No. 10-1463

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE HOPE CLINIC FOR WOMEN LTD.; ALLISON COWETT, M.D., M.P.H., **Plaintiffs-Appellants,** **v.** **BRENT ADAMS, et al.,** **Defendants-Appellees.**	**Appeal from Circuit Court of Cook County** **Circuit Number 09 CH 38661** **Trial Judge: Hon. Daniel A. Riley**

Consolidated with No. 10-1576

THE HOPE CLINIC FOR WOMEN LTD.; ALLISON COWETT, M.D., M.P.H., **Plaintiffs-Appellees,** **v.** **BRENT ADAMS, et al.,** **Defendants-Appellees,** **APPEAL OF: STEWART UMHOLTZ and EDWARD DETERS,** **Proposed Intervenors-Appellants.**	**Appeal from Circuit Court of Cook County** **Circuit Number 09 CH 38661** **Trial Judge: Hon. Daniel A. Riley**

REPLY BRIEF OF PLAINTIFFS-APPELLANTS IN CASE NO. 10-1463

Lorie A. Chaiten
Leah Bartelt
Krista Stone-Manista*
Roger Baldwin Foundation
of ACLU, Inc.
180 N. Michigan Avenue, Suite 2300
Chicago, IL 60601
(312) 201-9740

Kathleen L. Roach
Rachel B. Niewoehner
Geeta Malhotra
Sidley Austin LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000

Jennifer Dalven
Alexa Kolbi-Molinas
American Civil Liberties
Union Foundation
(*pro hac vice*)
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500

*Admitted to the Bar in the State of California

Attorneys for Plaintiffs-Appellants in Case No. 10-1463

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

POINTS AND AUTHORITIES

ARGUMENT

Plaintiffs' well-pled allegations demonstrate that the Parental Notice of Abortion Act of 1995 (the "Act") imposes, without justification, burdensome and discriminatory requirements on pregnant minors who choose to exercise their fundamental right to abortion. Defendants have not disputed a single fact, nor do they contend that the allegations are somehow not well-pled. Instead, Defendants put forth the unprecedented view that Illinois courts, presented with claims under the Illinois Constitution's Privacy, Equal Protection, Due Process and Gender Equality Clauses, must blindly adhere to the results of federal cases interpreting federal due process rights, without any independent analysis of the Illinois claims. *See* Brief of Defendants-Appellees ("D.Br.") at 11-13. Neither the power of the Illinois judiciary to interpret the state Constitution nor the constitutional rights of the people of this state is so anemic.

I. DEFENDANTS DISTORT THE LIMITED LOCKSTEP APPROACH TO INTERPRETING THE ILLINOIS CONSTITUTION.

Under the limited lockstep approach to interpreting the Illinois Constitution, unique provisions, such as the Privacy Clause, are interpreted without reference to federal law. *See People v. Caballes*, 221 Ill. 2d 282, 289 (2006); *People v. Nesbitt*, 938 N.E.2d 600, 604, __ Ill. App. 3d __ (2nd Dist. 2010) ("[T]he fact that article I, section 6's search and seizure provision is read in limited lockstep with the fourth amendment to the federal constitution does not require that the privacy clause of our constitution must be interpreted in accordance with federal law.") (emphasis omitted). Thus, while Defendants urge this Court to relegate Illinois' privacy protections to the status of the court created federal privacy right premised on the penumbras of the federal Bill of Rights, Illinois

precedent requires interpretation of Illinois' unique and explicit Privacy Clause, unlimited by federal law.

Where, by contrast, a provision of the Illinois Constitution has a counterpart in the U.S. Constitution, Illinois courts look to the language of the Illinois Constitution, the drafters' intent and state tradition, history and values to assess whether and how to incorporate precedent interpreting the federal provision into their analysis of the Illinois constitutional right. *Caballes*, 221 Ill. 2d at 289-314. While Illinois courts generally apply the same analysis and standards as the U.S. Supreme Court in these situations, they are not bound by federal case results, nor do they dispense with all analysis of Illinois law and the role federal precedent will play, as Defendants urge. *See People v. McCauley*, 163 Ill. 2d 414, 436 (1994) ("in the context of deciding State guarantees, Federal authorities are not precedentially controlling; they merely guide the interpretation of State law"); *Rollins v. Ellwood*, 141 Ill. 2d 244, 275 (1990) ("While this court may . . . look for guidance and inspiration to constructions of the Federal due process clause by the Federal courts, the final conclusions on how the due process guarantee of the Illinois Constitution should be construed are for this court to draw."); *see also Comm. for Educ. Rights v. Edgar*, 174 Ill. 2d 1, 32-40 (1996) (performing extensive independent analysis of state equal protection claim even though U.S. Supreme Court had rejected a similar federal equal protection claim); *People v. Washington*, 171 Ill. 2d 475, 480-89 (1996) (conducting extensive analysis of federal and state law and concluding that Illinois due process rights were more protective than federal).

Finally, Defendants' argument that limited lockstep somehow means *federal due process* decisions are dispositive of *all* of Plaintiffs' Illinois constitutional claims, *see,*

e.g., D.Br. at 11-12, fails under leading Supreme Court precedent. For example, in *Washington*, federal precedent dictated that neither the Eighth Amendment nor federal procedural due process encompassed a right to bring post-conviction, free-standing claims of innocence. Yet, that fact did not bar the Illinois Supreme Court's consideration of state constitutional claims. Rather, the Court evaluated each Illinois constitutional claim at issue and concluded that Illinois provided procedural and substantive due process protection not afforded under federal law. 171 Ill. 2d at 485-89.

Similarly, in *McCauley*, the Illinois Supreme Court upheld waiver of a defendant's right to counsel under federal Fifth Amendment precedent but conducted an independent analysis under Illinois' comparable right against self incrimination. And, after holding that Illinois precedent supported departure from federal law under article I, section 10, the Court pursued a separate evaluation of Illinois due process principles, which, it concluded, led to the distinct result that the defendant's waiver was not constitutionally valid. 163 Ill. 2d at 440-45; *see also Comm. for Educ. Rights*, 174 Ill. 2d 1 (notwithstanding U.S. Supreme Court rejection of federal equal protection claim, Illinois Supreme Court evaluates claims under Illinois education article and Equal Protection Clause). There simply is no Illinois precedent to support Defendants' position that, since federal courts have upheld parental involvement statutes on federal due process grounds, each of Plaintiffs' Illinois constitutional claims is barred.

II. THE CIRCUIT COURT ERRED IN DISMISSING PLAINTIFFS' EQUAL PROTECTION CLAIM.

As Plaintiffs have demonstrated, the circuit court erred in applying collateral estoppel to their Illinois equal protection claim. Brief of Plaintiffs-Appellees ("P.Br.") at 36-40. Defendants do not even attempt to show that identical issues, actually litigated and

decided in a prior action, are again before the court, as they must for collateral estoppel to apply. *See Herzog v. Lexington Twp.*, 167 Ill. 2d 288, 295 (1995). Indeed, they concede that no equal protection claim was "actually litigated" at any phase of *Zbaraz v. Madigan*, 572 F.3d 370 (7th Cir. 2009). *See* D.Br. at 40 ("[the *Zbaraz* plaintiffs] never saw fit to litigate [an equal protection] claim before the district court or on appeal in the Seventh Circuit"). Defendants' concession defeats their claim and the circuit court's ruling, for unlike res judicata, collateral estoppel does not apply to matters that could have been, but were not litigated. *Nowak v. St. Rita High Sch.*, 197 Ill. 2d 381, 390 (2001).[1]

Defendants' arguments on the merits are equally unpersuasive. Defendants do not dispute that the Act creates two classes of pregnant teens and discriminates based on exercise of the abortion right. Nor do they dispute Plaintiffs' allegations showing that the Act's discriminatory treatment of teens who choose abortion is without justification. Rather, their argument rests on a cramped conception of Illinois' limited lockstep doctrine which would bar consideration of state constitutional claims.

Although the "analysis applied" when evaluating equal protection claims is the same under both the U.S. and Illinois Constitutions (e.g., classifications based on race are subject to strict scrutiny), *Comm. for Educ. Rights*, 174 Ill. 2d at 33 (internal quotations omitted), Illinois courts do not, as Defendants contend, blindly reach the same result as

[1] The Seventh Circuit's decision on federal due process grounds, in no way resolved the central question of Plaintiffs' equal protection claim: the constitutionality of allowing minors who continue their pregnancies to make all medical decisions while imposing harmful restrictions on those who choose the far safer abortion option. No party presented such arguments to the Seventh Circuit and nothing in the court's decision suggests that it considered or decided them. *Compare* D.Br. at 40 *with Zbaraz*, 572 F.3d 370.

the federal courts. *Id.* at 33-40.[2] For example, in assessing a state equal protection claim in *Committee for Educational Rights*, the Illinois Supreme Court acknowledged that the U.S. Supreme Court had rejected a similar challenge to Texas' school funding scheme on federal equal protection grounds; the U.S. Supreme Court had held that education was not a fundamental right for purposes of federal equal protection and Texas' funding scheme survived rational basis review. *Id.* at 33-34 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973)). If Defendants' view of the limited lockstep doctrine were correct, this would have marked the end of the Illinois Supreme Court's analysis and would have dictated its decision.[3] Instead, the Court performed a separate analysis to determine whether education was a fundamental right under the Illinois Constitution and thus, in contrast to federal constitutional precedent, entitled to strict scrutiny. *Id.* at 34-37. Finding no Illinois fundamental right to education, the Court conducted a rational basis review. While considering the federal *Rodriguez* decision persuasive, the Court nonetheless performed an extensive analysis before reaching its conclusion upholding Illinois' funding scheme. *Id.* at 37-40. That analysis would have been unnecessary, and

---

[2] This argument is doomed in any event, because the U.S. Supreme Court has never ruled on an equal protection challenge to a parental involvement law. *See* D.Br. at 44 (acknowledging that *H.L. v. Matheson*, 450 U.S. 398 (1981) was "not squarely addressing an equal protection [claim]"); *cf. id.* at 41 (describing *Hodgson v. Minnesota*, 497 U.S. 417 (1990), as having sustained a notice law "against claims that included an equal protection challenge," but failing to acknowledge that the equal protection claim that had been before the lower court was not before the Supreme Court, *id.* at 433 n.19); *see also* P.Br. at 42-43 & 43 n.21. Moreover, for the reasons explained in Plaintiffs' opening brief, the lower federal court cases Defendants cite, *see* D.Br. 41-45, are neither binding on Illinois courts, *see* P.Br. at 43, nor of any persuasive value. *Id.* at n.20.

[3] Defendants appear to conflate the limited lockstep and lockstep approaches. *See Caballes*, 221 Ill. 2d at 307 ("Under the lockstep approach, the state constitutional analysis begins and ends with consideration of the U.S. Supreme Court's interpretation of the textual provision at issue.") (internal quotations omitted).

indeed inappropriate, if Defendants were correct that federal court decisions upholding parental involvement laws (which did not even rule on equal protection grounds) deprive this Court of its ability to independently evaluate a state equal protection claim. *See* D.Br. at 41-42.

Because the Act classifies minors based on how they exercise the fundamental right to abortion, and because the Illinois Supreme Court reviews classifications affecting fundamental rights under a strict scrutiny standard, the Act is subject to such scrutiny. *See* P.Br. at 17-19, 46-47; *see also Comm. for Educ. Rights*, 174 Ill. 2d at 35 (fundamental rights protected by Illinois Constitution "include the expression of ideas, participation in the political process, travel among the states and privacy with regard to the most intimate and personal aspects of one's life"); *Family Life League v. Dep't of Public Aid*, 112 Ill. 2d 449, 454 (1986) (fundamental right to abortion under Illinois Constitution).[4] And, this is a level of scrutiny the Act cannot survive. P.Br. at 24-31, 41-42.

---

[4] In an attempt to evade strict scrutiny, Defendants make the extreme argument that the Act implicates no fundamental right. D.Br. at 42. Their argument appears to be based on the tautology that an abortion restriction implicates a fundamental right and therefore is subject to strict scrutiny *only* if the restriction is unconstitutional. For example, Defendants claim that a "regulation implicates a fundamental right" only if it "imposes an undue burden on a woman's ability" to have an abortion. *Id.* But this is not even a correct statement of *federal* law, no less Illinois law. Under federal law, undue burden is the test of whether a restriction is unconstitutional – it is not some type of threshold trigger that a restriction must meet before it is subjected to heightened scrutiny. *See, e.g., Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) ("An undue burden exists, *and therefore a provision of law is invalid*, if its purpose or effect is to place a substantial obstacle in the path of a woman . . . ." (emphasis added)); *see also id.* at 877 (explaining that undue burden standard is "shorthand" for the conclusion that a restriction is unconstitutional). Nor do *Harris v. McRae*, 448 U.S. 297 (1980) and *Maher v. Roe*, 432 U.S. 464 (1977), help. There, the U.S. Supreme Court held that because the choice not to fund abortions through Medicaid simply "'made childbirth a more attractive alternative . . . , but [ ] imposed no restriction on access to abortions that was not already there,'" it was subject to rational basis review. *Harris*, 448 U.S. at 314 (quoting *Maher*, 432 U.S. at

But regardless, the Act cannot satisfy even lower tier rationality review. The allegations establish that abortion is safer than continuing a pregnancy; that minors who choose to remain pregnant are permitted to consent to a whole host of procedures that are far riskier than abortion; 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 exercise these same rights by choosing to continue a pregnancy and have a child. P.Br. at 8-13, 26-30.[5] Faced with these facts, Defendants resort to arguing that the Court should uphold the Act because a legislator might irrationally believe – contrary to all the available evidence – that abortion is more dangerous than continuing a pregnancy to term. But this argument makes a mockery of real science and Illinois' guarantee of equal protection. Defendants' argument fails to differentiate between a statute based on "rational speculation," D.Br. at 46 (quoting *Cutinello v. Whitley*, 161 Ill. 2d 409 (1994)), which may be upheld under rational basis review, and a statute based on specious and discredited facts, which cannot survive even deferential review. *See People v. McCabe*, 49 Ill. 2d 338, 341-350 (1971). As the Illinois Supreme Court has held, even under rational basis review, "there is a judicial obligation to insure that the power to classify has not been exercised arbitrarily . . . ." *Id.* at 341. Specifically, a court must "judge whether

---

474). Here, the Act is clearly a direct "restriction on access to abortions that was not already there."

[5] This Court must take all well-pled allegations as true notwithstanding *amici* efforts to dispute them. *See* P.Br. at 16; *see also People v. Kohrig*, 113 Ill. 2d 384, 406 (1986) (striking portions of *amicus* brief, because "certain safety statistics relied on [therein] were not presented in the trial courts"); *contrast* Brief *Amicus Curiae* Stewart Umholtz, *et al.* at 36-37; *Amicus Curiae* Brief of Illinois Legislators. In any event, Defendants' *amici*'s reliance here on methodologically unsound studies, unsupportable statistics, and distortions of the relevant issues, *see amicus curiae* Brief of American College of Obstetricians and Gynecologists, *et al.*, in no way undermines the well-pled allegations, based on the most comprehensive scientific evidence. *See id.*; P.Br. at 8-13, 26-30.

the data presently available provides a reasonable basis for the . . . classification," *id.* at 342, and where it does not, the law must fall. *Id.* at 350.

As the allegations here overwhelmingly demonstrate, there is no rational, let alone compelling, basis for requiring parental notification for minors who choose abortion while not requiring the same of minors who continue their pregnancies. *See* P.Br. at 26-30. Accordingly, whether the test is rational basis or something more exacting, the Act denies pregnant teens seeking abortion equal protection of the laws.[6]

III. THE CIRCUIT COURT ERRED IN DISMISSING PLAINTIFFS' ILLINOIS PRIVACY CLAIM.

A. As Defendants Concede and the Illinois Supreme Court Has Held, the Privacy Clause Protects the Fundamental Right to Abortion.

Defendants' argument with respect to Plaintiffs' privacy claim, that Illinois' express Privacy Clause provides no protection for abortion, is foreclosed both by Defendants' own admission and by the Illinois Supreme Court's decision in *Family Life League*, 112 Ill. 2d 449. Indeed, as Defendants are constrained to concede, in that case, the Illinois Attorney General, *citing the Privacy Clause*, "urged that the right to an abortion guaranteed by the U.S. Constitution '*was also* secured by the drafters of the 1970 Illinois Constitution.'" D.Br. at 16 n.3. And in its decision, the Illinois Supreme Court agreed. 112 Ill. 2d at 454 (citing Privacy Clause in holding that "the fundamental constitutional right of privacy which encompasses a woman's decision to terminate her pregnancy . . . [was] secured by the drafters of the 1970 Constitution").

---

[6] Notably, Defendants do not contend, as they do with Plaintiffs' privacy claim, that, if this Court finds an equal protection violation, a "no set of circumstances" test would require dismissal. Nor could they, as a finding that the Act unconstitutionally discriminates against one class of minors based on how they exercise their fundamental right means the Act denies equal protection in all of its applications. *See* P.Br. at 42 n.19.

Defendants' arguments to avoid *Family Life League* are unconvincing. As an initial matter, Defendants' contention that *Family Life League* involved only "public disclosure of [private] information," D.Br. at 16, is disingenuous at best. While the state raised the "public disclosure" argument, the Supreme Court dismissed it as "impotent" before ever addressing the protections of *Roe v. Wade*, 410 U.S. 113 (1973), or the Illinois Privacy Clause. *See* 112 Ill. 2d at 454. Moreover, the state's argument for the recognition of a fundamental right to abortion under the Privacy Clause was central to its defense that disclosure of identifying information about abortion providers would lead to harassment that would deter physicians from offering abortions, thus depriving women of access to such care and the ability to exercise their fundamental right. *See id.* at 454-55.

Defendants' remarkable assertion that the Supreme Court's statement is dicta that this Court is free to ignore fares no better. This is evident from contrasting the Court's dismissal of the state's initial argument – about the disclosure of private information – in which the Court dismissed the claim without even discussing the right at issue – with its discussion of the state's second argument about the infringements on the right to abortion, in which the Court clearly identified the right, as well as the source of the protection, and only then rejected the claim because it was unsupported by the record. In any event, whatever quibbles the Defendants may have with the depth of the Supreme Court's analysis, the fact remains that neither Defendants nor this Court is free to ignore the Court's holding that the Privacy Clause protects the fundamental right to abortion. [7]

[7] *State ex rel. Stephan v. Harder*, 641 P.2d 366 (Kan. 1982), and *Minnesota Medical Association v. State*, 274 N.W.2d 84 (Minn. 1978), "confirm[]" nothing. D.Br. at 16-17. Those cases rejected arguments like the state's in *Family Life League*, because there was no evidence of harassment. That they failed to evaluate their own states' constitutions

B. Defendants' Effort to Limit the Scope of the Privacy Clause Is Without Support.

In their effort to avoid their own concession and the Supreme Court's *Family Life League* decision, Defendants attempt to narrow the Privacy Clause to protection against "intrusions related to unlawful searches and seizures." D.Br. at 14-15. Even if Defendants were not foreclosed from making this argument, their own cases repudiate this claim. *See id.* Indeed, while the Illinois Supreme Court has linked the search and seizure provision with the Fourth Amendment, it has consistently treated the Privacy Clause as a separate and *independent constitutional right*. *See, e.g.*, *In re Lakisha M.*, 227 Ill. 2d 259, 279 (2008); *Caballes*, 221 Ill. 2d at 317.[8] As the Court of Appeals recently confirmed:

> [T]he fact that article I, section 6's search and seizure provision is read in limited lockstep with the fourth amendment to the federal constitution does not require that the privacy clause of our constitution must be interpreted in accordance with federal law. In other words, *Caballes* does not require application of limited lockstep analysis when determining the parameters of the Illinois Constitution's privacy provision.

Nesbitt, 938 N.E.2d at 604 (emphasis omitted) (Privacy Clause "is broadly written, with no definition limiting the types of privacy intended to be protected").[9]

In addition, Defendants' effort to limit the Privacy Clause erroneously conflates the three distinct clauses of article I, section 6: (1) search and seizure in the traditional

---

says nothing about the meaning of the Illinois Privacy Clause and in no way undermines the Illinois Supreme Court's holding here.

[8] *See also Kunkel v. Walton*, 179 Ill. 2d 519, 537 (1998) (Constitution's protection of personal privacy "is stated broadly and without restrictions"); *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 451 (1997) ("the protections afforded by the Illinois Constitution go beyond the guarantees of the Federal Constitution") (internal quotation omitted).

[9] As the Privacy Clause is to be interpreted without regard to federal law, Defendants' effort to distinguish decisions striking parental involvement laws under other states' constitutions that, like Illinois', contain an express right to privacy or inalienable rights clause, D.Br. at 25, also fails. *See* P.Br. at 27-31.

sense; (2) the modern problem of "governmental interceptions of communications"; and (3) the right to privacy. 3 Sixth Illinois Constitutional Convention, Record of Proceedings ("Proceedings") at 1523-25. The drafters were clear that the Privacy Clause protected something more than the "search and seizure" and "interceptions of communications" clauses, *id.* at 1535 ("[T]he purpose obviously of this provision is to cover those situations that aren't covered by the other parts of the proposed section 6"), and that they were crafting broad protections that would evolve with a changing society. 6 Proceedings at 31-32 (delegates concerned with the whole range of "infringements on individual privacy" they expected would "increase as our society becomes more complex").

Nor can Defendants' contention that the Privacy Clause provides no protection against "interference with [one's] *conduct*," D.Br. at 15, be taken seriously. Were Defendants right, it would mean that the Privacy Clause affords *no* protection for a host of personal and private behavior, including, for example, the right of couples to use contraception. Such a result runs directly counter to the drafters' intention to protect a "zone of privacy" that includes both "thoughts and *highly personal behavior*." 6 Proceedings at 32 (emphasis added).[10]

Finally, Illinois' longstanding support for reproductive autonomy in its statutes, common law and tradition, *see* P.Br. at 22-24, is not undermined by long-overturned abortion restraints, *see* D.Br. at 21-22.[11] *Cf. Family Life League*, 112 Ill. 2d at 454;

---

[10] That the Supreme Court refused to protect the "right to 'do one's thing' on an expressway" in *Kohrig*, 113 Ill. 2d at 396 (no Privacy Clause protection for right not to wear a seatbelt) – the only example Defendants cite – does not repudiate this clear statement of the Committee, let alone overrule *Family Life League sub silentio.*

[11] In examining state tradition and values, Illinois courts include recent cases and enactments. *See, e.g., Washington*, 171 Ill. 2d at 486 (in breaking lockstep, relied on

Stallman v. Youngquist, 125 Ill. 2d 267, 278 (1988) (rejecting cause of action by fetus against pregnant woman for prenatal injuries, because such action would invade pregnant woman's "right to bodily autonomy" by subjecting to state scrutiny "all the decisions a woman must make in attempting to carry a pregnancy to term"); *In re Baby Boy Doe*, 260 Ill. App. 3d 392, 399 (1st Dist. 1994) ("[T]he state [constitutional] right of privacy protects substantive fundamental rights, such as the right to reproductive autonomy."). Illinois' rich common law tradition of support for privacy and bodily autonomy, is fully consistent with *Family Life League*'s holding that the right to reproductive autonomy is protected as fundamental by the Constitution's Privacy Clause.[12]

C. The Act Cannot Pass Scrutiny.

Defendants present no argument to rebut Plaintiffs' assertion that if the Privacy Clause protects abortion as a fundamental right – which, as shown, it does – government interference with that right is subject to strict scrutiny. Nor do Defendants offer any rejoinder to Plaintiffs' showing that the Act fails strict scrutiny. *See* P.Br. at 24-31. Thus,

---

recent judicial decisions); *People v. Krueger*, 175 Ill. 2d 60, 76 (1996) (same). Both *Krueger* and *Washington* also relied on decisions from other states in deciding whether to depart from federal law in Illinois. *Washington*, 171 Ill. 2d at 489; *Krueger*, 175 Ill. 2d at 76. And, while Defendants seek to 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," D.Br. at 25, the Supreme Court in *Krueger* relied on a decision from the New Jersey high court in departing from federal law in that case. *Krueger*, 175 Ill. 2d at 76.

[12] Defendants erroneously argue that the drafters intended to "give the General Assembly unfettered authority to regulate abortion." D.Br. at 20. To the contrary, the drafters created constitutional rights that would limit the legislature and evolve through judicial interpretation. *See, e.g.*, 3 Proceedings at 1533, 1538 (The courts will "ultimately [] decide what this constitution means"; its meaning will be "subject to interpretation and [] construed for years to come."); *id.* at 1379 (courts look to "community mores and a growing sense of what constitutes justice" in interpreting constitution); *see also* P.Br. at 22 n.8.

since Defendants' sole argument to support dismissal of Plaintiffs' privacy claim is foreclosed, Plaintiffs' privacy claims must be reinstated.

However, even if the Act were judged under a reasonableness standard, it would fail. *Id.* The Privacy Clause provides "a continuum of privacy protections . . . depending on the degree of intrusiveness" of the government's action. *Caballes*, 221 Ill. 2d at 322. Thus, the greater the privacy interest infringed upon, the greater the state's justification must be. For example, in *In re a Minor*, 149 Ill. 2d 247 (1992), the Illinois Supreme Court upheld a statute allowing a court to prohibit disclosure of the identities of minor victims of abuse against a challenge based on freedom of the press. The Court recognized that, under the Privacy Clause, minor victims had a "compelling interest" in protecting their identities from disclosure and concluded that there was no government interest that outweighed the minors' compelling privacy interest. *Id.* at 256-57.[13]

The privacy interest here – the fundamental right to decide, without interference and free from threats, coercion and abuse, whether to continue a pregnancy – is clearly compelling. *See Family Life League*, 112 Ill. 2d at 454; *Baby Boy Doe*, 260 Ill. App. 3d at 399. And, Illinois courts have routinely invalidated under the Privacy Clause state action that is far less invasive than the Act. *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 (1992) (striking down statute authorizing breathalyzer test of individual involved in motor vehicle accident).

[13] Notably, the New Jersey Supreme Court engaged in the same balance of interests Defendants urge here, *see* Def.Br. at 26 (reasonableness determined by "balancing the need for official intrusion against the constitutionally protected interest of a private citizen"), in striking New Jersey's parental notification law on equal protection grounds in *Farmer*, 762 A.2d 609.

Thus, even if this Court determined that the Act should be judged against Illinois' reasonableness standard, it would fail. While the state has an interest in protecting minors, the allegations show that the Act harms, rather than protects young women. *See* P.Br. 26-29; *see also* Brief of American College of Obstetricians and Gynecologists, *et. al.* Defendants make no attempt to show that the Act in fact advances its purported interests, but instead, merely reiterate its requirements and conclude – without support – that they are "reasonable." D.Br. at 26. Indeed, their sole argument for upholding the Act is that the federal courts have done so. This cannot suffice, for 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. Rather, this Court has an obligation to conduct an examination of the facts and independently analyze the claim. *See supra* at 1-3. Moreover, Defendants' argument is entirely without regard for the varying factual records among the cases. This distinction is all the more striking where, as here, the Court is bound by Plaintiffs' well-pled allegations supported by evidence that did not exist at the time of the initial federal decisions. *See McCabe*, 49 Ill. 2d at 347 (rejecting under rational basis review argument that marijuana use leads to heroin addiction because "[t]his thesis, once broadly entertained, has recently encountered serious challenge").

D. The Circuit Court Erred in Dismissing Plaintiffs' Privacy Claim Based on Its Mistaken Belief That It Could Not Grant Relief for the Constitutional Wrongs Demonstrated.

Defendants cannot support the circuit court's dismissal, based on the erroneous view that it was powerless, as a matter of law, to grant relief for the constitutional violations here. P.Br. at 31-36. As an initial matter, Defendants have no response to cases like *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006),

which demonstrate that where courts find that a statute operates unconstitutionally even in a "very small percentage of cases," they have an obligation to fashion a remedy. *Id.* at 328. Instead, Defendants make the circular argument that there is no constitutional violation here. D.Br. at 33. Of course there is no remedy if there is no wrong. But that says nothing about whether the circuit court was correct to deprive Plaintiffs the opportunity to prove that a wrong exists simply because it believed that Plaintiffs could not show that the Act operates unconstitutionally in every circumstance.

Nor can Defendants distinguish cases showing that Illinois courts do not rigidly adhere to the "no set of circumstances" test. *See, e.g.*, D.Br. at 31-32. Defendants do not dispute that these cases decline to apply the test, but instead attempt to discredit them with assertions that they are about whether a predicate fact can serve as a proxy for another presumed fact or whether the statute's classification had a proper fit. Defendants offer no explanation of why this matters or why such cases would be exempt if, as Defendants suggest, Illinois courts rigidly adhered to the no set of circumstances test.

Furthermore, these cases are no different from the instant one. For example, in *In re Amanda D.*, 349 Ill. App. 3d 941 (2nd Dist. 2004), a predicate fact (prior conviction for certain crimes) served as a proxy for another (unfit to parent) without an adequate constitutional fit. *Id.* at 948-50. Some parents could contest the presumed fact of unfitness in a best interest hearing, but some who were fit to parent, would nevertheless lose parental rights. *Id.* Faced with this substantive constitutional wrong, the court struck the statute on its face, even though every application would not be unconstitutional. *Id.* at 953-54 (burden of proving "that no individual is a member of both the proxy class and the class of unfit parents" is "too high"); *see also In re H.G.*, 197 Ill. 2d 317, 329-30

(2001) (facially invalidating law that equated child's time in foster care with parental unfitness, even though law did not operate unconstitutionally in every circumstance and some parents could prove fitness in a best interest hearing). Here, the Act presumes that a pregnant minor who chooses abortion is incapable of making an informed decision without parental or court involvement, yet, the well-pled allegations demonstrate that that is not the case for the majority of young women. *See* P.Br. at 13, 29-30. Moreover, while minors can seek to prove in a bypass hearing that the parental notice requirement should not apply to them (just as the parents in *Amanda D.* and *H.G.* could argue fitness in a best interest hearing), the allegations show that even the best run bypass process subjects such minors to unacceptable harms, including medically risky delay, risk of breach of confidentiality and abuse. *See* P.Br. at 10-12.[14]

Moreover, acceptance of Defendants' argument would provide Illinois women with even less protection under the state Constitution than that provided by the U.S. Supreme Court which strikes restrictions on abortion in their entirety if they operate unconstitutionally in a "large fraction of the cases in which [they are] relevant." *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992). Defendants do not dispute this federal rule, but argue that, even if Illinois law "offers additional substantive rights," it provides no room for application of the large fraction test. D.Br. at 33 n.6. They

[14] While the court in *In Re Branning*, 285 Ill. App. 3d 405 (4th Dist. 1996), quotes the no set of circumstances language, *see* D.Br. at 32, it does not apply the test and indeed facially invalidates a law even though there were some, and perhaps many, constitutional applications. In *Branning*, the court held that a statute permitting court authorization of electroconvulsive therapy (ECT) without a finding that the individual was unable to make a rational decision for himself violated substantive due process on its face, despite that some individuals for whom authorization for ECT was sought would not be able to make decisions for themselves and therefore their substantive due process rights would not be violated. 285 Ill. App. 3d at 412.

offer no authority for this proposition and fail to explain how the Illinois Constitution could offer greater rights but lesser remedies to enforce those rights.

Finally, Defendants' attempt to rely on a number of federal cases to suggest that "parental involvement laws are well suited to as applied challenges." D.Br. at 32-33 (citing *Zbaraz*, 572 F.3d at 388, in which the court comments that an as applied challenge by "individual women who have attempted to participate in bypass proceedings and found them wanting," would suffice). However, neither Defendants nor these decisions explain how such a challenge could conceivably provide a remedy for someone who has been harmed by the inherent risks of the bypass process itself – someone who, for example, was thrown out of her home after her parents learned of her attempts to access the bypass process, or someone who was unable to seek and obtain a judicial waiver in time to avail herself of abortion services and was thus forced to carry an unwanted pregnancy to term. The courts' offhand statements that an as-applied challenge will suffice, without consideration of how such a challenge would function in practice, cannot justify the harms that enforcement of the Act will impose.[15]

IV. THE CIRCUIT COURT ERRED IN DISMISSING PLAINTIFFS' ILLINOIS DUE PROCESS CLAIM.

The circuit court erred in holding that Plaintiffs' Illinois Due Process Clause claim was collaterally estopped, and when the well-pled facts here are scrutinized under Illinois precedent reviewing government interference with a fundamental right, the error of the circuit court's ruling is apparent.

---

[15] Defendants attempt to distinguish *Amanda D.* by arguing that an as applied challenge would have been impossible there. D.Br. at 32-33. But that is precisely the point. As *Ayotte* teaches, where as applied relief is inappropriate or ineffective, a court has an obligation to remedy the constitutional wrong through facial invalidation even if the law is not unconstitutional in every one of its potential applications.

Illinois courts do not, as Defendants urge, blindly adopt the results of federal due process cases without conducting their own analysis of Illinois law and, where appropriate, departing from U.S. Supreme Court analysis and results. *See Washington*, 171 Ill. 2d at 488-89; *McCauley*, 163 Ill. 2d at 440; *supra* at 2-4. This alone defeats collateral estoppel. *See* P.Br. at 45-46.

As to the merits, adherence to federal precedent here would be "fundamentally unfair," would fail to respect Illinois' express right to privacy and would countermand Illinois precedent dictating that interference with a fundamental right be reviewed under strict scrutiny. *See* P.Br. at 46-47. Moreover, the drafting history is consistent with judicial recognition of the abortion right. The delegates resoundingly rejected due process rights for "the unborn," 3 Proceedings at 1523, and clearly anticipated that constitutional rights would be defined through ongoing judicial interpretation. *Id.* at 1501 (due process depends on "what the [S]upreme [C]ourt is doing"); *id.* at 1533 (courts will "ultimately [] decide what this constitution means"); *id.* at 1538 (Constitution will be "subject to interpretation and [] construed for years to come"); *id.* at 1374 (cases will interpret Constitution, relying on "community mores and a growing sense of what constitutes justice – what constitutes due process of law – that's the process that's going on, and it isn't going to stop with our proceedings"). Here, although no specific reference to abortion was included in the Due Process Clause, the Illinois Supreme Court has since held that the 1970 Constitution protects "a fundamental constitutional right of privacy which encompasses a woman's decision of whether to terminate her pregnancy." *Family Life League*, 112 Ill. 2d at 454. This judicial interpretation of what rights are fundamental

under the Illinois Constitution gives life to the bare constitutional provisions and, in keeping with the drafters' intent, shapes the content of the Due Process Clause.

V. THE CIRCUIT COURT ERRED IN DISMISSING PLAINTIFFS' GENDER EQUALITY CLAIM.

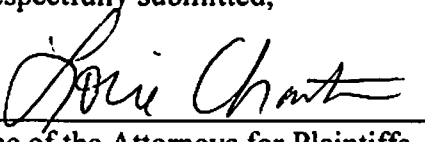
The Act unconstitutionally burdens young women who choose to terminate their pregnancies based on the gender-based stereotype that it is natural or normal for a woman to become a mother, while the decision to end a pregnancy is an unnatural one requiring state intervention. P.Br. at 48-49. Defendants' citation to *Lane v. Lane*, 35 Ill. App. 3d 276 (1st Dist. 1975), simply does not stand for the proposition that stereotype-based discriminatory classifications between persons of the same gender are beyond the reach of Article I, Section 18. And, Defendants' contention that Title VII cases "have no bearing on the state gender equality clause," D.Br. at 48, is likewise belied by this Court's precedent. *See Erickson v. Board of Education, Proviso Township High School*, 120 Ill. App. 3d 264 (1st Dist. 1983) (relying on Title VII jurisprudence to resolve a claim brought under Article I, Section 18). Because the burdens the Act places on young women who choose to have abortions are rooted in "stereotyped expectations" about how women and girls are supposed to behave, *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999), the Act discriminates on the basis of gender in violation of Article I, Section 18.

CONCLUSION

For the reasons stated in Plaintiffs' opening brief and herein, Plaintiffs respectfully request that this Court reverse the circuit court's judgment and remand for further proceedings. [16]

Dated: January 25, 2011

Respectfully submitted,



One of the Attorneys for Plaintiffs-Appellants in 1-10-1463

Lorie A. Chaiten
Leah Bartelt
Krista Stone-Manista*
Roger Baldwin Foundation of ACLU, Inc.
180 N. Michigan Avenue
Suite 2300
Chicago, IL 60601
(312) 201-9740

Kathleen L. Roach
Rachel B. Niewoehner
Geeta Malhotra
Sidley Austin LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000

Jennifer Dalven
Alexa Kolbi-Molinas
American Civil Liberties Union Foundation
(*pro hac vice*)
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500

*Admitted to the Bar in the State of California

[16] Plaintiffs also respectfully request that, based on the unrebutted proof submitted in support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (Separate App'x of Plaintiffs-Appellants, Vol. 2, at A93-291), this Court continue during remand, should it rule in favor of Plaintiffs in this appeal, the temporary restraining order entered by the circuit court and continued by stipulation of the parties, which is set to expire upon this Court's ruling. (Record on Appeal, Vol. 5, at C01144.)

CERTIFICATE OF COMPLIANCE WITH SUPREME COURT RULE 341(c)

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statements of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 20 pages.

Lorie Chaiten

One of the Attorneys for Plaintiffs-Appellants in 1-10-1463

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2011, I caused true and correct copies of the foregoing **Reply Brief of Plaintiffs-Appellants in No. 10-1463** to be served by the following methods upon:

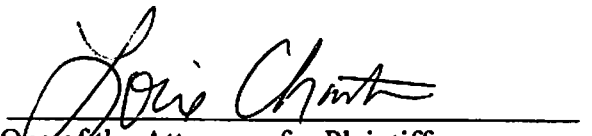
Three Copies By Priority U.S. Mail, postage prepaid:

Attorneys for Defendants-Appellees
Lisa Madigan, Attorney General
Michael A. Scodro, Solicitor General
Jane Elinor Notz, Deputy Solicitor General
Brett E. Legner, Assistant Attorney General
Illinois Attorney General's Office
James R. Thompson Center
100 West Randolph Street, 12th Floor
Chicago, IL 60601

Attorneys for Proposed Intervenors-Appellants in No. 10-1576
Thomas Brejcha
Peter Breen
Thomas More Society
29 S. LaSalle Street, Suite 440
Chicago, IL 60603

One Copy By Priority U.S. Mail, postage prepaid:

Additional counsel for Proposed Intervenors-Appellants
Paul Benjamin Linton, Special Counsel
Thomas More Society
921 Keystone Avenue
Northbrook, IL 60062



One of the Attorneys for Plaintiffs-Appellants in No. 10-1463

Lorie A. Chaiten
Leah Bartelt
Krista Stone-Manista*
Roger Baldwin Foundation of ACLU, Inc.
180 North Michigan Ave., Suite 2300
Chicago, IL 60601
(312) 201-9740
*Admitted to the Bar in the State of California

Jennifer Dalven
Alexa Kolbi-Molinas
American Civil Liberties Union Foundation
(*pro hac vice*)
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500

Kathleen L. Roach
Rachel B. Niewoehner
Geeta Malhotra
Sidley Austin LLP
One South Dearborn Street
Chicago, Illinois 60603
(312) 853-7000