex. H ¶¶ 27-29 7,10. This evidence is clearly probative of what will happen in Illinois on the reasonable inference that pregnant minors in Illinois are no different than their counterparts in other states. Furthermore, Plaintiffs' affiants have also presented evidence regarding Illinois teens who could not involve their parents in their abortion decisions. *Id.* Ex. B ¶¶ 27; *id.* Ex. G ¶ 14.

abortion decision, thirty percent had previously experienced violence in their home, feared violence, or feared being force to leave home. Pls. Mem. Ex. B ¶ 27; *see also id.* Ex. G ¶ 17 (quantitative study revealed that 18.8% of Massachusetts minors seeking a judicial bypass were doing so because of fear of severe adverse reactions such as abuse and being kicked out of the home). These numbers alone would be sufficient to satisfy the large fraction test.

But even aside from that data, Defendants fundamentally misperceive Plaintiffs' claim by focusing only on those minors who would experience the most severe forms of harm. Plaintiffs' claim is that the Act infringes the rights of *all* minors who would, in the absence of the law, seek an abortion without involving a parent: For each and every one of these minors, the Act discriminates against them by applying a restriction that does not apply to pregnant minors who choose to continue their pregnancies (equal protection claim). For each and every one of these minors, the Act imposes restrictions based on impermissible stereotypes about women's proper role as mothers (gender discrimination claim). And for each and every one of these minors, the Act intrudes on their right to privacy and reproductive choice – either by requiring her to disclose her plan to a parent against her wishes or by requiring her to disclose confidential information about her sexual history and reproductive choices to a judge (privacy and substantive due process claims). Because the Act violates the rights of all minors subject to its restrictions, whether the test is something akin to the large fraction test or whether it is the no set of circumstances test, Plaintiffs meet it.

Moreover, careful thought about how parental involvement laws function demonstrates that the concept of an as applied challenge (the alternative to the facial

challenge to which Defendants object) makes little sense in this context and at best is simply a fancy name for the judicial bypass process that the evidence demonstrates harms minors and violates their rights. In the as applied challenge that Defendants envision, presumably a teen, or class of teens, would go to court seeking a ruling that the Act is unconstitutional as applied to her or them: because notifying their parents would cause them harm, because they are capable of making an informed decision on their own, and so on. Even assuming one could use something akin to the judicial bypass with its technical requirements of confidentiality and expedition to make this challenge, something that is far from clear, the teens who brought the suit would still be subject to all of the delay, emotional harm, and potential breaches of confidentiality that the process entails. *See* Pls. Mem. at 12-14. And, the process would be of no use to the young woman too afraid to go to court. Pls. Mem. at 12. But more fundamentally, what would the relief from this as applied challenge look like? A ruling that the Act is unconstitutional as applied to best interest and mature minors? And how would the next minor prove that she is part of the class to whom the law cannot constitutionally be applied? Presumably, she too would have to go to court and prove that she is mature or that notifying her parents would cause her harm. In sum, requiring minors to bring as applied challenges is just another way of saying that they would – at best – have to go through the very bypass process that Plaintiffs challenge as harmful and insufficient here.

III. PLAINTIFFS ARE NOT COLLATERALLY ESTOPPED FROM SEEKING TEMPORARY RELIEF UNTIL THE ILLINOIS COURTS ARE PREPARED TO IMPLEMENT THE ACT'S BYPASS PROCESS

Collateral estoppel applies "only as to the point actually litigated and determined." *N. Ill. Med. Ctr. v. Home State Bank of Crystal Lake*, 136 Ill. App. 3d 129,

143 (2nd Dist. 1985). The issue before this Court, based on evidence collected in September and October of 2009, is whether Illinois state courts are presently prepared to comply with the Act's judicial bypass requirements – days before Defendants will begin to discipline physicians who fail to comply with the Act's notification requirements. This issue was neither litigated nor determined by the federal courts that ruled in February 2008 and July 2009. Plaintiffs' evidence, collected after the injunction on the Act was lifted and within weeks of the expiration of Defendants' grace period, nevertheless shows that numerous Illinois courts are unwilling or unable to conduct bypass proceedings in a manner consistent with the Act's requirements. Pls. Mem. at 35-36.

Evaluating evidence collected in 2007, the federal district court declined to "speculate" whether the Illinois courts were ready to implement the bypass process on some uncertain future date, and presumed they were prepared based on the Illinois Supreme Court's presumption to the same effect. *Zbaraz v. Madigan*, No. 84-CV-00771, 2008 U.S. Dist. LEXIS 15559, at *9 (N.D. Ill. Feb. 28, 2008). The Seventh Circuit (though Plaintiffs never litigated the issue in that forum) similarly commented that the statute was "nascent," so "clerks understandably lack familiarity with it." *Zbaraz v. Madigan*, 572 F.3d 370, 382 (7th Cir. 2009). The Act is no longer "nascent" as, absent action by this Court, Defendants will begin to enforce it within days.

Even if the Seventh Circuit's decision to presume readiness based on the Illinois Supreme Court's own presumption was a "determin[ation]" of the issue in July, *see* Defs. Resp. at 39, it cannot constitute collateral estoppel now where the dispositive facts were not previously before the federal court. *N. Ill. Med. Ctr.*, 136 Ill. App. 3d at 144 ("When

new facts or conditions intervene before a second action … the issues are no longer the same.").

As shown, many Illinois courts remain unprepared to implement a bypass process in accord with the Act; the law must therefore be enjoined.

CONCLUSION

For the reasons stated above and in Plaintiffs' opening brief, Plaintiffs respectfully request that this Court enter a temporary restraining order to preserve the status quo while Plaintiffs pursue their request for preliminary injunctive relief.

Dated: October 30, 2009

Respectfully submitted,

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of October, 2009, I caused true and correct copies of the foregoing **Plaintiffs' Reply Brief in Support of Their Motion for Temporary Restraining Order and Preliminary Injunction** to be served by the methods indicated below:

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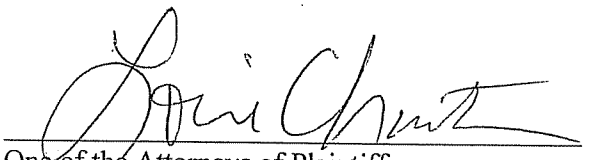

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