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Long Road to Justice: The Illinois Supreme Court, the Illinois Attorney General, and the Parental Notice of Abortion Act of 1995

*Paul Benjamin Linton**

I. INTRODUCTION

On July 14, 2009, the United States Court of Appeals for the Seventh Circuit, in *Zbaraz v. Hartigan*,¹ upheld the constitutionality of the Illinois Parental Notice of Abortion Act of 1995.² The Seventh Circuit's decision brought to a successful end the Illinois General Assembly's thirty-five year struggle to enact enforceable legislation requiring the consent of, or notice to, a parent or legal guardian of a pregnant minor before she undergoes an abortion. Between 1975 and 1995, the General Assembly enacted five different statutes requiring parental consent, parental consultation, or parental notice. Until now, those efforts have been thwarted, first, by a series of federal court decisions holding the statutes invalid on federal constitutional grounds and, later (and for a much longer period of time), by the failure (or refusal) of the Supreme Court of Illinois to issue the appropriate rules necessary to implement those statutes. As a result, Illinois was the only state in the Midwest not to have an enforceable parental consent or notice statute in effect.

In Part II, this Article sets forth the history of Illinois's efforts to enact an enforceable parental consent or notice statute. Then, Part III analyzes the Illinois Supreme Court's refusal in 1995 to issue the judicial bypass rule necessary to implement the Parental Notice of Abortion Act of 1995. Part IV details the strategy the author developed to persuade the court to adopt the necessary rule. Parts V and VI review and analyze the ensuing federal district court litigation once the

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1. 572 F.3d 370 (7th Cir. 2009).

2. The court's holding is discussed *infra* Part VII.

implementing rule (Illinois Supreme Court Rule 303A) was adopted in September 2006. Finally, Part VII summarizes the disposition of the case on appeal.

II. A HISTORY OF THE ILLINOIS GENERAL ASSEMBLY'S THIRTY-FIVE-YEAR EFFORT TO ENACT AN ENFORCEABLE PARENTAL CONSENT OR NOTICE STATUTE

Beginning in 1975, the Illinois General Assembly has struggled to enact an enforceable statute requiring parental consent or notice before an unemancipated minor may obtain an abortion. Until recently, those efforts—involving two parental consent statutes, two parental notice statutes, and a statute requiring parental “consultation”—have been unsuccessful, struck down on federal constitutional grounds by federal courts, or derailed by the unwillingness of the Illinois Supreme Court to promulgate appropriate rules for appeals from judicial bypass hearings. That history is set forth below.

A. *The Illinois Abortion Law of 1975*

The first post-*Roe* Illinois abortion statute, the Illinois Abortion Law of 1973,³ did not contain a parental consent or notice requirement. But in 1975 the General Assembly enacted a statute that included, among other provisions, a parental consent requirement.⁴ The statute required the written consent of one parent (or person *in loco parentis*) of an unmarried minor under the age of eighteen before an abortion could be performed, unless a physician certified that the abortion was “necessary in order to preserve the life or health of the mother.”⁵ The statute, however, contained no mechanism by which a minor could go to court to obtain an order authorizing her to have an abortion without obtaining her parent’s consent.

A temporary restraining order, blocking enforcement of the statute, was entered on November 22, 1975. A preliminary injunction entered on December 2, 1975, and a permanent injunction entered on April 12, 1978 followed.⁶ The permanent injunction was issued on the basis of the United States Supreme Court’s decision in *Planned Parenthood of*

3. Illinois Abortion Law of 1973, Public Act No. 78-225 (effective July 19, 1973) (codified at ILL. REV. STAT. ch. 38, ¶¶ 81-11 to 81-19 (1973)).

4. Illinois Abortion Law of 1975, Public Act No. 79-1126, § 3(4) (effective Nov. 20, 1975) (codified at ILL. REV. STAT. ch. 38, ¶ 81-23(4) (Supp. 1976)) (repealed 1980).

5. *Id.*

6. *Wynn v. Scott*, 449 F. Supp. 1302, 1305, 1317 (N.D. Ill. 1978) (reciting the history of the litigation and issuing a permanent injunction).

Central Missouri v. Danforth.⁷ In *Danforth*, the Court held that the States could not confer on the parents of a minor an absolute veto power over her decision to obtain an abortion.⁸ Following *Danforth*, Illinois conceded that its parental consent statute was unconstitutional.⁹ The statute was later repealed.¹⁰

B. The Illinois Abortion Parental Consent Act of 1977

In 1977, the General Assembly enacted the Illinois Abortion Parental Consent Act of 1977.¹¹ This act required the written consent of both parents (subject to certain exceptions) of an unmarried minor, her guardian, or other person *in loco parentis*, before she could obtain an abortion.¹² The act also imposed a forty-eight hour waiting period.¹³ Parental consent was not required if the abortion was “necessary for the preservation of the life of the mother.”¹⁴ If the parental consent could not be obtained or was refused, the minor could seek court-authorized consent upon a showing that “the pregnant minor fully understands the consequences of an abortion to her and her unborn child.”¹⁵ Notice of the hearing had to be sent to her parents at their last known address by registered or certified mail.¹⁶

The United States District Court for the Northern District of Illinois entered a temporary restraining order on February 2, 1978, one month after the effective date of the statute, blocking its enforcement.¹⁷ The court then entered a preliminary injunction on February 23, 1978,¹⁸ followed by a permanent injunction on September 25, 1978, and November 2, 1978.¹⁹ The Seventh Circuit thereafter affirmed the permanent injunction on the basis of its earlier opinion affirming the

7. 428 U.S. 52 (1976).

8. *Id.* at 72–75.

9. *Wynn*, 449 F. Supp. at 1317.

10. Public Act No. 81-1078, § 2 (effective Jan. 1, 1980) (repealed 1984).

11. Illinois Abortion Parental Consent Act, Public Act No. 80-1139 (effective Jan. 1, 1978) (codified at ILL. REV. STAT. ch. 38, ¶¶ 81-51 to 81-55 (Supp. 1977)) (repealed 1995).

12. *Id.* ch. 38, ¶ 81-54(3).

13. *Id.* ch. 38, ¶ 81-54(2).

14. *Id.* ch. 38, ¶ 81-54 (last sentence).

15. *Id.* ch. 38, ¶ 81-54 (third to the last paragraph).

16. *Id.*

17. The history of the litigation is set forth in *Wynn v. Carey*, 582 F.2d 1375, 1379 (7th Cir. 1978).

18. *Wynn v. Scott*, 448 F. Supp. 997 (N.D. Ill. 1978), *aff'd sub nom. Wynn v. Carey*, 582 F.2d 1375 (7th Cir. 1978).

19. *Wynn v. Scott*, No. 78 C 237 (N.D. Ill. Sept. 25, 1978 & Nov. 2, 1978). The history of the litigation is set forth in *Wynn v. Carey*, 599 F.2d 193, 194 (7th Cir. 1979).

preliminary injunction.²⁰ In the earlier opinion, the court of appeals held that the consent statute was unconstitutional because, among other alleged defects, the statute required parents to be notified whenever their minor daughter sought an abortion or requested a judicial bypass hearing; the statute did not limit the issues in the bypass hearing to the minor's maturity and her best interests; the statute did not specify the procedures to be followed in seeking a judicial bypass; and the statute did not provide for appointment of counsel for the minor, anonymity of the minor, or an expedited review of the petition or its denial.²¹

C. Amendment to the Abortion Law of 1975

In 1979, the General Assembly, without amending the Abortion Parental Consent Act of 1977, amended the parental consent provision of the 1975 statute,²² replacing it with a "parental consultation" requirement.²³ This requirement was preliminarily enjoined,²⁴ and was later repealed with the enactment of the Parental Notice of Abortion Act of 1983.²⁵

D. The Parental Notice of Abortion Act of 1983

In 1983, the General Assembly enacted the Parental Notice of Abortion Act.²⁶ This act required "actual notice," defined as "the giving of notice directly, in person or by telephone,"²⁷ to both parents (subject to certain exceptions) of an unemancipated minor (or an incompetent person), her guardian, or other person *in loco parentis* at least twenty-four hours before the abortion was to be performed.²⁸ Notice was not required in the case of a "medical emergency" which "so complicate[d] the pregnancy as to require an immediate abortion."²⁹ Otherwise, a minor (or incompetent person) could petition the circuit court to waive notice; the court could waive the notice requirements if it

20. *Wynn v. Carey*, 599 F.2d at 196, *aff'g* *Wynn v. Scott*, No. 78 C 237 (N.D. Ill. Sept. 25, 1978 & Nov. 2, 1978) (citing *Wynn v. Carey*, 582 F.2d 1375 (7th Cir. 1978)).

21. *Wynn*, 582 F.2d at 1386-90.

22. ILL. REV. STAT. ch. 38, ¶ 81-23(4) (Supp. 1976).

23. Public Act No. 81-1078, § 1 (effective Jan. 1, 1980) (codified at ILL. REV. STAT. ch. 38, ¶ 81-23.3 (Cum. Supp. 1980)) (repealed 1984). This statute also applied to persons who had been adjudicated disabled and for whom a guardian had been appointed.

24. This litigation is recounted in *Charles v. Carey*, 627 F.2d 772, 775 n.2 (7th Cir. 1980).

25. Parental Notice of Abortion Act of 1983, Public Act No. 83-890, § 9 (effective Jan. 31, 1984) (codified at ILL. REV. STAT. ch. 38, ¶¶ 81-61 to 81-70) (repealed 1995).

26. *Id.*

27. *Id.* ch. 38, ¶ 81-63(c) (defining "actual notice").

28. *Id.* ch. 38, ¶¶ 81-64(a), (b).

29. *Id.* ch. 38, ¶ 81-66.

determined that the minor (or incompetent) was “mature and well-informed enough to make the decision [to have an abortion] on her own,” or that notification “would not be in the best interests of the minor or incompetent.”³⁰

The United States District Court for the Northern District of Illinois declared the Parental Notice of Abortion Act of 1983 unconstitutional and permanently enjoined its enforcement in *Zbaraz v. Hartigan*.³¹ The Seventh Circuit Court of Appeals held that, under the Supreme Court’s then recent decision in *City of Akron v. Akron Center for Reproductive Health*,³² the twenty-four hour waiting period was unconstitutional.³³ The court of appeals held further, however, that the waiting period was severable from the remainder of the statute.³⁴ But with respect to the remainder of the statute, the court enjoined enforcement of the parental notice act pending the Illinois Supreme Court’s promulgation of rules to assure expeditious and confidential proceedings at trial and on appeal.³⁵ The Illinois Supreme Court thereafter promulgated a rule for judicial bypass hearings and appeals,³⁶ which was found invalid by the district court in *Zbaraz v. Hartigan*,³⁷ because the rule did not provide for an ex parte, confidential proceeding at trial or on appeal.³⁸

30. *Id.* ch. 38, ¶¶ 81-65(d)(i), (ii).

31. 584 F. Supp. 1452 (N.D. Ill. 1984), *aff’d in part and vacated in part on other grounds*, 763 F.2d 1532 (7th Cir. 1985), *aff’d by an equally divided Court*, 484 U.S. 171 (1987). The affirmance of a lower court decision by an equally divided Supreme Court is not a precedent of the Court and may not be cited as binding authority.

32. 462 U.S. 416, 449–51 (1983). That holding was overruled in *Planned Parenthood v. Casey*, 505 U.S. 833, 881–87 (1992).

33. *Zbaraz*, 763 F.2d at 1535–39.

34. *Id.* at 1545.

35. *Id.*

36. ILL. SUP. CT. R. 307(a)(8), 307(e) (1989) (amended June 19, 1989, effective Aug. 1, 1989). At the time Rule 307 was amended, the Chief Justice of the Illinois Supreme Court was Thomas J. Moran and the other Justices (in order of seniority) were Daniel P. Ward, Howard C. Ryan, William G. Clark, Ben Miller, John J. Stamos and Horace L. Calvo. The amendments to Rule 307 were adopted more than five years after the parental consent statute was enacted.

37. 776 F. Supp. 375 (N.D. Ill. 1991).

38. *Id.* at 379–80, 382–84. Rule 307(e) appeared to contemplate an adversarial hearing on the minor’s petition when an ex parte hearing is clearly mandated by United States Supreme Court precedent (*see infra* Part III); to allow persons other than the minor, her counsel and/or her guardian ad litem to have access to the record of the bypass proceedings on appeal, thereby compromising the requirement of confidentiality; and to allow the Illinois Appellate Court, on its own motion, without any request by the minor or her attorney, to “order a different schedule” for the filing of documents on appeal, thereby delaying prompt disposition of an appeal from an order denying a petition. The Illinois Supreme Court’s adoption of an obviously unconstitutional judicial bypass rule was the first indication that the court, as then constituted, was more interested in subverting the parental notice statute than in implementing it. This became evident when the court set forth its reasons for refusing to adopt judicial bypass rule(s) under a later enacted parental notice statute, which reasons are discussed *infra* Part III.

E. The Parental Notice of Abortion Act of 1995

In 1995, the General Assembly enacted the Parental Notice of Abortion Act of 1995 (the "Act"),³⁹ which repealed both the Illinois Abortion Parental Consent Act of 1977,⁴⁰ and the Parental Notice of Abortion Act of 1983.⁴¹ The 1995 Act requires actual or constructive notice to "an adult family member"⁴² at least forty-eight hours before an abortion may be performed on an unmarried minor or incompetent person.⁴³ Notice is not required, however, if "the minor or incompetent person is accompanied by a person entitled to notice;" if "notice is waived in writing by a person entitled to notice;" if "the attending physician certifies in the patient's medical record that a medical emergency exists and there is insufficient time to provide the required notice;" if "the minor declares in writing that she is the victim of sexual abuse, neglect, or physical abuse by an adult family member;" or if notice is waived following a judicial bypass hearing.⁴⁴ With respect to the last exception, notice may be waived by a court if the pregnant minor (or incompetent person) is able to demonstrate by a preponderance of evidence in a judicial bypass hearing that she is "sufficiently mature and well enough informed to decide intelligently whether to have an abortion," or, in the alternative, that "notification . . . would not be in [her] best interests."⁴⁵

39. Parental Notice of Abortion Act of 1995, Public Act No. 89-18 (effective June 1, 1995) (codified at 750 ILL. COMP. STAT. 70/1 to 70/99 (1996)).

40. 720 ILL. COMP. STAT. ANN. 515/1 to 515/5 (West 1992), *repealed by* 750 ILL. COMP. STAT. 70/90 (1996).

41. 720 ILL. COMP. STAT. ANN. 520/1 to 520/10 (West 1992), *repealed by* 750 ILL. COMP. STAT. 70/95 (1996).

42. "An adult family member" is defined as "a person over 21 years of age who is the parent, grandparent, step-parent living in the household, or legal guardian." 750 ILL. COMP. STAT. 70/10 (2007).

43. *Id.* § 70/15. "Actual notice" is defined as "the giving of notice directly, in person, or by telephone." *Id.* § 70/10. "Constructive notice" is defined as "notice by certified mail to the last known address of the person entitled to notice with delivery deemed to have occurred forty eight hours after the certified notice is mailed." *Id.*

44. *Id.* § 70/20. "Medical emergency" is defined elsewhere in the Act as "a condition that, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function." *Id.* § 70/10. When notice is waived because of an allegation of sexual or physical abuse or neglect, and the abuse or neglect must be reported to public authorities under other laws of the state, the physician performing the abortion need not make the required notification until after the abortion has been performed in accordance with the provisions of the act. *Id.* § 70/20(4).

45. *Id.* § 70/25(d)(1), (2).

Section 25(f) of the Act specifies that “[a]n expedited confidential appeal shall be available, *as the [Illinois] Supreme Court provides by rule*, to any minor or incompetent person to whom the circuit court denies a waiver of notice.”⁴⁶ Section 25(g) “respectfully requested” the Supreme Court “to promulgate any rules and regulations necessary to ensure that proceedings under this Act are handled in an expeditious and confidential manner.”⁴⁷ The General Assembly asked the Supreme Court to provide the rule(s) requested by sections 25(f) and (g) because, under the Illinois Constitution, the court has the exclusive authority to adopt rules for appeals,⁴⁸ and concurrent authority (with the legislature) to adopt other rules of procedure.⁴⁹

On December 12, 1995, Daniel Pascale, the Administrative Director of the Administrative Office of the Illinois Courts, sent a one-page letter to Attorney General Jim Ryan regarding the status of the promulgation of the court rule(s) requested by section 25 of the Act.⁵⁰ In that letter, Pascale informed General Ryan that members of the supreme court directed him to advise Ryan that the court had decided *not* to promulgate the rule(s) requested by the Illinois Parental Notice of Abortion Act of 1995.⁵¹ Pascale further advised Ryan that, effective December 1, 1995, the court rescinded Rules 307(a)(8) and 307(e), which had been promulgated pursuant to the 1983 Parental Notice of Abortion Act.⁵² As previously noted, Rule 307(e) had been held unconstitutional by the federal district court.⁵³ Pascale’s letter provided no explanation for the court’s refusal to promulgate the rule(s) required to implement the 1995 Act.⁵⁴

46. *Id.* § 70/25(f) (emphasis added). An order allowing a waiver of notice is *not* appealable. *Id.* § 70/25(f) (last sentence).

47. *Id.* § 70/25(g).

48. ILL. CONST. art. VI, § 16 (last sentence). See *People ex rel Stamos v. Jones*, 237 N.E.2d 495, 498 (Ill. 1968) (“[T]he constitution has placed responsibility for governing appeal in the Supreme Court, not the General Assembly.”).

49. ILL. CONST. art. VI, § 16 (first sentence). Where rule-making authority is concurrent, a judicial rule prevails over a conflicting statute. *O’Connell v. St. Francis Hosp.*, 492 N.E.2d 1322, 1326 (1986).

50. Letter from Daniel Pascale, Admin. Dir. of the Ill. Courts, to Jim Ryan, Ill. Att’y Gen. (Dec. 12, 1995) (reprinted in Appendix A).

51. *Id.*

52. *Id.* The repeal of the earlier rule is reflected in the rules that appear in 166 Ill.2d cxxv-cxxix (1995).

53. See *Zbaraz v. Hartigan*, 776 F. Supp. 375, 377 (N.D. Ill. 1991).

54. At the time Rule 307(a)(8) and 307(e) were repealed, the Chief Justice of the Illinois Supreme Court was Michael A. Bilandic and the other Justices (in order of seniority) were Ben Miller, James D. Heiple, Charles E. Freeman, Moses W. Harrison II, Mary Ann G. McMorrow, and John L. Nickels. No justice dissented from the repeal of Rules 307(a)(8) and 307(e) or the court’s refusal to issue the rule(s) required by the Parental Notice of Abortion Act of 1995.

Apparently in response to outrage expressed by Governor Edgar, Attorney General Jim Ryan, and state legislators over the court's decision not to adopt any rules,⁵⁵ Pascale, on January 25, 1996, sent a five-page letter to Attorney General Ryan purporting to explain the supreme court's reasons for not promulgating the rule(s) required by the 1995 Act.⁵⁶ Copies of the letter were sent to Governor Edgar, the majority and minority leaders in the General Assembly, and federal district court Judge Paul Plunkett (who was presiding over the challenge to the Act). Because the Illinois Supreme Court refused to promulgate the rule(s) necessary to implement the Act, Judge Plunkett permanently enjoined the Act on February 8, 1996.⁵⁷

III. ANALYSIS OF THE ILLINOIS SUPREME COURT'S REFUSAL TO ISSUE THE JUDICIAL BYPASS APPEALS RULE(S)

In his letter of January 25, 1996 (reprinted in Appendix B), attempting to explain why the Illinois Supreme Court had refused to issue the judicial bypass appeal rules, Pascale made a number of statements regarding state and federal constitutional law that have little or no support in the applicable case law.⁵⁸

A. *Is a Bypass Mechanism Constitutionally Required?*

Pascale first speculated that a one-parent notice of abortion statute would not require a bypass mechanism of any kind.⁵⁹ There is little, if any, basis for this speculation. Although the United States Supreme Court has not squarely decided whether a one-parent notice of abortion statute requires a bypass mechanism,⁶⁰ the Eighth Circuit Court of

55. See e.g., Dave McKinney, *Teen Abortion Law Dies*, CHI. SUN-TIMES, Jan. 24, 1996, at 1; Janan Hanna and Christi Parsons, *State Justices Quietly Kill Law on Notifying Parent of Abortion*, CHI. TRIB., Jan. 24, 1996, § 1, at 1; Jean Latz Griffin, *Abortion Bill Move Resented*, CHI. TRIB., Jan. 26, 1996, Metro Northwest Section, at 1.

56. Letter from Daniel Pascale, Admin. Dir. of the Ill. Courts, to Jim Ryan, Ill. Att'y Gen. (Jan. 25, 1996) [hereinafter 1996 Pascale Letter] (reprinted in Appendix B).

57. *Zbaraz v. Ryan*, No. 84 CV 771, 1996 WL 33293423, at *1 (N.D. Ill. Feb. 8, 1996) (The district court held that the statute was "incomplete" because the bypass appeal rules had not been adopted).

58. A highly condensed summary of the critique that follows in the text was first published by the author in a letter to the editor shortly after Pascale's second letter was sent to the Attorney General. See Paul Benjamin Linton, *High Court Erred on Abortion Law*, CHI. TRIB., Feb. 19, 1996, § 1, at 12. At the time, the author was General Counsel for Americans United for Life.

59. See 1996 Pascale Letter, *supra* note 56 (second and third pages) (reprinted in Appendix B).

60. See *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 510 (1990) (failing to determine whether a judicial bypass is necessary in order to uphold the constitutionality of a one-parent notice statute).

Appeals has held that a one-parent notice statute does require a judicial bypass.⁶¹ Pascale counted Justice Stevens as one of five Justices who would uphold a one-parent notice statute without a bypass, but ignored Justice Stevens' statement in *Akron Center* that "the State must provide an adequate mechanism for cases in which the minor is mature or notice would not be in her best interests."⁶² The Fourth Circuit Court of Appeals has suggested that a one-parent notice of abortion statute does not require a judicial bypass mechanism for mature minors,⁶³ but that suggestion was mere dictum and not a holding of the court. More to the point, at the time Pascale sent his second letter (January 25, 1996), the Seventh Circuit Court of Appeals had twice held that parental notice statutes must comply with the requirements of parental consent statutes, including providing a judicial bypass mechanism.⁶⁴ Why Pascale would have believed that the federal courts would have upheld a one-parent notice statute, without any kind of a bypass mechanism, is baffling.

Regardless of the relative merits of Pascale's speculation regarding the constitutionality of a one-parent notice of abortion statute without a judicial bypass, the Parental Notice of Abortion Act of 1995 contains a non-severability provision with respect to the judicial bypass mechanism. Section 50 states, in part, that "Section 25 [the judicial bypass] is inseverable to the extent that if all or any substantial part of Section 25 is held invalid, then the entire Act is invalid."⁶⁵ This language was included at the insistence of Governor Edgar who was opposed to a pure notice (without judicial bypass) law.⁶⁶ Because of the inclusion of this non-severability language, the 1995 Act stands or falls

61. *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1458–63 (8th Cir. 1995) (striking down a South Dakota one-parent notice of abortion statute that did not have a judicial bypass mechanism), *cert. denied sub nom. Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174 (1996).

62. *Akron*, 497 U.S. at 522 (Stevens, J., concurring).

63. *Planned Parenthood of Blue Ridge v. Camblos*, 155 F.3d 352, 374–84 (4th Cir. 1998) (en banc).

64. See *Zbaraz v. Hartigan*, 763 F.2d 1532, 1539 (7th Cir. 1985), *aff'd by an equally divided court*, 484 U.S. 171 (1987) (per curiam), *reh'g denied*, 484 U.S. 1082 (1988); *Ind. Planned Parenthood Affiliates Ass'n, Inc. v. Pearson*, 716 F.2d 1127, 1132 (7th Cir. 1983).

65. 750 ILL. COMP. STAT. 70/50 (2008).

66. Editorial, *When a Court Presumes to Legislate*, CHI. TRIB., Jan. 30, 1996, §1, at 12.

The judicial bypass . . . was a critical element of the political compromise in the legislature—the bill would not have been approved without it. Such compromises are essential to the legislative process and are, in fact, a legislative prerogative. Unless there is something constitutionally wrong with that choice, the court is bound to respect it.

Id.

depending upon the existence of a valid judicial bypass, which requires rules for an expedited, confidential appeal. Without proper appeal rule(s), the judicial bypass provided by section 25 of the Act is incomplete and the statute could not be enforced.

B. Must Judicial Bypass Proceedings Be Confidential and Ex Parte?

Pascale next stated that judicial bypass proceedings under parental notice (or consent) statutes need not be confidential or ex parte.⁶⁷ Pascale cited no support for this claim. The Supreme Court's jurisprudence in this area clearly contemplates that judicial bypass proceedings be confidential and ex parte. Under binding Supreme Court precedent, neither the parents nor the legal guardian of a minor seeking a judicial bypass may be given notice of or participate in the bypass hearing.⁶⁸ The whole point of judicial bypass proceedings is to *avoid* giving notice to (or, in the case of consent statutes, obtaining consent from) the minor's parent(s) or legal guardian. If the bypass proceedings are not confidential and ex parte, they would fail to meet federal constitutional standards. Pascale did not appear to be familiar with the basic constitutional principles that govern judicial bypass proceedings.

C. Must Judicial Bypass Proceedings Be Open to the Public and the Press?

Pascale then suggested that confidential judicial proceedings do not comport with the requirement of the First Amendment that all judicial proceedings be open to the public (or at least the press).⁶⁹ Quite obviously, if the court allowed the press to attend, the proceedings would not have been confidential. To state that the proceedings must be *both* confidential (as Supreme Court precedent requires) *and* open to the press (as Pascale suggested) is to say that they could not take place at all ("squaring the circle"). Developing this suggestion further, Pascale opined that ex parte, confidential judicial proceedings do not comport with either the federal or state constitution because, apparently, all judicial proceedings must be open to the press (if not also the public)

67. See 1996 Pascale Letter, *supra* note 56 (fourth page) (reprinted in Appendix B).

68. See *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 512–13 (1990) (explaining the procedural safeguards implemented to maintain a minor's anonymity); *Bellotti v. Baird*, 443 U.S. 622, 647–48 (1979) (listing factors for courts to consider when determining whether to authorize an abortion without parental consent).

69. See 1996 Pascale Letter, *supra* note 56 (fourth page) (reprinted in Appendix B).

and must be adversarial.⁷⁰ Not surprisingly, Pascale provided no authority in support of this opinion, either.

More than three-fourths of the States have enacted parental involvement statutes with judicial bypass mechanisms.⁷¹ Significantly, no state supreme court has refused to issue the rules necessary to implement those statutes on the grounds set forth in Pascale's letter,⁷² nor have any such rules been challenged on those grounds. Moreover, there are a variety of judicial proceedings which are confidential, ex parte, or both: proceedings involving juveniles are clearly confidential;⁷³ probate proceedings may be non-adversarial;⁷⁴ and many other judicial proceedings are both confidential and ex parte, including grand jury proceedings,⁷⁵ applications for arrest warrants and search warrants,⁷⁶ applications for emergency orders of protection,⁷⁷ applications for non-consensual electronic interceptions,⁷⁸ and applications to seize books and records and/or freeze assets of persons or entities suspected of terrorist activities.⁷⁹ Pascale's letter betrayed no awareness of any of these statutes, all of which undermine his thesis. Providing an ex parte, confidential judicial proceeding in which to

70. *Id.*

71. See *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 326 n.1 (2006) (collecting statutes).

72. In one case, a state supreme court judge, joined by two other judges, dissented from an order affirming, as modified, the denial of a bypass petition on the grounds that the bypass hearing did not present a justiciable "case or controversy" under the state constitution because the proceedings were non-adversarial, an issue that had not been raised by the minor. *In re Anonymous*, 558 N.W.2d 784, 791-93 (Neb. 1997) (Caporale, J., dissenting). The majority rejected this argument. *Id.* at 789-91.

73. 705 ILL. COMP. STAT. 405/1-5(6) (2008) (juvenile court proceedings); 705 ILL. COMP. STAT. 405/1-8 (2008) (juvenile court records). See *In re A Minor*, 595 N.E.2d 1052, 1055 (Ill. 1992) (press has no absolute right to attend juvenile court proceedings).

74. 755 ILL. COMP. STAT. 5/5-1 to 5/5-3, 5/6-1 to 5/6-21 (2008).

75. 725 ILL. COMP. STAT. 5/112-6 (2008).

76. 725 ILL. COMP. STAT. 5/107-9 (2008) (arrest warrants); 725 ILL. COMP. STAT. 5/108-3, 108-4 (2008) (search warrants).

77. 725 ILL. COMP. STAT. 5/111-8 (2008) (authorizing ex parte orders of protection to prohibit domestic violence); 320 ILL. COMP. STAT. 20/9.5 (2008) (authorizing ex parte orders of protection to prevent elder abuse).

78. 725 ILL. COMP. STAT. 5/108B-1 to 5/108B-14 (2008) (granting chief judge of circuit court authority to enter ex parte order authorizing interception of private oral communication based upon a showing of probable cause).

79. 720 ILL. COMP. STAT. 5/29D-65(a) (2008) (granting court authority to enter ex parte order authorizing Attorney General or State's Attorney to freeze or seize all of the assets of any person when there is probable cause to believe that such person has used or intends to use the property in an act of terrorism); 225 ILL. COMP. STAT. 460/16.5(b) (2008) (granting court authority to enter ex parte order authorizing Attorney General, upon a showing of probable cause, to seize books and records and freeze assets of any charity engaged in terrorist acts).

consider a bypass petition does not violate either the First Amendment or any other provision of either the United States or Illinois Constitution.

D. Could Bypass Hearings Be Held Before Nonjudicial Officers?

Finally, Pascale suggested that bypass hearings could be held before administrative, not judicial, officers.⁸⁰ The United States Supreme Court has not yet ruled on the constitutionality of such a procedure.⁸¹ But this suggestion would not necessarily avoid the concerns Pascale expressed regarding non-adversarial judicial hearings. Normally, a party aggrieved by a final judgment or order of an administrative agency or official has the right to obtain judicial review of that judgment or order, either by statute or common law writ of certiorari.⁸² Thus, establishing a procedure under which bypass hearings are conducted, in the first instance, by administrative hearing officers would not avoid the “problem” Pascale identified in his letter (*i.e.*, a court being required to decide an issue in an *ex parte*, non-adversarial setting); it would only delay the problem until the matter reached a court following the denial of a bypass petition. Moreover, the inevitable delay that would attend judicial review of an administrative decision denying a bypass petition could jeopardize the constitutionality of any attempt to adopt such a mechanism. In any event,

[w]hen the [l]egislature has expressly chosen a judicial forum for the resolution of these issues [determination of maturity and best interests in a judicial bypass hearing], it is not this court’s province to rewrite the statute or suggest alternate or additional procedures to be utilized in this context, unless the judicial bypass statute violates . . . the state [c]onstitution, . . . the federal [c]onstitution (or any federal law made pursuant thereto), or . . . a federal treaty.⁸³

80. See 1996 Pascale Letter, *supra* note 56 (fourth page) (reprinted in Appendix B).

81. See *Planned Parenthood Ass’n of Kan. City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 492 n.20 (1983) (declining to consider “whether a qualified and independent non-judicial decisionmaker would be appropriate”); *Bellotti v. Baird*, 443 U.S. 622, 643 n.22 (1979) (“We do not suggest . . . that a State choosing to require parental consent could not delegate the alternative procedure to a juvenile court or an administrative agency or officer.”).

82. Although the Illinois Supreme Court has held that “there is no constitutional right to appeal administrative decisions,” *ESG Watts, Inc. v. Pollution Control Bd.*, 727 N.E.2d 1022, 1024 (Ill. 2000), and that “the right to appeal from an administrative decision is not essential to due process of law,” *Carver v. Nall*, 714 N.E.2d 486, 491 (Ill. 1999), there may be a due process right to appeal an administrative decision that has resulted in the denial of a substantive federal constitutional right. See generally 3 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 17.9 (4th ed. 2002) (discussing judicial review of administrative agency actions involving constitutional rights).

83. *In re Anonymous*, 558 N.W.2d 784, 790 (Neb. 1997).

The Parental Notice of Abortion Act of 1995 does not violate the state or federal constitution, any federal law, or any treaty.

In light of the foregoing, it would be difficult to describe the Illinois Supreme Court's refusal to issue the judicial bypass appeal rule(s) required by the parental notice act as, in Pascale's words, "a thoughtful decision."⁸⁴ Moreover, his effort to explain the court's refusal to issue the rule(s) struck some observers as a "thin-skinned response."⁸⁵ The *Chicago Sun-Times* called the supreme court's refusal to issue the rules "high-handed," the explanation for the court's action "belated and inadequate," and said that, regardless of one's views regarding abortion, everyone should be "outraged by this affront."⁸⁶ The *Chicago Tribune* was no kinder, accusing the court of effectively killing the parental notice statute, not because it was unconstitutional, but because "[i]t just didn't like the law."⁸⁷ The article continued: "If the justices want the power to veto laws simply because they don't like them, one of them ought to run for governor. Otherwise, they ought to accept their responsibility as the state's highest court and reconsider this misguided decision."⁸⁸

As a direct result of the Illinois Supreme Court's refusal to issue the judicial bypass appeal rule(s) required by the Parental Notice of Abortion Act of 1995, the federal district court, as previously noted, permanently enjoined enforcement of the Act.⁸⁹ That is where matters stood for more than ten years. During that time frame (1995 through 2006), more than 40,000 abortions were performed on Illinois minors, almost four thousand of which were performed on minors fourteen years of age or younger.⁹⁰ Because of the Illinois Supreme Court's refusal to issue the judicial bypass appeal rule(s) under the 1995 Act, not one of those minors was required to notify either of her parents or

84. Christi Parsons & Janan Hanna, *Justices Reject Abortion-law Blame: State Law's Demise Puts Court on Defense*, CHI. TRIB., Jan. 27, 1996, §1, at 1.

85. *Id.* Steven Lubet, a highly regarded professor of law at Northwestern University, called Pascale's explanation "extraordinary." *Id.* To be fair to Mr. Pascale, however, it is likely that the five-page letter was drafted by one of the justices' law clerks, not Mr. Pascale, who held an administrative position with the court.

86. Editorial, *Court Is Out of Line On Abortion Ruling*, CHI. SUN-TIMES, Jan. 28, 1996, at 33.

87. Editorial, *When a Court Presumes to Legislate*, CHI. TRIB., Jan. 30, 1996, §1, at 12.

88. *Id.* Years later, Eric Zorn, an ardent supporter of legalized abortion, characterized the court's refusal to act as "high-handed, unilateral and legally dubious." Eric Zorn, *Madigan Move on Consent [sic] Law Isn't Final Word*, CHI. TRIB., Jan. 23, 2007, Metro Sec. (Chicagoland Final Ed.), at 1.

89. *Zbaraz v. Ryan*, No. 84 CV 771 (N.D. Ill. Feb. 8, 1996) (order granting permanent injunction).

90. Illinois Department of Public Health Statistics, <http://www.idph.state.il.us/health/statshome.htm> (aggregated from figures available by clicking the yearly abortion statistics links).

legal guardian of her decision to obtain an abortion. And for more than ten years after the Act was enjoined, neither Attorney General Jim Ryan nor his successor, Attorney General Lisa Madigan, requested that the state supreme court reconsider its decision refusing to promulgate the appeal rule(s), even though the composition of the court gradually changed and, by 2006, only one member of the court that had refused to issue the rule(s) was still serving.⁹¹

IV. BREAKING THE LOGJAM

Early in January 2005, the author met with representatives of the principal prolife organizations in Illinois to discuss legal strategies for resuscitating the Parental Notice of Abortion Act of 1995. It was the author's position that any attempt to enact a new parental notice statute would be doomed to failure if the state supreme court continued to refuse to issue judicial bypass appeal rules, and that any effort by the legislature to enact such rules would be struck down as violating the court's exclusive right to adopt rules governing appeals.⁹² Instead, the author proposed a strategy of petitioning the supreme court to issue the rules under the 1995 Act. After debate and discussion, the representatives of the organizations accepted this strategy. Two months later, in March 2005, the author, along with several prolife representatives, met with DuPage County State's Attorney Joseph Birkett to ask him to file a petition with the state supreme court requesting the court to issue the judicial bypass appeal rule(s) necessary to implement the 1995 Act. Birkett agreed to do so. After various delays, Birkett filed a petition with the supreme court on June 28, 2006, and submitted a proposed rule to put the Act into effect. On September 7, 2006, the author, representing a consortium of prolife organizations, churches, and religious groups, filed a twenty-three page supplemental petition with the court in support of Birkett's petition. The supplemental petition provided the court with a detailed critique of its stated reasons for refusing to issue the judicial bypass appeal rule(s), suggested guidelines for drafting an appropriate rule, and proposed minor changes to the rule proposed by Birkett.

On Monday, September 18, 2006, the Illinois Supreme Court announced that it was going to promulgate the rule(s) necessary to

91. By February 1, 2001, a majority of the Justices who had refused to issue the judicial bypass rule(s) in 1995 had retired and been replaced by newly elected or appointed Justices. At the time, then Attorney General Ryan had almost two full years remaining in his second term.

92. ILL. CONST. art. VI, § 16 (last sentence).

implement the Parental Notice of Abortion Act of 1995.⁹³ Two days later, on September 20, 2006, it adopted Rule 303A.⁹⁴ Both the *Chicago Sun-Times* and the *Chicago Tribune* applauded the court's decision to adopt the rule(s) necessary to allow the parental notice law to go into effect, and underscored their support for the law.⁹⁵ Rejecting Planned Parenthood's criticism that adoption of Rule 303A was a "shameless political move" in an election year, the *Chicago Tribune* stated that the Illinois Supreme Court "did indeed allow politics to creep into the courtroom—almost 11 years ago [when it refused to issue the appeal rules]. All it is doing now is correcting that mistake."⁹⁶ The *Chicago Tribune* noted that the state supreme court "didn't rule on the constitutionality of the law" in 1995 but instead "killed the law" by "refusing to write the rules . . ."⁹⁷ "The state court sat on its hands; in effect, it vetoed a law supported by the governor and a majority of the House and Senate."⁹⁸ As a result, "[t]he measure languished for a decade," during which "six of the seven justices involved in the original decision have left the court," a fact that "did not escape the notice of those who think [that] abortion is too weighty a decision for most teenagers to make without adult guidance."⁹⁹ The *Chicago Tribune* mentioned that DuPage County State's Attorney Joseph Birkett had petitioned the court to "reconsider the issue," and that his petition was supported by the Thomas More Society (Chicago, Illinois), which represented ten other organizations that oppose abortion.¹⁰⁰ In the penultimate paragraph of its editorial, the *Chicago Tribune* stated that in issuing Rule 303A, the Illinois Supreme Court "made a sound legal

93. Michael Higgins & Bonnie Miller Rubin, *State Court Revives Teen Abortion Law*, CHI. TRIB., Sept. 19, 2006, §1 (Chi. Final Ed.), at 1.

94. ILL. SUP. CT. R. 303A (adopted Sept. 20, 2006); see also Michael Higgins, *Rules Issued on Notice of Teen Abortions*, CHI. TRIB., Sept. 21, 2006, Metro Sec., at 1; Abdon M. Pallasch, *Court Issues Rules on Abortion Law: Notification for Minors Faces One More Hurdle*, CHI. SUN-TIMES, Sept. 21, 2006, at 6; Christopher Wills, *Supreme Court Issues Rules For Teen Abortions*, CHI. DAILY L. BULL., Sept. 20, 2006, at 1.

95. Editorial, *After All, It Is the Law*, CHI. TRIB., Sept. 21, 2006, §1, at 24 [hereinafter *After All, It Is the Law*]; Editorial, *Parents Need to Know If Minor Child Has Abortion*, CHI. SUN-TIMES, Sept. 20, 2006, at 41.

96. *After All, It Is the Law*, supra note 95.

97. *Id.*

98. *Id.*

99. *Id.* Justice Freeman was the one remaining justice from the court that had refused to issue the judicial bypass appeal rules.

100. *Id.* As previously noted, the author drafted the supplemental petition for the Thomas More Society on behalf of a consortium of prolife organizations, churches and religious organizations.

decision, reversing a strange decision to disregard its responsibilities. The best thing you can say about that is, it's about time."¹⁰¹

V. THE RETURN TO FEDERAL COURT

The Illinois Supreme Court promulgated Rule 303A on September 20, 2006. The Attorney General, Lisa Madigan, however, did not promptly return to federal court to request that the court lift the ten-year-old injunction against enforcement of the statute. This led to speculation that Madigan, a supporter of legalized abortion, was dragging her feet. In mid-December 2006, three months after Rule 303A was adopted, DuPage County State's Attorney Joseph Birkett stated publicly that he was prepared to go to court within a matter of weeks to try to revive the 1995 Act if the Attorney General did not do so herself.¹⁰² "The law is now complete," Birkett explained, "so we need to move to lift the injunction. . . . It's not a complicated issue. It's relatively simple and straightforward."¹⁰³ Cara Smith, a spokeswoman for the Attorney General, denied that the controversial nature of the issue had anything to do "with the pace at which our efforts have moved forward."¹⁰⁴ According to Smith, officials in the Attorney General's Office had met with representatives from the ACLU of Illinois, Planned Parenthood, and the offices of Birkett and Cook County State's Attorney Richard Devine.¹⁰⁵ They had also talked with court clerks around the State and had conducted "exhaustive research" on the issues.¹⁰⁶

Finally, on January 19, 2007, four months after Rule 303A was adopted, Attorney General Madigan filed a five-page petition asking the federal district court to dissolve the permanent injunction issued in 1996 by Judge Plunkett following the Illinois Supreme Court announcement in December 1995 that it would not promulgate any judicial bypass appeal rule(s).¹⁰⁷ After reciting the history of the litigation, the state

101. *Id.*

102. Michael Higgins, *Birkett Seeks to Revive Parental Notice of Abortion*, CHI. TRIB., Dec. 20, 2006, Metro Sec., at 4.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* Ann Spillane, the Attorney General's Chief of Staff, later admitted to a reporter that "We did not do any real research at all" into whether the state courts would need time to prepare for judicial bypass hearings under the statute and the implementing rule. Michael Higgins, *Justices Gave Abortion Law Extra Push*, CHI. TRIB., May 6, 2007, Metro Sec., at 1.

107. Defendants' Petition To Present Judicial Bypass Rule For Review And For Further Relief, *Zbaraz v. Madigan*, No. 84 C 771 (N.D. Ill. Jan. 19, 2007) [hereinafter *Petition*]. Given the brevity of the petition, which simply recited the history of the litigation, noted the adoption of

supreme court's refusal to issue the judicial bypass appeal rule(s) in 1995, and the court's subsequent adoption of such a rule on September 20, 2006, the petition stated that "[i]t is . . . appropriate at this time to ask this Court to review the 1995 Act and Rule 303A."¹⁰⁸ Accordingly, the Attorney General asked the district court to "set an appropriate schedule to determine the constitutionality of the 1995 Act and the new rule."¹⁰⁹ In the very next paragraph of her petition, however, the Attorney General asked the district court to stay "any order allowing the statute to take effect . . . until such time as the circuit court and appellate court systems throughout the State are administratively prepared to implement the judicial bypass procedures provided by the 1995 Act and Rule 303A."¹¹⁰ To assist the court and the parties in making that evaluation, the Attorney General asked the district court to appoint a "special master" to "report on the status of the State Court Systems' preparation to implement the judicial bypass procedures."¹¹¹ In her prayer for relief, Attorney General Madigan requested that the district court "dissolve the February 9, 1996 injunction," but "[s]tay any order dissolving the February 9, 1996 injunction until such time as the circuit court and appellate court systems are administratively prepared to implement the judicial bypass procedures provided by the 1995 Act and Rule 303A."¹¹²

On February 6, 2007, Federal District Court Judge David Coar, to whom the case had been reassigned from Judge Plunkett, who was no longer sitting, held a hearing on the Attorney General's petition. At the outset of the hearing, Judge Coar expressed some uncertainty about "what we're doing here."¹¹³ After noting that the court issued a permanent injunction in 1996, Judge Coar said that the only jurisdiction he would have in the case would be to vacate the injunction, if that were

Rule 303A and asked the district court to schedule a hearing to determine the constitutionality of the 1995 Act and the implementing rule, it is not clear why it took four months for the Attorney General to prepare the pleading, especially in light of the fact that the petition was not supported by a memorandum discussing the applicable law. The lack of an implementing judicial bypass appeal rule was the *only* basis on which enforcement of the 1995 Act had been permanently enjoined on February 9, 1996, which was cured by the adoption of Rule 303A on September 20, 2006.

108. *Petition*, *supra* note 107, at ¶ 13.

109. *Id.* ¶ 14.

110. *Id.* ¶ 15. The petition set forth no facts on the basis of which one could conclude that the state courts were *not* prepared to handle judicial bypass petitions and any appeals from the denial of such petitions. Nor, as it turns out, was the Attorney General aware of any such facts, as her Chief of Staff later admitted. *See Higgins*, *supra* note 106, at 1.

111. *Id.* ¶ 16 (citing FED. R. CIV. P. 53).

112. *Id.* at 5, Prayer for Relief, ¶¶ 2, 3.

113. Transcript of Proceedings at 2, *Zbaraz v. Madigan*, No. 84 C 771 (N.D. Ill. Feb. 6, 2007).

appropriate.¹¹⁴ Although Thomas Ioppolo, the Assistant Attorney General handling the case, did ask the court to dissolve the injunction, he immediately added that “the injunction isn’t ready to be dissolved tomorrow because . . . we recognize that there would be some time needed for the Circuit Courts of Illinois to prepare themselves.”¹¹⁵ Judge Coar asked, “If it’s not ripe [for decision] yet, then why are you here? If it’s not ripe for a decision yet, haven’t you jumped the gun and shouldn’t we just wait until this case is ready to proceed?”¹¹⁶

Judge Coar seemed perplexed by the Attorney General’s request for a “special master,” expressing the view that there was no need for a special master and that the appointment of one “doesn’t . . . make any sense.”¹¹⁷ Throughout the hearing, Judge Coar repeatedly questioned the need for appointment of a special master and what her (the proposed special master’s) authority would be in monitoring the ability of the Illinois state courts to implement the judicial bypass proceedings and appeals.¹¹⁸ Judge Coar pointed out the internal inconsistency in the Attorney General’s submission:

I mean, it seems to me that the Attorney General is trying to have her cake and eat it too. Either the State of Illinois’ position is that the statute is constitutional now or it’s not. If it’s their position that it’s constitutional now, then there may be a factual question as to whether or not the Circuit Courts where these petitions would be filed in the first instance are ready to handle them, and the Appellate Courts where they would then go are ready to handle them.

But that would all be – all involve questions which would come up, factual questions which would come up in a hearing. I’m always concerned about appointing a special master because a special master is something above the parties but below the Court, and in my view special masters – the role and the powers of a special master have to be clearly specified. And I’m not sure under the scenario that you’ve described what the role of a special master would be other than doing what everybody else can do, [that] is collecting information.

For example, it’s not clear to me what power the special master would have to pass on the substance of the rules. Suppose one of the Circuit Courts came up with rules that just made no sense. Would the special master certify that there were rules in place but inadequate? I don’t know how that works. And without that kind of thing I just don’t see that a special master is appropriate.

114. *Id.*

115. *Id.* at 4.

116. *Id.*

117. *Id.* at 5.

118. *Id.* at 5–9.

On whether we should go forward at this point, it just seems to me that either it's the position that the statute as—with the rules as implemented is ready to be considered—the constitutionality of it is ready to be considered or it's not. And we shouldn't wait until—either we should wait to take up the Rule 60 motion until such time as the State of Illinois is ready to implement the statute or we shouldn't. But I don't think that we should go halfway on this. I'm not quite sure that the motion is ripe at this time.¹¹⁹

Judge Coar recognized his authority to vacate an injunction, but he was not sure that was what the Attorney General was asking him to do.¹²⁰ In light of the “request for a stay,” the State was apparently arguing that “we really need to wait and see what these [A]ppellate and Circuit Court rules look like.”¹²¹ If so, there would be no need to take up the question of constitutionality “until we see what [those] rules look like”¹²² Judge Coar ultimately determined that the matter was not “ripe yet for a decision,” and denied the Attorney General's petition to present the judicial bypass rule for review and for further relief “at this time.”¹²³ The denial was without prejudice.¹²⁴

In view of Attorney General Madigan's presentation on February 6, 2007, Judge Coar's denial without prejudice of her petition was entirely reasonable. The Attorney General's request that her petition to dissolve the permanent injunction be stayed while a special master be appointed to monitor the state courts' ability to comply with the statute and the implementing rule was unprecedented and unwarranted.

First, the request for an appointment of a special master was improper. Rule 53 of the Federal Rules of Civil Procedure governs appointments of special masters. Under Rule 53(a)(1), unless a statute provides otherwise, a court may appoint a master only to:

- (A) perform duties consented to by the parties;
- (B) hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by
 - (i) some exceptional condition; or

119. *Id.* at 8–9.

120. *Id.* at 10.

121. *Id.*

122. *Id.*

123. *Id.* at 11.

124. The request for appointment of a special master fueled speculation by DuPage County State's Attorney Birkett and officials of the Thomas More Society that the Attorney General was delaying taking the action necessary to put the 1995 Act into effect. See Michael Higgins & Judy Peres, *Abortion Law Called Legal*, CHI. TRIB., Jan. 20, 2007, § 1, at 1.

- (ii) the need to perform an accounting or resolve a difficult computation of damages; or
- (C) address pre[-]trial and post[-]trial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.¹²⁵

The Attorney General's request for the appointment of a special master fell into none of these categories. More specifically, it was not a request to which the other parties consented, it did not relate to trial proceedings, and it did not address either pre-trial or post-trial matters that could not be addressed "effectively and timely" by Judge Coar, who was perfectly willing to address a proper motion to dissolve the injunction, but not a "start/stop" motion like the one the Attorney General submitted. The Attorney General did not quote the provisions of Rule 53 in her petition, nor did she explain how her request for the appointment of a special master satisfied the requirements of the rule. Perhaps she might have argued that it fell within the scope of (a)(1)(B), to "hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury."

That authorization applies, however, only "if appointment is warranted by (i) some exceptional condition, or (ii) the need to perform an accounting or resolve a difficult computation of damages." The latter exception does not apply. What about the former? Did the Attorney General set forth an "exceptional condition" warranting appointment of a special master? Judge Coar did not think so, and the case law supports that judgment.

In *La Buy v. Howes Leather Co.*,¹²⁶ the United States Supreme Court, interpreting similar language in an earlier version of Rule 53 ("exceptional circumstances"), held that courts should narrowly construe these exceptional circumstances.¹²⁷ In *La Buy*, the Court rejected the appointment of a special master to resolve two complex antitrust cases despite the congestion of the district court's calendar of cases, the complexity of the issues, and the length of time required to try the cases.¹²⁸ The Court called the referral of these cases to a special master "little less than an abdication of the judicial function" that justified the extraordinary remedy of mandamus.¹²⁹ A district court may use special masters, the Court cautioned, only "to aid judges in the performance of special judicial duties, as they may arise in the progress

125. FED. R. CIV. P. 53(a).

126. 352 U.S. 249 (1957).

127. *Id.* at 256-60.

128. *Id.* at 258-59.

129. *Id.* at 256.

of a cause.”¹³⁰ In *Bartlett-Collins Co. v. Surinam Navigation Co.*,¹³¹ the Court of Appeals for the Tenth Circuit disapproved of referring a case to a special master, stating that the fact “[t]hat the case involves complex issues of fact and law is no justification for reference to a [m]aster”¹³²

Whether the Illinois courts are administratively prepared to handle judicial bypass petitions and appeals under the Parental Notice of Abortion Act of 1995 does not present an “exceptional condition,” as that term is used in Rule 53(a)(1)(B)(i) that warrants the appointment of a special master. Nor is such an appointment warranted under Rule 53(a)(1)(C) to “address pre-trial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.” Judge Coar did not express any unwillingness to hear evidence on the ability of Illinois courts and court officials to administer the parental notice statute, even assuming that such evidence is relevant in a pre-enforcement challenge. When special masters have been appointed, it frequently has been in the context of monitoring compliance with judicial decrees in exceptionally complex cases where a determination of unconstitutional conduct already has been made.¹³³

Second, the Attorney General’s request for a stay was improper. The plaintiffs challenged the Parental Notice of Abortion Act of 1995 on its face, not as-applied in any particular circumstances. Although a “systemic failure” of a parental notice or consent statute in practice may provide a basis for an as-applied challenge,¹³⁴ a pre-enforcement facial challenge to a notice or consent statute that has never gone into effect cannot be brought on the basis of speculation that state courts and court officials are not prepared to handle judicial bypass petitions.¹³⁵ For example, *Barnes v. Mississippi* presents facts remarkably similar to those present here. In *Barnes*, plaintiffs brought a pre-enforcement facial challenge to Mississippi’s parental consent statute. In support of

130. *Id.* (citation and internal quotation omitted).

131. 381 F.2d 546 (10th Cir. 1967).

132. *Id.* at 550–51.

133. *See Hart v. Cmty. Sch. Bd. of Brooklyn*, 383 F. Supp. 699, 767–68 (E.D.N.Y. 1974) (appointing special master “with expertise in government housing laws and in educational administration” to work with parties in formulating “remedial plans” in school desegregation case), *aff’d*, 512 F.2d 37 (2d Cir. 1975); *Chi. Hous. Auth. v. Austin*, 511 F.2d 82, 83 (7th Cir. 1975) (explaining the same proposition with respect to appointment of master in monitoring desegregation decree).

134. *Planned Parenthood League of Mass. v. Bellotti*, 868 F.2d 459, 469 (1st Cir. 1989) (citation and internal quotation marks omitted).

135. *See Barnes v. Mississippi*, 992 F.2d 1335, 1342–43 (5th Cir. 1993).

the district court's preliminary injunction, the abortion providers argued that "the Chancery Court system in Mississippi will be unable to implement the statute in a constitutional manner."¹³⁶ More specifically, the abortion providers

[P]resented affidavits to the district court indicating that most court clerks are either unfamiliar with the bypass procedures or are completely unaware that a minor could obtain an abortion without her parents' consent. They argue further that there are insufficient chancellors to hear cases and that court-appointed counsel will be difficult to obtain. They [also] worry that true confidentiality will be difficult or impossible to maintain since court personnel in small towns will recognize minors coming to court seeking the parental consent waiver.¹³⁷

The Court of Appeals for the Fifth Circuit determined that these allegations failed to provide a basis on which to enjoin enforcement of the statute:

All of these objections might be appropriate in an as-applied challenge to the constitutionality of the statute. But to sustain a facial challenge, the plaintiffs must show that under no circumstances could the law be constitutional.¹³⁸ Before the law is even implemented, this court is obliged to presume that state officials will act in accordance with the law. [*Ohio v. Akron [Center for Reproductive Health]*, 497 U.S. [502], 513 . . . [1990] ("We refuse to base a decision on the facial validity of a statute on the mere possibility of unauthorized, illegal disclosure by state employees."): There is no demonstrated pattern of

136. *Id.* at 1342.

137. *Id.* at 1342-43.

138. *Id.* at 1343 (internal citation omitted). Although there is a split in the circuit courts as to whether, in a facial challenge, the challenger must show that an abortion statute is unconstitutional in *all* applications, per the rule enunciated for facial challenges in *United States v. Salerno*, 481 U.S. 739, 745 (1987), there is no dispute that, at a minimum, the challenger must show that it is unconstitutional in a "large fraction" of the cases to which it applies. See *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 367-68, 373-74 (6th Cir. 2006) (interpreting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)); see also *A Woman's Choice-E. Side Women's Clinic v. Newman*, 305 F.3d 684, 687 (7th Cir. 2002) (declining to follow, in the context of a facial challenge to an abortion regulation, the "no set of circumstances" rule of *Salerno*). It would be speculative to suggest, in advance, that a statute would be improperly administered in a "large fraction" of cases. *Id.*

In reversing Judge Coar and dissolving the permanent injunction issued against enforcement of the Act, the Seventh Circuit recognized that "there is some disagreement over whether *Casey's* 'large fraction' test remains vital in light of more recent Supreme Court precedent affirming *United States v. Salerno's* instruction that plaintiffs can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid.'" *Zbaraz v. Madigan*, 572 F.3d 370, 381 n.6 (7th Cir. 2009) (citing *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)). The Seventh Circuit found it unnecessary to resolve this disagreement, determining that "the Illinois notice act is constitutional under either standard." *Id.*

abuse or defiance here that would warrant the court to presume otherwise. Too, remand for an *a priori* factual determination on whether a state was ready to implement its bypass procedure would likely draw upon “evidence” that is very speculative.¹³⁹

The Court of Appeals for the Fifth Circuit held that the parental consent statute was facially valid, vacated the preliminary injunction, and remanded the cause to the district court for entry of an order of dismissal.¹⁴⁰

Just as in *Barnes*, questions as to whether state court judges and court personnel are administratively prepared to deal with judicial bypass petitions and appeals from their denial under the Parental Notice of Abortion Act of 1995 and Illinois Supreme Court Rule 303A could not be decided in the context of plaintiffs’ facial challenge. Those questions must await an as-applied challenge after the statute and rule have been allowed to go into effect.¹⁴¹ The Supreme Court has emphasized that, “[a]bsent a demonstrated pattern of abuse or defiance, a State may expect that its judges will follow mandated procedural requirements.”¹⁴²

The representations made by the Attorney General in her petition filed on January 19, 2007, and in her oral presentation to Judge Coar on February 6, 2007—that the Illinois courts were not administratively prepared to address judicial bypass petitions—were not well received by the Illinois Supreme Court. At the request of the full court, Chief Justice Bob Thomas telephoned Attorney General Madigan in February 2007, after the hearing before Judge Coar, and disputed her representations that the state courts were not prepared to administer the Parental Notice of Abortion Act of 1995.¹⁴³ The Chief Justice’s telephone call was followed up with a one-page letter to the Attorney

139. *Barnes*, 992 F.2d at 1343.

140. *Id.*

141. See *Manning v. Hunt*, 119 F.3d 254, 271 (4th Cir. 1997) (stating that a plaintiff challenging a parental consent statute that is constitutional on its face “must . . . introduce evidence showing that the statutory program is actually applied in a manner which does not comply with *Bellotti v. Baird*, 443 U.S. 622 (1979)”).

142. *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 515 (1990). In addition to the foregoing, there is another reason why appointment of a special master would have been inappropriate. Neither the federal district court, nor any special master appointed by the court, has the authority to supervise the ability of state courts to comply with the parental notice statute and the implementing rule, and neither may direct state courts or state court officials to take any particular action with respect to either the statute or the rule. The district court’s jurisdiction, as Judge Coar properly noted, was limited to determining whether the statute, as supplemented by the rule, is constitutional.

143. Michael Higgins, *Justices Gave Abortion Law Extra Push*, CHI. TRIB., May 6, 2007, Metro Sec., at 1.

General, signed by all seven justices, including Justice Freeman, the sole remaining justice from the court that had refused to issue the judicial bypass rules in 1995. The first paragraph of the letter, dated February 27, 2007, noted that Chief Justice Thomas had called Attorney General Madigan at the request of the full court to express the justices' concerns regarding the representations she had made to Judge Coar.¹⁴⁴

The second paragraph stated as follows:

Representations made by the Illinois Attorney General's Office to Judge David Coar to the effect that the circuit and appellate courts of Illinois were not administratively prepared to proceed in adjudicating matters brought pursuant to the Parental Notification Act were in error. The Illinois Supreme Court, having adopted Supreme Court Rule 303A, is in compliance with section "g" of the Parental Notification Act. We presume, and therefore assert that, as with the enactment of any new law, our state courts are prepared to proceed to apply the law as enacted.¹⁴⁵

Less than one month after receiving this letter, Attorney General Madigan returned to federal court with a motion asking Judge Coar to dissolve the February 8, 1996 permanent injunction.¹⁴⁶ In her revised motion, the Attorney General abandoned her earlier request for appointment of a special master and simply asked that the permanent injunction be dissolved because, with the adoption of Illinois Supreme Court Rule 303A, "the 1995 Act is now complete, and the predicate underlying the permanent injunction order has disappeared."¹⁴⁷ A ten-page memorandum supported the motion.¹⁴⁸ The plaintiffs responded with a sixteen-page memorandum opposing the Attorney General's motion.¹⁴⁹

In their memorandum, the plaintiffs argued that state courts were not prepared to administer the parental notice Act and that the Illinois Supreme Court's adoption of Rule 303A failed to cure the constitutional defects of the 1995 Act.¹⁵⁰ In support of the former argument, plaintiffs

144. Letter from Bob Thomas, C.J., Ill. Sup. Ct., to Lisa Madigan, Ill. Att'y Gen. (Feb. 27, 2007) (reprinted letter, on file as Appendix C).

145. *Id.* ¶ 2. Section "g" refers to 750 ILL. COMP. STAT. 70/25(g) (2006).

146. Defendants' Motion to Dissolve the February 9, 1996 Permanent Injunction Order, *Zbaraz v. Madigan*, No. 84 C 771, 2008 WL 589028 (N.D. Ill. Feb. 28, 2008).

147. *Id.* at *5.

148. Memorandum in Support of Defendants' Motion to Dissolve the February 9, 1996 Permanent Injunction Order, *Zbaraz*, 2008 WL 589028 (No. 84 C 771).

149. Memorandum in Opposition to Defendants' Motion to Dissolve the February 9, 1996 Permanent Injunction Order, *Zbaraz*, 2008 WL 589028 (No. 84 C 771) [hereinafter Memorandum in Opposition to Defendants' Motion].

150. *Id.* at *3-15.

attached several declarations to their memorandum purporting to show that the circuit court clerks in certain counties “are not prepared—with detailed protocols, adequate staffing and clear training—to implement the process with absolute confidentiality and precise expedition”¹⁵¹

The declaration of Dorothy Brown (Exhibit C), the Clerk of the Circuit Court of Cook County, the most populous county in Illinois where most of the abortions in the state are performed, is of particular interest. According to her declaration, Ms. Brown participated in a press conference on October 10, 2006, shortly after the Illinois Supreme Court adopted Rule 303A, “to discuss the burden these petitions for waiver [of notice] would put on my office and to make it clear that [she] did not have procedures, staffing, or resources in place that would allow [her office] to properly implement the Act and Rule 303A.”¹⁵² As of mid-May 2007, seven months later, “[t]he situation ha[d] not changed”¹⁵³ Ms. Brown added that it was necessary for her office “to develop new procedures to comply with the directives of the Act and Rule 303A,” which, she emphasized, would require “a lengthy schedule.”¹⁵⁴ Curiously, Ms. Brown did not identify in her declaration any steps that she had taken to “develop new procedures” or train her staff to handle judicial bypass petitions in the eight months since the state supreme court adopted Rule 303A.

In support of the latter argument—that the adoption of Rule 303A did not cure the constitutional defects in the 1995 Act—plaintiffs claimed, first, that “the Act denies ‘immature, best interest’ minors the right to terminate an unwanted pregnancy, because it fails to confer authority upon the circuit courts to consent to abortion for these minors,”¹⁵⁵ and, second, that “even as supplemented by Rule 303A, significant gaps deny assurance of confidentiality and expedition for all teens who seek

151. *Id.* at *3–4; *see also* List of Exhibits Memorandum in Opposition to Defendants’ Motion to Dissolve the February 9, 1996 Permanent Injunction Order at Exhibits C-G, *Zbaraz*, No. 84 C 771, 2008 WL 589028 [hereinafter List of Exhibits].

152. List of Exhibits, *supra* note 151, Exhibit C, at *3.

153. *Id.* at *3.

154. *Id.* Ms. Brown did not specify how much additional time she needed.

155. *Id.* at *7–8. The statute under review requires parental *notice*, not parental *consent*. In a judicial bypass proceeding, the circuit court may waive the requirement of notice if it determines that it is not in the best interests of a pregnant minor to notify either of her parents (or other “adult family member”) of her decision to obtain an abortion. If the court waives notice, it need not also authorize the minor to consent to an abortion. The authority of pregnant minors to consent to medical and surgical treatment is specifically recognized by the Consent by Minors to Medical Procedures Act, 410 ILL. COMP. STAT. 210/0.01-210/5 (2008), a citation that was buried in plaintiffs’ memorandum. Memorandum in Opposition to Defendants’ Motion, *supra* note 149, at *9 n.9. Inexplicably, the Attorney General did not cite this Act in her reply memorandum.

to avail themselves of the bypass process.”¹⁵⁶ The defendants filed their reply to the plaintiffs’ memorandum on June 21, 2007.¹⁵⁷ The matter was then taken under advisement.

On February 28, 2008, Judge Coar issued his Memorandum Opinion and Order, denying the defendants’ motion to dissolve the permanent injunction order entered on February 9, 1996.¹⁵⁸ Judge Coar dismissed out of hand plaintiffs’ argument that the state courts were not prepared to administer the 1995 Act, as supplemented by Rule 303A. Citing the February 27, 2007, letter from the Illinois Supreme Court, Judge Coar “decline[d] to speculate that the state courts cannot adequately implement the law, before it has had a chance to carry out the procedures.”¹⁵⁹ “If the implementation is inadequate and an injury occurs, the injured party may then bring a separate suit when the issue is ripe. In the mean time, this court will presume that the state courts can and will carry out Rule 303A procedures properly and adequately.”¹⁶⁰ Judge Coar also rejected plaintiffs’ arguments that the Act and the Rule did not ensure confidentiality of the proceedings or an expeditious hearing and appeal from the denial of a judicial bypass petition.¹⁶¹

Judge Coar, however, did agree with the plaintiffs that the Act is unconstitutional because, although the Act “authorizes the court to waive parental notification when it is in the ‘best interest’ of the child,” it “does not authorize a method of consent for the abortion. Thus, under the statute, a ‘best interest’ minor who has waived parental notification is left without a mechanism to obtain consent for the abortion, and thus is in legal limbo.”¹⁶² Defendants had argued that “the [notice] statute would be contradictory if interpreted in this fashion, and that it should be assumed that authorization of consent for an abortion is granted when parental notification is waived.”¹⁶³ Judge Coar rejected this argument, explaining that “Defendants’ interpretation . . . reads something into the statute that is not there, and further is not supported by the case law or statutes of other states.”¹⁶⁴ Judge Coar concluded:

156. Memorandum in Opposition to Defendants’ Motion, *supra* note 149, at 8.

157. Defendants’ Reply Memorandum in Support of Their Motion to Dissolve February 9, 1996 Permanent Injunction Order, *Zbaraz v. Madigan*, No. 84 C 771, 2008 WL 589028 (N.D. Ill., Feb. 28, 2008).

158. *Zbaraz v. Madigan*, No. 84 C 771, 2008 WL 589028 (N.D. Ill. Feb. 28, 2008), *rev’d*, 572 F.3d 370 (7th Cir. 2009).

159. *Id.* at *6.

160. *Id.*

161. *Id.* at *8–12.

162. *Id.* at *6.

163. *Id.*

164. *Id.*

The Illinois statute lacks the language that permits a state court to authorize the consent for an abortion. This court cannot presume that the statute authorizes something that it does not state. As such, the minor is left without recourse, except to obtain consent from her parents, which the court, under these circumstances, has deemed not in her best interest. The statute is contradictory and incomplete on its face without an authorization of consent provision, and this court declines to lift the permanent injunction under these circumstances.¹⁶⁵

VI. ANALYSIS OF JUDGE COAR'S DECISION

Judge Coar's opinion proceeded on two assumptions. First, that a finding that "notification . . . would not be in the best interests of the minor" under section 25(d)(2) of the Act necessarily implies an adverse finding under section 25(d)(1), *i.e.*, that the minor is not "sufficiently mature and well enough informed to decide intelligently whether to have an abortion." Second, that an "immature" minor for whom the court has waived notice under section 25(d)(2) of the Act ("best interests") lacks authority under Illinois law to give effective consent to the performance of an abortion. Both assumptions are wrong.

First, a minor seeking a judicial waiver of notice under section 25 of the Act is not required to allege that she is "sufficiently mature and well enough informed to decide intelligently whether to have an abortion."¹⁶⁶ The minor may decide, for a variety of reasons (or no reason at all), to allege only that "notification . . . would not be in [her] best interests . . ." ¹⁶⁷ Accordingly, a finding that notification would not be in her "best interests" under section 25(d)(2) could not logically (or legally) be regarded as an implied finding that she failed to satisfy the "maturity" standard of section 25(d)(1).

Second, even if a minor seeking a judicial waiver of notice alleges both her "maturity" under section 25(d)(1) and "best interests" under section 25(d)(2), nothing in the Act requires the court to make a finding with respect to her maturity if it finds that notification is not in her "best interests."¹⁶⁸ A finding that notification would not be in the minor's "best interests" implies nothing regarding her "maturity."

Third, even if the court conducting the judicial waiver hearing makes specific findings under both sections 25(d)(1) and 25(d)(2), an adverse finding with respect to the former does not necessarily reflect on the

165. *Id.* at *7.

166. 750 ILL. COMP. STAT. 70/25(d)(1) (2008).

167. *Id.* § 25(d)(2).

168. A finding in favor of the minor under either subsection is not appealable. *Id.* § 25(f).

minor's "maturity." Instead, without in any way reflecting on the minor's "maturity," an adverse finding under section 25(d)(1) may reflect only a doubt on the part of the court that the minor is "well enough informed to decide intelligently whether to have an abortion."

Fourth, and most importantly, even if the court makes specific findings on both "maturity" and "best interests," an adverse finding with respect to the minor's "maturity" under section 25(d)(1) has no bearing on the minor's ability to consent to an abortion if the court makes a favorable finding with respect to her "best interests" under section 25(d)(2). Judge Coar assumed that an "immature" minor (a minor for whom notice was waived under section 25(d)(2), not section 25(d)(1)) lacks authority to consent to an abortion (or at least that her authority to consent is questionable) and that, as a consequence, she "is left without recourse, except to obtain consent from her parents, which the court, under these circumstances, has deemed not in her best interest."¹⁶⁹ Illinois law, however, is directly to the contrary.

Section One of the Consent by Minors to Medical Procedures Act provides as follows:

Consent by minor. *The consent to the performance of a medical or surgical procedure by a physician licensed to practice medicine and surgery, an advanced practice nurse who has a written collaborative agreement with a collaborating physician that authorizes provision of services for minors, or a physician assistant who has been delegated authority to provide services for minors executed by a married person who is a minor, by a parent who is a minor, by a pregnant woman who is a minor, or by any person 18 years of age or older, is not voidable because of such minority, and, for such purpose, a married person who is a minor, a parent who is a minor, a pregnant woman who is a minor, or any person 18 years of age or older, is deemed to have the same legal capacity to act and has the same powers and obligations as has a person of legal age.*¹⁷⁰

It is apparent from the emphasized language that a pregnant minor may consent to the performance "of a medical or surgical procedure" by a licensed physician, and that her consent "is not voidable because of [her] minority," and, further, that she "is deemed to have the same legal capacity to act and has the same powers and obligations as has a person of legal age." It is (or should be) apparent that, under this statute, a pregnant minor may consent to an abortion on her own, without the consent of her parent(s) (or her legal guardian) and without having to prove her "maturity."

169. Zbaraz, 2008 WL 589028, at *7.

170. 410 ILL. COMP. STAT. 210/1 (2008) (emphasis added).

In *In re E.G.*,¹⁷¹ the Illinois Supreme Court held that a mature minor has a limited common law right to refuse life-sustaining medical care, even though his death would be medically certain.¹⁷² The court distinguished this common law right from the statutory right afforded by the predecessor statute to the Consent by Minors to Medical Procedures Act. The Consent by Minors to Medical Operations Act,¹⁷³ the court explained, “grants minors the legal capacity to consent to medical treatment in certain situations,” including “an individual under 18 who is married *or pregnant*”¹⁷⁴ In referring to minors who wish to make their own health care decisions, the court held that “[a] trial judge must determine whether a minor is mature enough to make health care choices on her own. *An exception to this, of course, is if the legislature has provided otherwise, as in the Consent by Minors to Medical Operations Act*”¹⁷⁵ It is evident from *In re E.G.* that a pregnant minor may consent to a medical or surgical procedure (including an abortion) without regard to whether a court has determined that she is “mature enough to make health care choices on her own.” The same exception is continued in the Consent by Minors to Medical Procedures Act.

Under the Consent by Minors to Medical Procedures Act, a pregnant minor has “the same legal capacity to act and . . . the same powers and obligations as . . . a person of legal age.”¹⁷⁶ If an adult woman (“a person of legal age”) may consent to an abortion, then so may a minor, regardless of her “maturity” or “immaturity,” in the absence of a statute requiring parental consent (which Illinois has not enacted). The Consent by Minors to Medical Procedures Act does not require a pregnant minor to establish her “maturity” in a court proceeding, nor does it require her to obtain “authorization” from a court before she may consent to an abortion.¹⁷⁷ Judge Coar neither cited nor discussed the Consent by Minors to Medical Procedure Act or the Illinois Supreme Court’s opinion in *In re E.G.* interpreting the predecessor statute.

There is no Illinois case law interpreting section 1 of the Consent by Minors to Medical Procedures Act with respect to the issue of abortion, but courts in other states have considered similar statutes in that context.

171. *In re E.G.*, 549 N.E.2d 322 (Ill. 1990).

172. *Id.* at 327–28.

173. 410 ILL. REV. STAT. 210/1-210/5 (1987).

174. *In re E.G.*, 549 N.E.2d at 325 (emphasis added).

175. *Id.* at 327 (emphasis added).

176. 410 ILL. COMP. STAT. 210/1 (2008).

177. *In re E.G.*, 549 N.E.2d at 327.

And, contrary to Judge Coar's assumption,¹⁷⁸ other states have uniformly interpreted comparable language to permit a minor to obtain an abortion without the consent of her parent(s) or guardian(s).¹⁷⁹ Neither the Parental Notice of Abortion Act of 1995 nor any other Illinois statute limits or qualifies the pregnant minor's authority under the Consent by Minors to Medical Procedures Act to consent to a medical or surgical procedure.

In light of the foregoing, it is apparent that there was no need for the General Assembly, in enacting a parental notice statute, to "authorize a method of consent for the abortion."¹⁸⁰ The pregnant minor already has that authority under Illinois law. A "best interest" minor for whom notice has been waived under section 25(d)(2) of the 1995 Act is not "left without a mechanism to obtain consent for the abortion"¹⁸¹ That "mechanism" is section 1 of the Consent by Minors to Medical Procedures Act. Accordingly, contrary to Judge Coar's holding,¹⁸² a "best interest" minor has not been left in "legal limbo." Once notice has been waived for either reason ("maturity" or "best interests"), there is no remaining legal impediment to the minor's ability to obtain an abortion.

At least four other state parental notice statutes do not contain the language that Judge Coar thought to be necessary in a parental notice statute (*i.e.*, language authorizing consent to the abortion, not merely waiving notice to the parent(s) or legal guardian(s)).¹⁸³ All four statutes are in force. Neither Judge Coar nor the defendants cited any of them. The Georgia statute was upheld by the Eleventh Circuit Court of Appeals in *Planned Parenthood Association of the Atlanta Area v. Miller*.¹⁸⁴ In *Miller*, the plaintiff argued that "physicians [would] be unwilling to perform abortions even if a constructive order issues (the

178. *Zbaraz v. Madigan*, No. 84 C 771, 2008 WL 589028, at *6-7 (N.D. Ill. Feb. 28, 2008), *rev'd*, 572 F.3d 370 (7th Cir. 2009).

179. *See, e.g.*, *Ballard v. Anderson*, 484 P.2d 1345, 1348-53 (Cal. 1971) (allowing minors to seek therapeutic abortion without consent of parents); *In re Diane*, 318 A.2d 629, 631 (Del. Ch. 1974) (choosing, between two directly conflicting statutes, the statute providing that a pregnant female over twelve could give binding consent); *In re Smith*, 295 A.2d 238, 245-46 (Md. Ct. Spec. App. 1972) (stating that "medical treatment" under the minor consent statute encompassed the termination of pregnancy).

180. *Zbaraz*, 2008 WL 589028, at *6.

181. *Id.*

182. *Id.*

183. *See* COLO. REV. STAT. ANN. § 12-37.5-107(2)(a) (West 2009); GA. CODE ANN. § 15-11-114(c)(1), (2) (2005); IOWA CODE ANN. § 135L.3(3)(e)(1), (2) (West 2007); KAN. STAT. ANN. § 65-6705(e) (2002).

184. *Planned Parenthood Ass'n of the Atlanta Area v. Miller*, 934 F.2d 1462, 1479 (11th Cir. 1991).

court having failed to act within the statutory time frame) because the Act does not require the court to confirm in writing that an abortion is authorized.”¹⁸⁵ The Eleventh Circuit rejected this argument, finding “no constitutional infirmity in this provision of the Georgia Act.”¹⁸⁶

Neither Judge Coar nor the plaintiffs cited any authority stating that a notice statute, as opposed to a consent statute, must empower a court in a bypass hearing to authorize the minor to consent to an abortion if she already has that authority under other laws of the State. In Illinois, under the Consent by Minors to Medical Procedures Act, the pregnant minor does have that authority, and nothing in the Parental Notice of Abortion Act of 1995 purports to limit her authority.¹⁸⁷ Judge Coar’s holding that the Parental Notice of Abortion Act of 1995 is deficient because it does not authorize a pregnant minor to consent to an abortion when the circuit court has determined that notification of an “adult family member” would not be in her “best interests” is erroneous. A pregnant minor already has that authority under the Consent by Minors to Medical Procedures Act. Accordingly, in enacting a parental notice statute, the General Assembly was not required to empower the circuit court to authorize an abortion for a pregnant minor when parental notification would not be in her best interests.

VII. INTERVENTION AND APPEAL

On Tuesday, March 4, 2008, just days after Judge Coar denied the Attorney General’s motion to dissolve the permanent injunction, Thomas Brejcha, President and Chief Counsel of the Thomas More Society (which had represented the consortium of organizations petitioning the Illinois Supreme Court to adopt the judicial bypass rule(s) in September 2006) contacted Assistant Attorney General Thomas Ioppolo to request a meeting with Attorney General Madigan and her staff.¹⁸⁸ The meeting was proposed for the express purpose of asking the Attorney General to file a motion under Rule 59 of the Federal Rules of Civil Procedure requesting Judge Coar to reconsider

185. *Id.* at 1477.

186. *Id.*

187. Even assuming that the foregoing analysis is wrong, an assumption which is compelled by no legal authority, Judge Coar’s reading of the Parental Notice of Abortion Act of 1995 is mistaken. Section 25(f) of the Act provides, *inter alia*, that “[a]n order authorizing an abortion without notice shall not be subject to appeal.” 750 ILL. COMP. STAT. 70/25(f) (2006) (last sentence). Given this language, the only reasonable interpretation of § 25(d) is that a waiver of notice *is*, in effect, “[a]n order authorizing an abortion” All provisions of a statute must be read together, and when § 25(d) and § 25(f) are read together, it is apparent that an order waiving notice is an order “authorizing an abortion without notice”

188. E-mail from Thomas Brejcha to Thomas Ioppolo (Mar. 4, 2008) (on file with author).

his ruling denying her motion to dissolve the injunction.¹⁸⁹ The basis of the Rule 59 motion, as set forth in Mr. Brejcha's communication to Mr. Ioppolo, was that Judge Coar had overlooked the Consent by Minors to Medical Procedures Act, which, if brought to his attention, might result in a different ruling on the merits of the Attorney General's motion to dissolve the injunction.¹⁹⁰ Mr. Brejcha attached a short memorandum, which the author of this article had drafted.¹⁹¹ In the penultimate paragraph of his e-mail, Mr. Brejcha stated that if the Attorney General elected not to proceed with a Rule 59 motion, then he would seek "direct participation in the case on behalf of one or more members of the defendant class of State's Attorneys."¹⁹²

Mr. Brejcha met no success in his effort to arrange a meeting with Attorney General Madigan and her staff, nor did the Attorney General agree to file a Rule 59 motion. Accordingly, on March 13, 2008, within the ten business days allowed by the rule, Mr. Brejcha, along with other attorneys associated with the Thomas More Society, filed a Rule 59 motion with the district court.¹⁹³ The motion was filed on behalf of two members of the defendant class of Illinois State's Attorneys, Stewart Umholtz, State's Attorney of Tazewell County, and Edward Deters, State's Attorney of Effingham County. Along with the Rule 59 motion, Mr. Brejcha also filed a motion for leave to intervene under Rule 24 on behalf of the same two State's Attorneys.¹⁹⁴ On the same day (March 13, 2008), which was eighteen days before any notice of appeal had to be filed, the Attorney General filed her notice of appeal of Judge Coar's February 28, 2008 ruling.

An extremely abbreviated hearing was held before Judge Coar on March 20, 2008, on the Rule 59 and Rule 24 motions filed on behalf of Stewart Umholtz and Edward Deters. Judge Coar denied both motions.¹⁹⁵ The Rule 59 motion was denied as "procedurally defective"

189. *Id.*

190. *Id.*

191. *Id.* The memorandum set forth the analysis of Judge Coar's ruling that appears in Part VI of this article.

192. *Id.*

193. Motion To Reconsider, Alter Or Amend The Court's Ruling Of February 28, 2008, Zbaraz v. Madigan, No. 84 C 771, 2008 WL 589028 (N.D. Ill. Mar. 13, 2008) (citing FED. R. CIV. P. 59).

194. Motion For Leave To Intervene As Of Right, For Purposes Of Seeking Reconsideration Of Or Appealing From This Court's Decision Of 2/28/08, In Which It Ruled That Illinois' Parental Notice Of Abortion Act of 1995 Was Fatally Flawed For Lack Of A Consent Provision, And For Other Relief, Zbaraz v. Madigan, No. 84 C 771, 2008 WL 589028 (N.D. Ill. Mar. 13, 2008) (citing FED. R. CIV. P. 24).

195. Transcript of Proceedings at 3, Zbaraz v. Madigan, No. 84 C 771, 2008 WL 589028 (N.D. Ill. Mar. 20, 2008).

because neither Mr. Umholtz nor Mr. Deters had filed an appearance with the district court or was otherwise “before the court” when it denied the Attorney General’s motion to dissolve the permanent injunction.¹⁹⁶ The Rule 24 motion was denied, Judge Coar explained, because the district court “lost jurisdiction” of the case once the Attorney General filed her notice of appeal on March 13, 2008.¹⁹⁷ Umholtz and Deters appealed the denial of their two motions, and this appeal was consolidated with the Attorney General’s appeal on the merits of Judge Coar’s ruling on February 28, 2008 that denied her motion to dissolve the permanent injunction.

In her opening brief on appeal, the Attorney General vigorously defended the Parental Notice of Abortion Act of 1995 and Rule 303A,¹⁹⁸ as a result of which the plaintiffs abandoned all of the alternative arguments that they had raised before Judge Coar, including their argument that the state courts and court staff were not prepared to administer the statute and the rule.¹⁹⁹ The focus of the plaintiffs’ answer brief—and, indeed, the entire appeal—was the interplay between the parental notice act and the implementing rule on the one hand and the Consent by Minors to Medical Procedures Act on the other.²⁰⁰

The key to plaintiffs’ analysis was their verbal sleight-of-hand in treating a finding of “immaturity” in a judicial bypass hearing under the Parental Notice of Abortion Act of 1995 as a determination that the pregnant minor lacks “capacity” (or “legal capacity”) to consent to an abortion.²⁰¹ But a finding in a bypass hearing that a minor is not “sufficiently mature and well enough informed to decide intelligently whether to have an abortion,”²⁰² cannot be equated in a simplistic fashion with a finding that the minor lacks “capacity” to consent to an

196. *Id.* at 2.

197. *Id.*

198. Pursuant to an order from the court of appeals, which directed the defendants and the proposed intervenors to coordinate their briefs so as to avoid needless duplication of argument, representatives of the Thomas More Society, including Mr. Brejcha, President and Chief Counsel, and the author of this article, acting as Special Counsel for the Society, met with the Solicitor General and the Deputy Solicitor General to discuss the relative merits of the appeal and the arguments that should be made on appeal. DuPage County State’s Attorney Joseph Birkett and one of his assistants also attended the meeting at the Attorney General’s Office.

199. Plaintiffs’ abandonment of their alternative arguments, on the basis of which they could have defended Judge Coar’s order denying defendants’ motion to dissolve the injunction, was a tacit recognition that those arguments had little, if any, basis in law or fact.

200. Corrected Brief of the Plaintiffs-Appellees, *Zbaraz v Madigan*, 572 F.3d 370 (7th Cir. 2009) (Nos. 08-1620, 08-1782), 2008 WL 5098929.

201. *Id.* at 20–24.

202. 750 ILL. COMP. STAT. 70/25(d) (2008).

abortion. Immaturity is not incapacity. The issue under the “immaturity” prong of the 1995 Act is not whether the minor is mature enough to consent to an abortion (which would be the case under a consent statute), but whether she is mature enough not to notify one of her parents (or legal guardian) of her decision to obtain an abortion. If the plaintiffs’ analysis of the 1995 Act were correct, a minor whose judicial bypass petition had been denied would not be able to consent to an abortion even if she did notify one of her parents (or legal guardian). The denial of her petition, in plaintiffs’ view, would have demonstrated her lack of capacity to consent to an abortion. Accordingly, a parent (or legal guardian) would have to consent to the abortion. But, clearly, that is not what the law requires.

In their brief, plaintiffs did not appear to question that, apart from the Parental Notice of Abortion Act of 1995, pregnant minors may give effective consent to an abortion under the Consent by Minors to Medical Procedures Act. Pregnant minors need not obtain the consent of either parent or anyone else. Nor, in the absence of the 1995 Act, need they notify a parent or anyone else. That is all changed, under the plaintiffs’ analysis, by virtue of the enactment of the Parental Notice of Abortion Act of 1995. Without expressly saying so, plaintiffs argued, in effect, that the 1995 Act amended by implication the Consent by Minors to Medical Procedures Act with respect to minors whose judicial bypass petitions have been denied or allowed only under the “best interests” standard. But amendments by implication, like repeals by implication, are not favored in the law and will not be found absent a clear and unmistakable conflict between the earlier enacted statute and the later enacted statute.²⁰³ There is no such conflict here, however, because the earlier statute (the Consent by Minors to Medical Procedures Act) deals with the authority of pregnant minors (among others) to consent to medical treatment, while the latter statute (the Parental Notice of Abortion Act of 1995) deals only with notice. Plaintiffs’ analysis of “legal capacity” might be relevant to an abortion performed upon an “incompetent” person—adult or minor—who, presumably, lacks capacity to consent to medical or surgical procedures and would have to be represented by a legal guardian or a guardian ad litem, but has no relevance to an abortion performed upon “immature” minors who have not been adjudicated as “incompetents.”²⁰⁴

203. *People v. Ullrich*, 553 N.E.2d 356, 359 (Ill. 1990) (“[A] statute will not be held to have implicitly amended an earlier statute unless the terms of the later act are so inconsistent with those of the prior act that they cannot stand together.”); *see also* *Bhd. of Maint. of Way Employees v. CSX Transp., Inc.*, 478 F.3d 814, 818 (7th Cir. 2007) (same).

204. Nothing in the 1995 Act requires the court, in granting a petition for waiver in a judicial

On July 14, 2009, the Seventh Circuit Court of Appeals reversed Judge Coar's order, upheld the constitutionality of the 1995 Act and Rule 303A, and vacated the permanent injunction that had been issued more than thirteen years earlier when the Illinois Supreme Court refused to issue the judicial bypass appeal rule(s). "The district court's ruling that the notice act does not authorize a method of consent for best interest minors," the court of appeals explained, "appears to rely on the following chain of argument raised by the plaintiffs below and on appeal."²⁰⁵

In what may be an excess of ingenuity, the plaintiffs argue that, without an express authorization of consent provision, any order issued by a bypass court waiving parental notice for "best interest" minors will be ineffective to authorize consent because (1) the court will necessarily consider a minor's maturity first and only reach the "best interests" question if it concludes that a minor is too immature to make the abortion decision on her own; (2) such a finding of immaturity will necessarily be included in the bypass court's decision waiving parental notice because the notice act requires the bypass court to "issue written and specific factual findings and legal conclusions supporting its decision," section 25(e); and (3) once a minor has been adjudicated to be immature, she will be unable to consent to an abortion on her own, because of Illinois' common law rule requiring informed consent to all medical procedures: an immature minor cannot give informed consent.²⁰⁶

"Each link in this chain of argument," the court of appeals found, "misinterprets the language of the statute and ignores its purpose."²⁰⁷ Accordingly, the court rejected plaintiffs' interpretation of the statute.²⁰⁸ For the reasons set forth earlier in this article,²⁰⁹ the court of appeals determined first, that, contrary to plaintiffs' argument, the language and structure of the Parental Notice of Abortion Act of 1995 empower Illinois circuit courts to issue orders authorizing consent to an abortion without notice.²¹⁰ Second, the court determined that the language of the 1995 Act does not require the court, in a judicial bypass

bypass hearing, to indicate, *in the order itself*, on which ground the petition was allowed. See 750 ILL. COMP. STAT. 70-25(f) (2008) (last sentence) ("An order authorizing an abortion without notice shall not be subject to appeal"). Accordingly, a physician who intended to perform an abortion on a minor who had obtained a waiver of notice would have no basis on which to question the minor's "capacity" to consent or to "look behind" the order waiving notice.

205. *Zbaraz*, 572 F.3d at 382–83.

206. *Id.* at 383.

207. *Id.*

208. *Id.*

209. See discussion *supra* Part VI.

210. *Zbaraz*, 572 F.3d at 383.

hearing, to consider the minor's maturity before it considers her best interests.²¹¹ And, third, the court found that the language of the Act does not require the circuit court to make findings both with respect to the minor's maturity and her best interests.²¹²

The court of appeals made two other points. Even assuming that "an immature minor cannot give informed consent to her own abortion,"²¹³ plaintiffs' argument "still fails."²¹⁴ The minor will not need to consent on her own. Even without statutory authorization, the court may issue an order authorizing consent. The district court held to the contrary that the statute's bypass provision forecloses this option and that bypass judges would be hamstrung in their attempts to authorize consent for immature minors when an abortion without parental notice is in the minors' best interests. But this is unreasonable. Courts do not need explicit legislative authorization to issue orders in aid of their own judgments. That authority inheres in the judicial process.²¹⁵

The court of appeals noted that "[t]his basic principle of common law is well established in Illinois jurisprudence and does not depend on express statutory authorization."²¹⁶ Accordingly:

if a state bypass court determines that a minor has established one of the exceptions to the act's notice requirements, i.e., that she is either mature or that an abortion without notice is in her best interests, the act requires the court to waive parental notice . . . , so that the minor may obtain an abortion without telling her parents.²¹⁷

"That the act lacks a provision expressly instructing the court to issue an order giving effect to its decision does not impair its plain power of enforcement."²¹⁸ After all, the court of appeals asked rhetorically, "[w]hat would be the point of providing a waiver of notice if there were no way to enforce it? The act clearly contemplates the court's ability to follow through on this score, which is well supported by the common law governing courts' inherent authority."²¹⁹

Finally, the court of appeals found that "the district court's interpretation of the statute ignores its purpose, which is to require

211. *Id.* at 383-84.

212. *Id.* at 384.

213. An assumption that, in light of the Consent by Minors to Medical Procedures Act, discussed above in Part VI, is questionable, as the court of appeals noted. *Id.* at 384 n. 9.

214. *Id.* at 384.

215. *Id.* at 385.

216. *Id.*

217. *Id.* at 385-86.

218. *Id.* at 386.

219. *Id.*

notice to parents, unless a bypass court waives notification because the minor is mature or notification is not in her best interests.”²²⁰ As this article has previously explained,²²¹ “[t]he plaintiffs’ interpretation of the bypass provisions would *disallow* ‘best interest’ abortions,” which the court of appeals noted, “squarely contradicts the purpose of the second half [of] the judicial bypass provision, which is to *allow* abortions without notification whenever doing so would be in the minor’s best interests.”²²² The court determined that the plaintiffs’ attempt “to draw a distinction between an order ‘waiving notice’ and an order ‘authorizing consent to an abortion without notice’ . . . is not compelled by the statute’s language and, in fact, [is] nonsensical in the context of the act’s bypass provisions.”²²³ The court refused to “construe a statute in a way that leads to absurd results.”²²⁴ Concluding its analysis of the statute in light of plaintiffs’ argument, the court of appeals reiterated that “the sole purpose of the bypass provisions is to allow the minor to obtain an abortion without notice; thus, the same court that ‘waives notice’ also should ‘authorize consent to an abortion without notice.’”²²⁵

VIII. CONCLUSION

The Illinois General Assembly’s effort to enact an enforceable parental notice of abortion statute was thwarted for more than twenty years by the failure (or refusal) of the Illinois Supreme Court to adopt appropriate rules to implement either the Parental Notice of Abortion Act of 1983 or the Parental Notice of Abortion Act of 1995, and by the failure of two Attorneys General to ask the court to adopt such rules. Neither former Attorney General Jim Ryan, a Republican, nor the present Attorney General, Lisa Madigan, a Democrat, petitioned the state supreme court to issue the rules necessary to implement the Parental Notice of Abortion Act of 1995 at any time after December 1995, even though, by February 1, 2001, the composition of the court had changed, replacing a majority of the Justices who had refused to issue any rules under the 1995 Act.²²⁶ Following the Illinois Supreme Court’s adoption of Rule 303A on September 20, 2006, Attorney

220. *Id.*

221. *See* discussion *supra* Part VI.

222. *Zbaraz*, 572 F.3d at 386 (emphasis added).

223. *Id.*

224. *Id.*

225. *Id.*

226. As of February 1, 2001, Attorney General Jim Ryan still had almost two years left in his second term.

General Madigan, who in her first term had never petitioned the court to issue rule(s) to implement the 1995 Act, waited more than four months before returning to federal court. Given the relative simplicity of the issue presented (whether the permanent injunction should be dissolved following promulgation of Rule 303A), there was no apparent reason for that delay. Moreover, the stated reasons given by the Attorney General—the need to engage in “exhaustive research” into the relevant facts and law—was later contradicted by her Chief-of-Staff’s admission that her office had not really done any research,²²⁷ as well as by Madigan’s failure to submit a memorandum in support of her petition to dissolve the injunction. There was nothing in her five-page petition that was not known as of September 20, 2006. Moreover, the Attorney General’s request in January 2007 that the district court appoint a special master to monitor and report back to Judge Coar on the ability of state courts and court staff to implement the 1995 Act and Rule 303A could be viewed as a not too subtle attempt to delay a court hearing on dissolving the injunction blocking enforcement of the Act. Judge Coar, as previously noted, rejected this request as unwarranted, unprecedented and unnecessary.²²⁸ It was not until the Illinois Supreme Court had personally chastised the Attorney General in a telephone call from then Chief Justice Thomas and in a follow-up letter that she abandoned her request for a special master and moved Judge Coar to dissolve the permanent injunction.

The failures of Attorneys General Ryan and Madigan, however, pale in comparison to the Illinois Supreme Court’s abdication of its own responsibilities. For more than twenty years, both Republican and Democratic members of the Illinois Supreme Court repeatedly failed to fulfill their duties under Article VI of the Illinois Constitution to the People of the State of Illinois by refusing to issue appropriate rule(s) to implement the parental notice statutes enacted by the state legislature.

The Illinois General Assembly enacted its first parental notice statute in 1983, which was to take effect on January 1, 1984. The Illinois Supreme Court waited more than five and one-half years before adopting the rules necessary to implement the statute and then promulgated a rule—Rule 307(e)—that was blatantly unconstitutional. Had the state supreme court promptly adopted appropriate rules following the enactment of the Parental Notice of Abortion Act of 1983, the State could have begun enforcing the statute by 1989, by which time the federal litigation over the statute and the implementing rules could

227. See *supra* note 106.

228. See *supra* notes 117–19 and accompanying text.

have been brought to a successful conclusion. The court compounded its dereliction of duties when it refused to issue any rules to implement the Parental Notice of Abortion Act of 1995. The court's after-the-fact attempt to explain its reasons for doing so was transparently pretextual and devoid of any legal reasoning or citation of relevant authorities. The "explanation" offered by Daniel Pascale, the court's administrative director, displayed a remarkable ignorance of the federal constitutional principles applicable to judicial bypass hearings and appeals and overlooked a multitude of state court proceedings that are *ex parte*, confidential, or both. It is extraordinary that the Illinois Supreme Court refused to adopt judicial bypass rules when no other state supreme court in the country has refused to do so, and when no bypass rules have been challenged in any court—state or federal—on the grounds raised in Pascale's letter. Indeed, it was not until Justice Thomas was elected as Chief Justice of the Illinois Supreme Court that the court finally fulfilled its constitutional and statutory duties. It is hard to avoid the conclusion of both the *Chicago Tribune* and the *Chicago Sun-Times* that the state supreme court "deep-sixed" the Parental Notice of Abortion Act of 1995, not on any legal or constitutional grounds, but simply because the Justices disagreed with the public policy underlying the Act.²²⁹ But such disagreement has no place in the courts.

Apart from the development of common law principles which, in any event, is ultimately subject to legislative control, the responsibility for establishing the State's public policy, regarding abortion or any other issue, rests with the political branches of state government—the Governor and the General Assembly—not the judiciary. The belated, but welcomed, promulgation of Supreme Court Rule 303A, however, suggests that the Justices of the Illinois Supreme Court have become sensitive to separation of powers considerations and recognize their appropriate place in the constitutional structure of government—interpreting the state constitution, developing common law principles, construing state statutes, deciding cases, promulgating court rules, and exercising oversight over the state courts.²³⁰ Their role does not extend

229. *After All, It Is the Law*, *supra* note 95, at § 1, at 24; Editorial, *Court Is Out of Line On Abortion Ruling*, CHI. SUN-TIMES, Jan. 28, 1996, at 33; Editorial, *When a Court Presumes to Legislate*, CHI. TRIB., Jan. 30, 1996, § 1, at 12.

230. Following the submission of this article, the Illinois Parental Notice of Abortion Act of 1995 was challenged on state constitutional grounds. *See* Complaint, *Hope Clinic for Women, Ltd. v. Adams*, No. 98 CH 38661 (Cir. Ct., Cook County 2009). On March 29, 2010, the circuit court of Cook County granted the defendants' motion for judgment on the pleadings and dissolved the temporary restraining order that had been issued several months earlier blocking enforcement of the Act. *See* Memorandum Opinion and Order, *The Hope Clinic for Women, Ltd. v. Adams*, No. 98 CH 3866 (Cir. Ct., Cook County, Mar. 29, 2010). The circuit court, however,

to making (or, in this case, unmaking) the law. The court's interest in ensuring that other agents of Illinois government—including the Attorney General, as well as the many circuit court clerks in the State—fulfill their constitutional responsibilities is also welcome. The People of the State of Illinois will discover, as the people in other states with enforceable parental notice or consent statutes already have, that an effective parental involvement law will result in fewer adolescent pregnancies, abortions and out-of-wedlock births. That result is something both sides of the abortion debate should welcome.

stayed the effectiveness of its order pending an appeal by the plaintiffs. For the reasons set forth in Chapter 16 of the author's book, *ABORTION UNDER STATE CONSTITUTIONS: A STATE-BY-STATE ANALYSIS* (Carolina Academic Press 2008), it is unlikely that the Illinois Supreme Court would hold that the Illinois Constitution confers a right to abortion recognized in *Roe v. Wade*. Accordingly, the parental notice law is likely to go into effect once its constitutionality has been finally resolved by the state supreme court.

APPENDIX A



ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS

Daniel Pascale
Administrative Director

160 N. LaSalle Street, Suite N1806
Chicago, IL 60601
Telephone: (312) 793-8191

Honorable James Ryan
Attorney General of Illinois
James R. Thompson Center
100 West Randolph Street
13th Floor
Chicago, Illinois 60601

December 12, 1995

Attention: Kathleen K. Flahaven
Assistant Attorney General

Re: Zbaraz v. Ryan, 84 C 771 (N.D.Ill)

Dear General:

While the Supreme Court of Illinois is not a party to the litigation referenced above, the Court is aware of the fact that with the entry of the agreed preliminary injunction order of June 8, 1995 the case has been stayed, in effect, to afford the Court an opportunity to promulgate rules as requested by the Parental Notice of Abortion Act of 1995.

The members of the Supreme Court have directed me to advise you, so that the District Court and the parties to the litigation can promptly be notified, that it is their decision that no additional rules will be promulgated. Further, by order dated December 1, 1995, the Court rescinded the existing Rule 307(a)(8) and 307(e) which was promulgated pursuant to the 1983 Act.

This information is being conveyed to you as the representative of the State of Illinois. Please advise me if I can provide further information.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Daniel Pascale".

APPENDIX B



ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS

Daniel Pascale
Administrative Director

160 N. LaSalle Street, Suite N1806
Chicago, IL 60601
Telephone: (312) 793-8191

Honorable Jim Ryan
Attorney General of Illinois
James R. Thompson Center
100 West Randolph Street
13th Floor
Chicago, Illinois 60601

January 25, 1996

Attention: Kathleen K. Flahaven
Assistant Attorney General

Re: Zbaraz v. Ryan, 84 C 771 (N.D.III)

Dear Attorney General Ryan:

During its administrative conference at the November 1995 Term, the Illinois Supreme Court took judicial notice of the agreed order entered June 8, 1995 by the United States District Court for the Northern District of Illinois (District Court) in the case referenced above. The agreed order "defers any adjudication as to the constitutionality of the Parental Notice of Abortion Act of 1995 until the Supreme Court of Illinois promulgates rules pursuant to Section 25(g) governing appeals from denials of waiver of parental notice." It also states that the "1995 Act is incomplete and cannot be adjudicated" until the court promulgates rules. The court had a number of concerns.

The Parental Notice of Abortion Act of 1995 (the Act) provides that no person may perform an abortion upon a minor or incompetent unless 48-hour actual notice is given to an adult family member, defined as a parent, grandparent, step parent or legal guardian. Notice is not required to both parents, nor is the consent of either required; once the notice is given, after 48 hours the abortion may proceed. If actual notice is not possible, notice by certified mail to the last known address of the person entitled to notice must be given.

The Act permits the minor to petition the circuit court to waive notice to the defined family member. The circuit court appoints a legal guardian and may also appoint an attorney for the minor if the minor so requests. The court must rule on the petition within 48 hours after the petition is filed; failure to rule will automatically waive the notice requirement. If the circuit court grants waiver, no appeal is permitted. If the court denies waiver of notice, the Act provides for an expedited appeal and the Supreme Court is "respectfully requested" to promulgate any necessary rules to ensure expeditious and confidential proceedings.

An earlier enactment in 1983 required 24-hour notice to both parents. It also called for a "judicial bypass". It was immediately attacked in federal court in *Zbaraz v. Hartigan* (84 C 771) and was subsequently enjoined. On appeal, the United States Court of Appeals for the Seventh Circuit remanded the case to afford the Illinois Supreme Court an opportunity to promulgate rules (763 F.2d 1532 (1985)). The United States Supreme Court affirmed the judgment by an evenly divided court. *Zbaraz v. Hartigan*, 484 U.S. 171 (1987).

Immediately after the governor approved the 1995 Act, on June 8, 1995 at the request of the attorney general of Illinois and the plaintiff, the District Court entered an agreed preliminary injunction order in *Zbaraz v. Ryan* to afford the Illinois Supreme Court an opportunity to promulgate rules.

The United States Supreme Court decisions concerning these issues which followed the Seventh Circuit's judgment and the related affirmance by an equally divided U.S. Supreme Court prohibit restrictions on abortions for minors where consent is required unless there is also provided some kind of expedited "bypass" procedure, that is, an opportunity for a third party to waive the consent requirement. In *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990), involving a statute which, rather than requiring consent, required 24 hours notice to one of the woman's parents, the Court observed:

"[a]lthough our cases have required bypass procedures for parental consent statutes, we have not decided whether parental notice statutes must contain such procedures. [citation] We leave the question open, because, whether or not the Fourteenth Amendment requires notice statutes to contain bypass procedures, [the Ohio statute's] bypass procedure meets the requirements identified for parental consent statutes in *Danforth*, *Bellotti*, *Ashcroft*, and *Akron*. *Danforth* established that, in order to prevent another person from having an absolute veto power over a minor's decision to have an abortion, a State must provide some sort of bypass procedure if it elects to require parental consent. [citation] As we hold today in *Hodgson v. Minnesota*, [497 U.S. 417], it is a corollary to the greater intrusiveness of consent statutes that a bypass procedure that will suffice for a consent statute will suffice also for a notice statute. See also [*H.L. v.*] *Matheson*, *supra*, at 411, n.17, 67 1.Ed.2d 388, 101 S. Ct. 1164 (notice statutes are not equivalent to

consent statutes because they do not give anyone a veto power over a minor's abortion decision)."

497 U.S. at 510-11.

And in a related case, decided the same day, Justice Stevens, writing for the Court stated that

"the requirement that both parents be notified, whether or not both wish to be notified or have assumed responsibility for the upbringing of the child, does not reasonably further any legitimate state interest."

Hodgson v. Minnesota, 497 U.S. 417, 450 (1990).

The opinion also states that

"We think it is clear that a requirement that a minor wait 48 hours after notifying a single parent of her intention to get an abortion would reasonably further the legitimate state interest in ensuring that the minor's decision is knowing and intelligent. ***The brief waiting period provides the parent the opportunity to consult with his or her spouse and a family physician, and it permits the parent to inquire into the competency of the doctor performing the abortion, discuss the religious or moral implications of the abortion decision, and provide the daughter needed guidance and counsel in evaluating the impact of the decision on her future. See *Zbaraz v. Hartigan*, 763 F.2d 1532, 1552 (CA7 1985) (Coffey, J., dissenting), *aff'd* by an equally divided Court, 484 U.S. 171"

497 U.S. at 448

Taken together, these cases seem to say that statutes requiring either parental consent to abortion, or notice to two parents, must include a bypass procedure. The United States Supreme Court has not considered a single parent notice statute without a bypass, but the clear implication of *Hodgson*, above, is that such a statute would be constitutionally allowed.

The 1995 Illinois statute requires notice only to one adult family member. Based on the cases cited above, it is unlikely that the United States Supreme Court would find a federal constitutional violation if the statute lacked a bypass. It may be added that the majority in the *Akron* case is still active on the Court: Chief Justice Rehnquist, and Justices Stevens, O'Connor, Scalia, and Kennedy.

Of course, the 1995 statute does incorporate a bypass, as did the 1983 statute. The agreed preliminary injunction again assumes that the Illinois Supreme Court will enact an expedited appeal procedure. The matter is before the federal court only because of a federal question; because of the questions already decided in prior

cases referred to above, there is a federal question here only if a bypass is required. If it is not required, then the issue of whether there are appeal rules is only a state issue and thus, for federal jurisdiction purposes, irrelevant.

There is a related issue which needs consideration. The District Court's memorandum opinion declares that an adversary proceeding would not be consistent with the purpose or nature of the hearing. In effect, the District Court requires an ex parte hearing, for

"If the proceedings are effectively confidential as they must be, no respondent could possibly appear in the case. The only persons having knowledge of the woman's appeal should properly be any guardian ad litem or attorney appointed to assist her and the judge--none of whom can be a 'respondent'."

Zbaraz v. Hartigan, 776 F. Supp. 375, 383 (N.D. Ill. 1991).

But the United States Supreme Court has never decided that the proceeding must be ex parte, secret and exempt from the claims of the first amendment. While the Ohio statute considered in the Akron case did contemplate an ex parte hearing, no one questioned it as an impermissible departure from standard concerns of justiciability.

The District Court's language is rather surprising from an Article III judge, because it sanctions a non-adversary proceeding. The courts of Illinois, like the federal courts, sit to decide "cases or controversies". This being so, it seems necessarily to imply a respondent and some kind of adversary proceeding. Otherwise, the court does not appear to be carrying out a judicial function. If the only persons having knowledge of the minor's appeal can be the guardian or attorney and the judge, one wonders what there is for the appellate court to do when the record is simply the pleading and the lower court's findings.

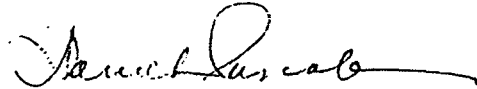
In sum, the General Assembly's request to this Court seems to be the result of an excess of caution. However, it is noteworthy that United States Supreme Court decisions do not mandate a "judicial" bypass, only that, where consent or notice to both parents is required, "some sort of bypass procedure" must be available. If the General Assembly were to conclude that even in a one-adult-family-member notice statute there should be some sort of review, nothing would preclude it from establishing or designating an administrative agency to perform what is clearly a non-judicial function.

The 1995 Act includes a severability provision and the constitutionality of the statute may be determined without a "judicial bypass", based on the cases cited above. If your office chooses not to defend the Act without appellate rules, or if the federal courts determine that the United States Constitution does require a bypass even in the context of the 1995 Act, the General Assembly can take appropriate steps

to provide administrative evaluation of the maturity of pregnant minors to avoid informing a parent.

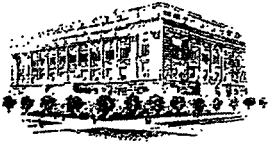
If I can be of assistance, please call me.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Daniel L. Scola", with a long horizontal flourish extending to the right.

cc : Hon. Paul E. Plunkett
Hon. Jim Edgar
Hon. James "Pate" Philip
Hon. Lee Daniels
Hon. Michael J. Madigan
Hon. Emil Jones
Marc Oliver Beem, Esq.

APPENDIX C



SUPREME COURT
STATE OF ILLINOIS
SPRINGFIELD
62706

February 27, 2007

Honorable Lisa M. Madigan
Illinois Attorney General
500 S. Second Street
Springfield, Illinois 62706

Dear Attorney General Madigan:

At the request of the full Court, Chief Justice Thomas expressed to you our concerns regarding assertions made in the petition filed by your office in the Zbaraz matter. This letter, offered as follow-up, summarizes the substance of the Court's full discussion of this matter.

Representations made by the Illinois Attorney General's Office to Judge David Coar to the effect that the circuit and appellate courts of Illinois were not administratively prepared to proceed in adjudicating matters brought pursuant to the Parental Notification Act were in error. The Illinois Supreme Court, having adopted Supreme Court Rule 303A, is in compliance with section "g" of the Parental Notification Act. We presume, and therefore assert that, as with the enactment of any new law, our state courts are prepared to proceed to apply the law as enacted.

Respectfully,





 Robert R. Thomas Charles E. Freeman Thomas R. Fitzgerald Thomas L. Kilbride




 Rita B. Garman Lloyd A. Karmer Anne M. Burke

Justices
Supreme Court of Illinois