No. 04-1144

In The
Supreme Court of the United States

KELLY A. AYOTTE, ATTORNEY GENERAL
OF THE STATE OF NEW HAMPSHIRE,
IN HER OFFICIAL CAPACITY,

Petitioner,

v.

PLANNED PARENTHOOD OF NORTHERN
NEW ENGLAND, CONCORD FEMINIST
HEALTH CENTER, FEMINIST HEALTH CENTER
OF PORTSMOUTH, AND WAYNE GOLDNER, M.D.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The First Circuit**

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the First Circuit Court of Appeals erred in holding that New Hampshire's Parental Notification statute was facially invalid because it did not contain a health exception and because the death exception was drawn too narrowly?

2. Whether the First Circuit Court of Appeals erred in holding that a facial challenge to New Hampshire's parental notification statute should not be governed by the "no set of circumstances" standard articulated in *United States v. Salerno*, 481 U.S. 739 (1987)?

PARTIES TO THE PROCEEDING IN THE COURT BELOW

Petitioner, Kelly A. Ayotte,[1] Attorney General of the State of New Hampshire, is sued in her official capacity.

Respondents are Planned Parenthood of Northern New England, Concord Feminist Health Center, Feminist Health Center of Portsmouth, and Wayne Goldner, M.D.

[1] Respondents initially sued Peter Heed, Attorney General of the State of New Hampshire, in the United States District Court for the District of New Hampshire in November, 2003. Kelly Ayotte became Attorney General in July, 2004.

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The opinion of the United States Court of Appeals for the First Circuit is reported at 390 F.3d 53 (1st Cir. 2004). It is set forth in the Appendix to the Petition for Writ of Certiorari at 1. The order of the United States District Court for the District of New Hampshire holding New Hampshire's Parental Notification Prior to Abortion Act unconstitutional and enjoining its enforcement is reported at 296 F. Supp.2d 59 (2003), and is set forth in the Appendix to the Petition for Writ of Certiorari at 24.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on November 24, 2004.

The jurisdiction of the court is invoked pursuant to 28 U.S.C. § 1254(1) (2002) to review a civil judgment. This Court granted the Petition for a Writ of Certiorari on May 23, 2005.

STATEMENT OF THE CASE

1. In June, 2003, the New Hampshire Legislature passed the Parental Notification Prior to Abortion Act (Act) with an effective date of December 31, 2003. N.H. REV. STAT. ANN. § 132:24-28.

The Act provides that no abortion shall be performed upon an unemancipated minor or upon a female for whom a guardian or conservator has been appointed until at least 48 hours after written notice has been delivered to one parent of the minor at the usual place of abode of the

parent. The physician or an agent must deliver the notice to the parent personally or by certified mail with return receipt requested and with restricted delivery to the addressee. N.H. REV. STAT. ANN. § 132:25.

The parental notification requirement has three exceptions: first, no notice is required if the attending abortion provider certifies in the pregnant minor's medical record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice, N.H. REV. STAT. ANN. § 132:26, I(a); second, the persons who are entitled to notice certify in writing that they have been notified; and third, if the minor chooses not to notify her parent or guardian, a judicial bypass procedure is available where a judge may authorize an abortion provider to perform an abortion absent parental notification if the judge concludes that the pregnant minor is mature and capable of giving informed consent, or the pregnant minor's best interests would be served by waiving the notification requirement. N.H. REV. STAT. ANN. § 132:26, II. If the judicial bypass procedure is used, the pregnant minor may participate in the court proceedings on her own behalf and the court may appoint a guardian *ad litem* for her. The court must advise her that she has the right to court-appointed counsel and must provide her an attorney upon her request. Proceedings in court shall be confidential and shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interest of the minor. An expedited confidential appeal is available to any pregnant minor for whom the court denies an order authorizing an abortion without notification. Access to the courts is afforded twenty-four hours a day, seven days a week. N.H. REV. STAT. ANN. § 132:26, I, II.

Performance of an abortion in violation of the statute is a misdemeanor and is grounds for a civil action by a person wrongfully denied notification. A person is not liable "if the person establishes by written evidence that the person relied upon evidence sufficient to convince a careful and prudent person that the representations of the pregnant minor regarding information necessary to comply with this section are bona fide and true or if the person has attempted with reasonable diligence to deliver notice, but has been unable to do so." N.H. REV. STAT. ANN. § 132:27.

The Act also contains a severability provision, which provides that if any provision or application thereof to any person is held invalid, such invalidity will not affect the provisions or applications of the Act which can be given effect without the invoked provisions or applications. N.H. REV. STAT. ANN. § 132:28

2. On November 17, 2003, respondents, Planned Parenthood of Northern New England, Concord Feminist Health Center, Feminist Health Center of Portsmouth and Wayne Goldner, M.D. filed a complaint pursuant to 42 U.S.C. § 1983 seeking a declaratory judgment that the Act is unconstitutional and a preliminary injunction to prevent enforcement once it became effective. Joint Appendix (hereinafter "J.A.") at 3.

In an order dated December 29, 2003, the United States District Court for the District of New Hampshire (DiClerico, J.) declared the Act unconstitutional on its face and enjoined the Attorney General, and those acting pursuant to and under her direction and authority from enforcing the Act. Appendix to the Petition for Writ of Certiorari (hereinafter "Pet. App.") at 23.

The district court found unconstitutional both the lack of an explicit health exception to protect the health of the pregnant minor, and the narrowness of the Act's exception for abortions necessary to prevent the minor's death. Pet. App. 33. The district court declined to rule on the constitutionality of the confidentiality provisions contained in the Act. Pet. App. 37-38. In its decision, the District Court relied in part on Dr. Goldner's declaration that describes medical complications which may occur during pregnancy, putting pregnant minors at risk and requiring prompt or immediate termination of the pregnancy. Pet. App. 35-36. While Dr. Goldner states in his declaration that there may be occasions during a pregnancy which require prompt or immediate termination of the pregnancy, he does not state whether he has had to use any medical procedures in an emergency situation during his many years of practice. J.A. 23-26.

The district court also stated that the judicial bypass provision of the Act necessarily delayed an abortion in a health emergency. Pet. App. 34. In a declaration of Jennifer Sabino, she related her experience with the judicial bypass provisions in Massachusetts. She stated that approximately 16,000 judicial bypass hearings had been conducted in Massachusetts and that on only 15 occasions had a judge ruled that an abortion should not occur. J.A. 39.

The First Circuit affirmed the district court, finding that in deciding whether the Act is facially invalid, the *undue burden standard* set forth in *Planned Parenthood of S. Pa. v. Casey*, 505 U.S. 833, 876-77 (1992) should apply as opposed to the "no set of circumstances" standard set forth in *United States v. Salerno*, 481 U.S. 739 (1987). Pet. App. 9. Relying on *Stenberg v. Carhart*, 530 U.S. 914

(2000), the First Circuit also ruled that complementing the undue burden standard, there is a specific and independent constitutional requirement that all abortion regulations must contain a health exception. The First Circuit determined that because the Act contains no explicit health exception, and because no health exception is implied by other provisions of New Hampshire law or by the Act's judicial bypass procedure, the Act is facially unconstitutional. Pet. App. 17-18.

The First Circuit further concluded that because the death exception contained in the Act was drawn too narrowly and because the Act fails to safeguard a physician's good faith medical judgment that a minor's life is at risk against criminal and civil liability, the Act was unconstitutional. Pet. App. 20.

Because the First Circuit found the Act in its entirety unconstitutional on the aforementioned grounds, it declined to address whether the confidentiality provisions contained in the Act are constitutional. Pet. App. 38.

SUMMARY OF THE ARGUMENT

New Hampshire's Parental Notification Prior to Abortion Act does not present a substantial obstacle to any woman's right to choose an abortion; instead, the Act provides pregnant minors with the benefit of parental guidance and assistance in exercising what is undoubtedly a difficult choice. This Court's well-established judgment that parental notification statutes are constitutional is "based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their

best interests at heart." *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 895 (1992). New Hampshire's Act promotes compelling state interests, not the least of which is protecting the health of the pregnant minor by providing an opportunity for parents to supply essential medical history information to the physician. New Hampshire's Act contains a judicial bypass provision and makes the courts available twenty-four hours a day, seven days a week to allow a pregnant minor to avoid the notification and waiting periods of the act when it is in her best interest – such as the hypothetical case where an emergent health issue arises and the minor does not wish to or cannot notify a parent.

The court of appeals' decision, facially striking down the entire act based principally on its conclusion that the lack of a general health exception rendered the act wholly invalid, misconstrued this Court's decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000). *Stenberg* did not hold that every regulation touching on abortion *in any way* has to include a general health provision to be constitutionally sound. A health exception is only required when there is substantial medical authority that supports the proposition that a specific regulation could pose a significant risk to women's health. Here, this type of substantial medical authority was not presented. Moreover, over fifteen years ago in *Hodgson v. Minnesota*, 497 U.S. 417 (1990), a virtually identical parental notification statute, which did not contain a general health exception and contained the same death exception as New Hampshire's Act, was found to be constitutional. There is no evidence in the record that over the last decade and a half, Minnesota's act has operated to put minors at risk and surely had it operated

in such a manner, it would have been further challenged or repealed.

Even if this Court finds that New Hampshire's Act lacks a constitutionally required health exception or that its death exception is drawn too narrowly, the Act's judicial bypass provision nevertheless saves the act by providing a mechanism to address emergent health issues. The Act requires court availability twenty-four hours a day, seven days a week. There is no reason to believe that a judge will not act immediately if a pregnant minor's health is at stake. Contrary to the court of appeals' concerns about potential delays, New Hampshire is entitled to a presumption that judges will act in accordance with the Act's time prescriptions.

The court of appeals also failed to give proper deference to a state court's prerogative to interpret the exception in the act allowing a physician to perform an immediate abortion when "necessary to prevent the minor's death," N.H. REV. STAT. ANN. § 132:26, I(a), in a way that preserves the constitutionality of the Act. A New Hampshire state court could easily read the "necessity" language in the act to include in the good faith medical judgment of the physician. The Court of Appeals wrongfully concluded that New Hampshire's death exception is overly narrow.

Finally, the court of appeals' decision is undermined by its failure to apply the proper standard of review in evaluating the respondent's pre-enforcement, facial challenge to the Act. The court of appeals improperly construed this court's well-established test from *United States v. Salerno*, 482 U.S. 739, 745 (1987) that an act is constitutional on its face unless the challengers can establish "no

set of circumstances" under which it may validly operate as conflicting with *Casey's* substantive constitutional standard that an abortion regulation is invalid if it constitutes an undue burden on a woman's right to choose. Properly interpreting these standards together, in order to succeed on a facial challenge to an abortion regulation, the respondents should have been required to show that under no set of circumstances can New Hampshire's Act be applied in a manner which is not an undue burden. Applying the proper standard, respondent's facial challenge fails because New Hampshire's Act operates constitutionally in most, if not all, cases.

This Court's practice of avoiding unnecessary or premature decisions of constitutional issues and adjudicating constitutional questions only in concrete factual situations supports continued application of *Salerno*'s "no set of circumstances" test to all non-First Amendment facial challenges. The *Salerno* standard properly favors as-applied adjudication, allowing statutes to be refined on a case-by-case basis by preventing improper applications, rather than totally invalidating statutes which further legitimate state interests and are capable of constitutional application. This allows states the opportunity to interpret and enforce statutes to avoid constitutional infirmities, and limits unnecessary intrusion by federal courts.

There is no justification for departing from *Salerno's* logical rule to facial challenges for abortion regulations, and in fact, this court has applied the rule to such challenges. *See Rust v. Sullivan*, 500 U.S. 173, 183 (1991); *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 514 (1990) ("*Akron II*"). The court of appeals' enjoinder of New Hampshire's notification act "based upon a worst-case analysis that may never occur," *Akron II*, 497 U.S. at

514, such as its concerns about a hypothetical case in which the Act might place a pregnant minor's health or life at risk, demonstrates the need for this Court to uphold the validity of the *Salerno* rule in abortion cases.

Finally, if the Court determines that New Hampshire's Act is unconstitutional in its application to emergent health or death cases, the relief provided by the First Circuit in invalidating the entire statute is not warranted. The New Hampshire Act contains a clear severability provision that if any provision "or the application thereof to any person or circumstances is held invalid, such invalidity shall not effect the provisions of this subdivision which can be given effect." N.H. REV. STAT. ANN. § 132:28. Severance is a state law issue. New Hampshire law recognizes that unconstitutional applications of a statute can be severed from the constitutional applications of the same. *See Woolf v. Fuller*, 174 A. 193, 196 (N.H. 1934). If this court affirms the judgment of the court of appeals that in certain applications the act operates invalidly then this Court should respect the New Hampshire legislature's express intent to preserve the Act's constitutional applications by issuing an injunction against only those applications which violate the law.

ARGUMENT

I. The New Hampshire Parental Notification Prior to Abortion Act Is Constitutional.

The New Hampshire Legislature was well within established constitutional bounds when it enacted the Parental Notification Prior to Abortion Act, N.H. REV. STAT. ANN. § 132:24-28. The joint opinion in *Casey* clarified that

states may enact laws "which in no real sense depriv[e] women of the ultimate decision," 505 U.S. at 875, and that "[r]egulations which do no more than create a structural mechanism by which the State, or a parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." *Id.* at 877. New Hampshire's Act does not create a substantial obstacle to any woman's choice to have an abortion; it provides minors with the benefit of parental guidance and assistance in exercising a tough choice. The Act requires that one parent be notified of her child's choice to have an abortion forty-eight hours before a minor can exercise that choice. It has a judicial bypass mechanism to allow a minor to avoid the notification and waiting period provisions of the Act to address the minor's best interests, including any emergent health concerns, and contains an express provision to protect the life of the pregnant minor. N.H. REV. STAT. ANN. § 132:26. This Court has consistently rejected constitutional challenges brought against comparable state statutes that require a parent or guardian to be notified before an unemancipated minor undergoes an abortion and which include a waiting period. *See Lambert v. Wickland*, 520 U.S. 292 (1997); *Hodgson*, 497 U.S. at 417; *Akron II*, 497 U.S. 502; *H.L. v. Matheson*, 450 U.S. 398 (1981).

However, despite these prior decisions, and this Court's clear recognition of the important role parents play in assisting their unemancipated daughters in exercising their right to choose, the court of appeals struck down New Hampshire's entire notification act on its face based principally on its conclusion that *Stenberg* requires *all* regulations touching on abortion to include a general

health exception. *See Planned Parenthood of Northern New England v. Heed*, 390 F.3d 53, 59 (1st Cir. 2004). The Court also concluded that the explicit death exception contained in the Act was drawn too narrowly. *See id.* at 64. The court of appeals decision rendering New Hampshire's Act unconstitutional on its face was incorrect and should be reversed by this Court for the following reasons: 1) the Act does not place an undue burden on a young woman's choice to have an abortion; 2) New Hampshire modeled its act after a Minnesota law which this Court validated fifteen years ago in *Hodgson*, 497 U.S. at 497, and which remains in effect; 3) *Stenberg* did not create a *per se* health exception requirement for all abortion regulations; 4) New Hampshire's Act protects the health of the pregnant minor through its judicial bypass provision; and 5) the court of appeals failed to give proper consideration to New Hampshire state law and this Court's decision in *Doe v. Bolton*, 410 U.S. 179, 191 (1973), in construing the death exception to the Act.

A. New Hampshire's Parental Notification Act Does Not Impose An Undue Burden On A Minor's Right To Choose.

"The very notion that the State has a substantial interest in potential life leads to the conclusion that not all [abortion] regulations must be deemed unwarranted." *Casey*, 505 U.S. at 876. Only those regulations which constitute an undue burden on a woman's right to choose are constitutionally deficient. "A finding of an undue burden is shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877.

New Hampshire's Act presents no barriers to a woman's right to choose. Instead, it properly "facilitates the wise exercise of that right. . . ." *Id*. at 877.

Parental notification statutes serve several compelling state interests, including protecting the emotional and physical health of the pregnant mother, vindicating the importance of the parent-child relationship, and promoting the family unit. *See Hodgson*, 497 U.S. at 445. As a result, this Court has consistently found such statutes to be constitutional. *See Lambert*, 520 U.S. at 297 (per curiam) (collecting cases); *Hodgson*, 497 U.S. at 417; *Akron II*, 497 U.S. at 520; and *H.L. v. Matheson*, 450 U.S. at 413. *Casey* re-affirmed the importance of these state interests when it distinguished the unconstitutional spousal consent provisions of Pennsylvania's Act from parental notification and consent statutes. *See Casey*, 505 U.S. at 895. It stated: "[t]hose enactments, and our judgment that they are constitutional, are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart." *Id*.

In upholding a parental consent provision, *Casey* aptly noted, "[w]e have been over most of this ground before. Our cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure." Hence, New Hampshire's Act, which contains a judicial bypass provision that allows a court to avoid its notification and waiting requirements if it is in the minor's best interests does not constitute an undue burden on a woman's right to choose.

Nevertheless, without even engaging in an analysis of whether the Act constitutes an undue burden, the court of appeals struck down New Hampshire's entire statutory scheme, in reliance on *Stenberg*, because it does not contain an express health exception. This perceived shortcoming of the act does not pose an undue burden on a woman's right to choose; no woman will be hindered from having an abortion as a result of the Act. Unlike the spousal consent provision struck down in *Casey* – where the Court relied upon data demonstrating the impact of the invalid provision on abused spouses – here there is no equivalent data in the record regarding a category of women whose health will be harmed by the operation of the Act. The Declaration of Dr. Goldner raises only generalized concerns about medical conditions that could require an emergency abortion in a hypothetical case, and it provides no statistics or medical research addressing the prevalence of these generalized health risks that are described. There is no evidence that Dr. Goldner has ever encountered such a case. Nor is there any evidence in the record from the forty-two other states that have parental notification or consent statutes[2] that physicians have had to perform immediate abortions to protect a woman's

[2] *See* ALA. CODE § 26-21-5; ALASKA STAT. § 18-16-060; ARIZ. REV. STAT. § 36-2152; CAL. HEALTH & SAFETY CODE § 123450; IDAHO CODE § 18-609A; IND. CODE § 16-34-2-4; KY. REV. STAT. ANN. § 311.732; LA. REV. STAT. ANN. § 40:1299.35.12; MASS. GEN. LAWS ch. 112, § 12S; ME. REV. STAT. ANN. tit. 22, § 1597-A, 1588; MICH. COMP. LAWS § 722.905; MISS. CODE ANN. § 41-41-57; MO. REV. STAT. § 188.028; N.J. STAT. ANN. § 9:17A-1.6; OHIO REV. CODE ANN. § 2929.12; 18 PA. CONS. STAT. § 3206; R.I. GEN. LAWS § 23-4.7-4; S.C. CODE ANN. § 44-41-30; TENN. CODE ANN. § 37-10-305; TEX. OCC. CODE § 164.052(a)(18); VA. CODE ANN. § 16.1-241; WIS. STAT. § 48.375; WYO. STAT. ANN. § 35-6-118.

health in a situation that could not have been addressed by New Hampshire's judicial bypass provision.

The constitution is not offended by a provision requiring notification of a parent when a minor's health is at risk. "[T]his Court has made clear that a state may promote but not endanger a woman's health when it regulates the methods of abortion." *Stenberg*, 530 U.S. at 931 (citations omitted). In that regard, parental notification can help protect a woman's health by ensuring that the physician has all the information needed to conduct the procedure without harming the minor. This parental involvement has been described as follows:

> [Notification] serves a significant state interest by providing an opportunity for parents to supply essential medical and other information to the physician. The medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature. An adequate medical and psychological case history is important to the physician. Parents can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data.

Matheson, 450 U.S. at 411 (footnote omitted); *see also Akron II*, 497 U.S. at 518. ("[A]ppellees do not contest the superior ability of a physician to garner and use information supplied by a minor's parents upon receiving notice. We continue to believe that a state may require the physician himself or herself to take reasonable steps to notify a minor's parent because the parent often will provide important medical data to the physician.") (citation omitted). Parents can also assist minors, who are likely to be

less experienced in dealing with the medical profession, in selecting highly qualified health care providers and reviewing their qualifications, professional experience and medical advice.

In *Hodgson*, this Court upheld Minnesota's statute that is virtually identical to the New Hampshire Act. *See Hodgson*, 497 U.S. at 461 (opinion of O'Connor, J.). The fact that Minnesota's statute has operated for fifteen years, since this Court's decision, without any evidence that it infringes on women's health further demonstrates that New Hampshire's Act promotes a minor's health and is not an undue burden. The *Hodgson* court upheld Minnesota's law requiring notification of two parents, as well as a forty-eight hour waiting period prior to a minor's abortion with a judicial bypass procedure.[3] Aside from its less restrictive one-parent notification requirement, the New Hampshire Act is virtually indistinguishable from the Minnesota statute in *Hodgson*. Compare N.H. REV. STAT. ANN. § 132:24 with MINN. STAT. § 144.343(4). Neither the Minnesota statute nor the New Hampshire Act contain a general health exception. *See id*.

The First Circuit simply dismissed *Hodgson* by stating that the "Court did not consider a challenge to [the Minnesota] statute's lack of a health exception." *Heed*, 390 F.3d at 53. However, a close reading of *Hodgson* demonstrates that the Court was well aware of the lack of a health exception, yet it still upheld the constitutionality of the statute. The Court referenced the death exception numerous times, *see Hodgson*, 497 U.S. at 422, 426 n.7; *see*

[3] A majority of the Court rejected a two parent notification requirement without a judicial bypass. *See id.* at 455 (Stevens, J.).

also id. at 493 (Kennedy, J. concurring in the judgment in part and dissenting in part.) That exception is identical to the death exception in New Hampshire's Act and does not contain a health exception. Although the *Hodgson* Court was not principally focused on it, the Court was aware that the statute lacked an explicit health exception, but it did not rule that provision patently unconstitutional, or even question its validity. Given this awareness and explicit reference to Minnesota's exception, the First Circuit's easy dismissal of *Hodgson* is not well-reasoned. Surely, had Minnesota's act infringed on the health of minors over the last fifteen years, it would have been further challenged in court or modified by the state legislature.

In addition, at least two other states have parental notification or consent statutes which do not contain an explicit health exception. *See* MO. ANN. STAT. § 188.028 (West 2004); N.D. CENT. CODE § 14-02.1-03.1 (2004). These statutes have been in effect for more than fifteen years, and the respondents have presented no evidence that minors have been placed at risk as a result of the operation of these statutes.

The absence of any evidence regarding actual health risks arising from these laws demonstrates the deficiency of allowing a facial challenge to an abortion regulation to proceed without requiring the challenger to establish that no set of circumstances exists under which the statute would be valid. *See infra*, § II. A statute with many constitutional applications could be invalidated based solely on hypothetical concerns that may never materialize.

B. There Is No *Per Se* Rule Requiring All Abortion Regulations To Contain A Health Exception.

Relying on *Stenberg*, the First Circuit ruled that the Act was unconstitutional because it did not contain an explicit exception to protect the health of the mother. *See Heed*, 390 F.3d at 60-62. In effect, the First Circuit created a *per se* rule that all statutes regulating abortion must contain a health exception in order to survive constitutional challenge. *See id.* at 59. The First Circuit has misread *Stenberg*. The Nebraska statute at issue in *Stenberg* was entirely different from a parental notification act as it attempted to altogether ban a method of abortion. The statute at issue in *Stenberg* attempted to proscribe partial birth abortions without any method for relief such as the judicial bypass in New Hampshire's Act. Moreover, the New Hampshire Act does not ban abortion, but simply seeks to promote the interest of minors in having the benefit of parental involvement. Thus, while the law at issue in *Stenberg* could endanger a woman's health by preventing her from receiving the safest method of abortion, New Hampshire's Parental Notification Act would not. The decision in *Stenberg* makes plain that the Court did not create a *per se* health exception rule in that case. At the outset, the Court was simply applying the principles of *Casey* to the circumstances of the Nebraska statute which completely banned D & X (partial birth) abortions: "[w]e shall not revisit those legal principles [set forth in *Roe v. Wade*, 410 U.S. 113 (1973) and *Casey*]. Rather, we apply them to the circumstances of this case." *Stenberg*, 530 U.S. at 921. Hence, the Court began its analysis of the case by expressly *denying* that it was enunciating any new legal principles beyond those previously set forth in *Roe v. Wade* and *Casey. Id.* The Nebraska

statute included an exception that would allow the D & X procedure to be performed if necessary to save the woman's life; it did not, however, include an exception that would allow the procedure to be used if necessary to preserve her health. Applying *Casey*, the Court held that "the governing standard requires an exception 'where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother,'" because the Court has "made it clear that a State may promote but not endanger a woman's health when it regulates the methods of abortion."

The *Stenberg* court then went on to discuss Nebraska's contention that a law does not require a health exception unless there is a need for such an exception. The Court did not expressly or impliedly reject that general proposition. Instead, the Court discussed the medical evidence presented at the district court level, and concluded that there was evidence in the record to support the conclusion that in some circumstances the D & X might be the safest procedure. 530 U.S. at 932. Therefore, based upon the actual medical evidence presented at the district court hearing, the Court concluded that a law banning the procedure must include a health exception:

> The upshot is a District Court finding that D & X significantly obviates health risks in certain circumstances, a highly plausible record-based explanation of why that might be so, a division of opinion among some medical experts over whether D & X is generally safer, and an absence of controlled medical studies that would help answer these medical questions. *Given these medically related evidentiary circumstances, we believe the law requires a health exception.*

Stenberg, 530 U.S. at 936 (emphasis added). Hence, the Court's holding was *not* that *all* laws regulating abortion methods must have health exceptions; rather, it was limited to the circumstances of the law banning the D & X procedure and the medical evidence in the record. The Court expressly rejected the idea that a state can *never* ban an abortion procedure simply because some doctors prefer it:

> By no means must a State grant physicians 'unfettered discretion' in their selection of abortion methods. But where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health, *Casey* requires the statute to include a health exception when the procedure is 'necessary in appropriate medical judgment, for the preservation of the life or health of the mother.' 505 U.S. at 879. Requiring such an exception *in this case* is no departure from *Casey*, but simply a straightforward application of its holding.

Stenberg, 530 U.S. at 938 (emphasis added). The Court did *not* hold that *every* law regulating abortion in any manner requires a health exception. Here, there is no such record of substantial medical authority, similar to the record upon which the *Stenberg* court relied, to support the proposition that parental notification regulations require an explicit health care exception.

Stenberg's narrow holding regarding the basic need for a health exception in a statute banning partial birth abortions should not be mistaken for a broad decision that would clash with *Casey*'s express endorsement of a health exception triggered only by "significant threats to the life or health of a woman." *Casey*, 505 U.S. at 880. The First

Circuit's creation of a *per se* rule that all abortion regulations must have a health exception would mean that a statute which requires abortion providers to keep records of the type of abortions performed and the ages of the women who had abortions would need a health exception. This is simply illogical and absurd.

C. The Judicial Bypass Provision Adequately Protects The Life And Health Of The Mother And Saves The Act From Any Alleged Constitutional Deficiency.

Even if this Court finds that the New Hampshire Act lacks a constitutionally required health exception, the Act's judicial bypass provision renders the statute constitutionally sound. "In a series of cases, this Court has explicitly approved judicial bypass as a means of tailoring a parental consent provision so as to avoid unduly burdening the minor's limited right to obtain an abortion." *Hodgson*, 497 U.S. at 461 (O'Connor, J. concurring in part and concurring in the judgment in part) (although two-parent notification requirement was unconstitutional, the law passed constitutional muster when coupled with a judicial bypass alternative); *see also Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (*Bellotti II*) ("[t]he opportunity for direct access to court . . . is adequate to safeguard throughout pregnancy the constitutionally protected interests of a minor in the abortion decision").

The New Hampshire Act adequately protects the health of the mother. The Act provides that written notice must be given to an unemancipated minor's parent or guardian and that no abortion may be performed until at least 48 hours after notice has been delivered. N.H. REV. STAT. ANN. § 132:25, I. The Act provides exceptions where

an abortion is necessary to prevent the minor's death or where the parent or guardian certifies in writing that they have been notified. N.H. REV. STAT. ANN. § 132:26, I(a), (b). Additionally, if the minor chooses not to notify her parent or guardian, a judicial bypass procedure is available where a judge may authorize an abortion provider to perform an abortion if the judge concludes that the pregnant minor's best interest would be served. N.H. REV. STAT. ANN. § 132:26, II. The Act also provides that a person shall not be held liable under the penalty section of the Act if the person has attempted with reasonable diligence to deliver notice. N.H. REV. STAT. ANN. § 132:27.

The judicial bypass contained in the Act provides a method for protecting a minor's health by allowing a minor to obtain an immediate abortion when it is in her best interests. The Act requires the judicial bypass procedure to occur promptly and sets forth maximum time limits within which the courts may act, and there is nothing in the Act which would prevent a court from proceeding even more promptly. N.H. REV. STAT. ANN. § 132:26, II(b). The Act requires that a court be available twenty-four hours a day, seven days a week. N.H. REV. STAT. ANN. § 132:26, II(c). This portion of the judicial bypass section provides adequate protection for health emergencies. The provision that courts be available twenty-four hours a day, seven days a week plainly means that the courts should provide immediate relief in emergency situations, something which courts do routinely. Furthermore, the statute expressly says that the court is to give precedence over other matters and to "reach a decision promptly and without delay so as to serve the best interests of the minor." N.H. REV. STAT. ANN. § 132:26, II(b). The First Circuit's suggestion that someone might have to wait

fourteen days in an emergency does not make sense in light of the provision.[4] In the case of a medical emergency, access to a judge can be almost immediate. There is no reason to believe that a judge would not act expeditiously if the health of a minor is at issue. Indeed, a state may expect that its judges will follow mandated procedural requirements. *See Akron II*, 497 U.S. at 515. Courts routinely address time sensitive issues promptly, regardless of the time of day or night, in a variety of circumstances, such as restraining orders in domestic violence cases, search and arrest warrants in criminal cases, child protection orders and emergency health orders. In many instances, authorization for such procedures is given over the telephone. *See, e.g.*, N.H. REV. STAT. ANN. § 173-B:4 (telephonic domestic violence restraining order). Judicial bypass hearings in Massachusetts average twelve minutes and 92 percent of the hearings were less than or equal to 20 minutes. *See* Suzanne Yates and Anita J. Pliner, *Judging Maturity in the Courts: The Massachusetts Consent Statute*, 78 Am. J. Pub. Health. 646, 648 (1988). Additionally,

[4] *See Application of President and Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 978 (1964) as an example of how expeditiously courts act in medical emergencies. In that case, attorneys for Georgetown Hospital applied to the United States District Court for the District of Columbia for permission to administer blood to a woman who was a Jehovah's Witness. The teachings of that sect prohibited the injection of blood into the body. The District Court denied the application. Counsel for the hospital applied for an emergency writ to a single judge of the Court of Appeals. The judge called the hospital by telephone, spoke with a doctor and confirmed the representations made by counsel. The judge then went to the hospital, spoke with the woman's husband, the woman, and the doctors and then signed an order allowing the doctor to administer such transfusions as the doctors should determine were necessary to save the woman's life. This occurred within a span of one hour and twenty minutes. *Id*. at 1006-07.

the history in Massachusetts, relied upon by Planned Parenthood in the courts below, suggests that courts routinely authorize the abortion procedure to proceed. J.A. 39. Certainly, if an abortion is necessary for the preservation of the health or life of the minor, it would be in the pregnant minor's best interest and a court would authorize the procedure within minutes, if necessary.

Here, the First Circuit rejected the judicial bypass procedure as constitutionally inadequate because a minor's health unnecessarily could be at risk if delays in reaching a judicial decision took place. *Heed*, 390 F.3d at 62. By doing so, the court necessarily recognized that a judicial bypass alternative could serve as, or "stand in for," a health exception. *See id*. Nevertheless, possible delays "during which time a minor's health may be adversely affected," rendered the bypass inadequate. *Id*.

Because the New Hampshire Legislature has mandated that its state judges make decisions "without delay" to "serve the best interest of the pregnant minor," *see* N.H. REV. STAT. ANN. § 132:26, II(b), the First Circuit should have concluded that judges would act expeditiously to serve the best interests of pregnant minors. *See Akron II*, 497 U.S. at 515 ("a state may expect that its judges will follow mandated procedural requirements").

D. The Act's Exception Permitting A Physician To Perform An Immediate Abortion When Necessary To Prevent A Minor's Death Is Not Unconstitutional.

New Hampshire's Act permits a physician to perform an immediate abortion when an abortion "is necessary to prevent the minor's death and there is insufficient time to

provide the required notice." N.H. REV. STAT. ANN. § 132:26, I(a). The court of appeals struck down the death provision on its face for two reasons: (1) The court concluded that the Act's provision that an immediate abortion can be performed when necessary to prevent a minor's death failed to safeguard a physician's good-faith medical judgment concerning when a minor's life is at risk; and (2) The court found that the Act was drawn too narrowly because of a perceived concern that it may not be possible for an abortion provider to determine with certainty whether death will occur within or outside of the requisite 48 hour window of the Act.

The court of appeals failed to give New Hampshire state courts "the opportunity to construe [the] law to avoid constitutional infirmities." *New York v. Ferber*, 458 U.S. 747, 768 (1982); *see also Bellotti v. Baird*, 428 U.S. 132, 147 (1976) (*Bellotti I*) (stating that Massachusetts' parental consent law "is susceptible of a construction by the state's judiciary which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem"). This Court, in *Doe v. Bolton*, 410 U.S. 179, 191 (1973) addressed an attack on a Georgia statute that made it a crime for a physician to perform an abortion except when it is "based upon his best clinical judgment that an abortion is necessary." *Id.* Appellants in that case, much like respondents here, contended that the word "necessary" did not warn the physician what conduct was proscribed, that the statute is wholly without objective standards and is subject to diverse interpretation, and that the doctor will err on the side of caution and will be arbitrary. *Heed*, 390 F.3d at 63. This Court stated that "[w]hether, in the words of the Georgia statute, 'an abortion is necessary' is a

professional judgment that the Georgia physician will be called upon to make routinely." *Id*. Most recently, in *Stenberg*, this Court stated:

> The word "necessary" in *Casey's* phrase "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother," cannot refer to an absolute necessity or to absolute proof. Medical treatments and procedures are often considered appropriate (or inappropriate) in light of estimated comparative health risks (and health benefits) in particular cases. Neither can that phrase require unanimity of medical opinion. Doctors often differ in their estimation of comparable health risks and appropriate treatment. And *Casey's* words "appropriate medical judgment" must embody the judicial need to tolerate responsible differences of medical opinion . . .

Stenberg, 530 U.S. at 937 (citation omitted).

Given these interpretations by this Court, there is no reason to believe that New Hampshire courts would not interpret New Hampshire's Parental Notification Act to protect the good faith judgment of abortion providers. *Cf. State v. Rollins-Ercolino*, 821 A.2d 953 (N.H. 2003) (where statute does not provide for specific mental state, the New Hampshire Supreme Court serves as final arbiter of Legislature's intent as it is expressed in words of statute considered as a whole).

The First Circuit's reliance on *Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998) is inapposite. The *Voinovich* court construed an Ohio abortion regulation which had provisions containing subjective and objective elements in

that a physician must believe that an abortion is necessary and his belief must be objectively reasonable to other physicians. Because of this dual standard, a physician did not know against which standard his conduct would be tested and his liability determined. Accordingly, the Ohio Act did not adequately notify the physician that certain conduct is prohibited and the Act was unconstitutional. *Id.* at 204.

Likewise, the statute struck down in *Colautti v. Franklin*, 439 U.S. 379 (1979) suffered from a similar infirmity; a "double ambiguity" within the statute's terms. New Hampshire's Act is entirely distinguishable. It does not have a dual standard, and therefore is not ambiguous. Moreover, given the Court's sentiments in *Doe* and *Stenberg*, the Act can be interpreted to readily protect a provider's good faith judgment.

The court of appeals also critiqued the Act's 48 hour notice delay as forcing "physicians to either gamble with their patients' lives in the hopes of complying with the notice requirement before a minor's death becomes inevitable, or to risk criminal and civil liability by providing an abortion without parental notice." *Heed*, 390 F.3d at 63. This concern is unsubstantiated. The court of appeals' argument assumes that the statute will be a barrier to abortion providers who think that an abortion will be necessary to protect the life of the mother and who are unsure whether the procedure needs to occur within 48 hours.

However, the statute provides two clear options to abortion providers. First, a provider can seek assurance that those entitled to notice have actually been notified. *See* N.H. REV. STAT. ANN. § 132:26, I(b). A written note from a parent makes the 48 hour waiting period unnecessary. *Id.*

Second, a provider can make use of the judicial bypass process available 24 hours a day, 7 days a week. N.H. REV. STAT. ANN. § 132:26, I(c). The Act's provision of a judicial bypass makes it more than "fairly possible [to] construe [the] statute to avoid a danger of unconstitutionality." *Akron II*, 497 U.S. at 514. The above analyses also apply to the argument of respondents which the First Circuit did not address, that is that the death exception does not allow for circumstances in which abortion is the best, but not the only, option for saving a minor's life. Because the Act allows providers to rely on their good faith medical judgment, this argument fails. Furthermore, the provider can make use of the judicial bypass provision. This would cure any constitutional infirmity.

Accordingly, because the "death exception" contained in the Act can be construed constitutionally, minors face no risk that doctors will not do what is best for their patients. Hence, there is no undue burden for minors in need of life-saving abortions.

Given the entire statutory scheme, and the record in this case, New Hampshire's parental notification act should not be invalidated "on a facial challenge based upon a worst-case analysis that may never occur." *Id.*

II. THE CHALLENGE TO THE NEW HAMPSHIRE PARENTAL NOTIFICATION ACT FAILS BECAUSE IT CANNOT MEET THE "NO SET OF CIRCUMSTANCES" TEST FOR FACIAL CHALLENGES SET FORTH IN *UNITED STATES v. SALERNO*.

In *United States v. Salerno*, the Court articulated the following standard of review for facial challenges:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exist under which the Act would be valid. The fact that the [Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

481 U.S. 739, 745 (1987). This has long been the rule for facial challenges. In a long line of cases preceding *Salerno*, this Court defined a statute as facially invalid only if it was unconstitutional in every conceivable application. *See, e.g., Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984); *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 965 n. 13, 966 (1984); *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95, 497 (1982); *see also New York State Club Ass'n v. New York*, 487 U.S. 1, 11 (1988) (post-*Salerno*).

In the abortion context, this Court has stated that when a facial challenge is made, individuals challenging the statute must show that "no set of circumstances exists under which the Act would be valid." *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 514 (1990) (*Akron II*) (quoting *Webster v. Reproductive Health Services*, 492 U.S. 490, 524 (O'Connor, J., concurring in part and concurring in judgment)); *see also Rust v. Sullivan*, 500 U.S. 173, 183 (1991) (facial challenge to federal regulations limiting the ability of recipients of federal funds to engage in abortion-related activities "is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act

would be valid") (internal quotation marks and citations omitted). Courts may not invalidate on its face a state statute regulating abortion "based upon a worst case analysis that may never occur." *Akron II*, 497 U.S. at 514. Despite this well-established principle, the First Circuit found *Casey* to be in tension with *Salerno* and rejected *Salerno* outright. *See Heed*, 390 F.3d at 57-58. This dismissal of *Salerno* was incorrect and should be reversed by this Court for the following reasons: (1) the *Salerno* test has long governed facial challenges and is consistent with this Court's traditional practice of adjudicating constitutional questions only in concrete cases and controversies; (2) *Salerno* is compatible with *Casey*'s undue burden standard, which simply identifies the substantive constitutional standard against which the *Salerno* test applies; (3) to the extent that *Casey*'s "large fraction" test is in tension with *Salerno*, that standard has only been applied by a plurality of this Court to a challenge to the constitutionality of a spousal notification provision; (4) even if the "large fraction" test applies, New Hampshire's Act passes constitutional muster because there is no large fraction of pregnant minors who would face significant health risks as a result of the Act; (5) there is no sound reason for this Court to create an abortion regulation exception to the *Salerno* test; and (6) even if the Act is found unconstitutional in cases of medical emergency, the Act should not be struck down on its face because the unconstitutional applications of the Act are severable.

A. *Salerno* Reiterates The Long Established Standard Governing Facial Challenges And Is Consistent With This Court's Traditional Practice Of Adjudicating Constitutional Questions Only In Concrete Cases And Controversies.

"The very foundation of the power of federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them." *United States v. Raines*, 362 U.S. 17, 20 (1960). "This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.'" *Id.* (quoting *Liverpool, New York & Philadelphia S. S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885)). This requirement that an actual case or controversy exists, stemming from Article III of the United States Constitution, gives rise to the rule barring third party standing. Under that rule, "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York v. Ferber*, 458 U.S. 747, 767 (1982) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973)); *see also Yazoo & M.V.R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217, 219-20 (1912). The rule barring third party standing "reflects two cardinal principles of our constitutional order: the personal nature of constitutional rights, and prudential limitations on our constitutional adjudication." *Ferber*, 458 U.S. at 767 (citations omitted).

Because constitutional rights are personal in nature, and resolution of a particular case or controversy presented to a court generally can be achieved by a pronouncement on the constitutionality of the concrete application presented, challenges to the constitutionality of a law should typically take the form of an "as-applied" challenge. A successful as-applied challenge renders the statute invalid only insofar as it applies to the litigant's activities; thus, the court's involvement is appropriately limited to that which is necessary to adjudge the legal rights of the litigants actually before the court. By focusing on the statute's application in the present case, rather than hypothetical applications of the statute to third parties, the court avoids "unnecessary pronouncement on constitutional issues" and "premature interpretations of statutes in areas where their constitutional application might be cloudy." *Raines*, 362 U.S. at 22. This leaves open the possibility that in a future case "a limiting construction could be given to the statute by the court responsible for its construction if an application of doubtful constitutionality were in fact concretely presented." *Id.; see also Ferber*, 458 U.S. at 768 (noting that the traditional rule barring third party standing "fulfills a valuable institutional purpose; it allows state courts the opportunity to construe a law to avoid constitutional infirmities").

Under the traditional rule for facial invalidation, a statute which can be constitutionally applied is not invalid on its face. *Salerno*, 481 U.S. at 745. The only exception to this general rule of facial invalidity is the overbreadth doctrine of the First Amendment. *See Vincent*, 466 U.S. at 796-99 (recognizing two different ways in which a statute may be deemed facially invalid – "either because it is unconstitutional in every conceivable application, or

because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad' "); *see also Salerno*, 481 U.S. at 745 (noting that this Court has "not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment"). The overbreadth doctrine exists only in the First Amendment context, and "is a specialized exception to the general rule for facial challenges, justified in light of the risk that an overbroad statute will chill free expression." *See City of Chicago v. Morales*, 527 U.S. 41, 79, n. 2 (1999) (Scalia, J., dissenting).

Limiting overbreadth to the First Amendment is not only consistent with this Court's prior application of the doctrine,[5] but also preserves the proper balance between courts and legislatures by ensuring that courts decide only concrete cases and actual controversies. The practice of as-applied invalidation, favored under the *Salerno* standard, is supported by principles of federalism and institutional limitations on courts. *See J. H. Munson Co.*, 467 U.S. at 947 (Rehnquist, J., dissenting, joined by Burger, C.J., Powell, J., and O'Connor, J.) (explaining the advantages of as-applied invalidation, including that "it is less intrusive on the legislative prerogative and less disruptive of state policy[,]" and "allows state courts the opportunity to construe a law to avoid constitutional infirmities"). As this Court stated in *Younger v. Harris*, 401 U.S. 37, 52 (1971),

[5] Even in the First Amendment context, this Court has recognized that application of the overbreadth doctrine is "strong medicine" which should be employed by the Court "sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613. "In the development of the overbreadth doctrine, the Court has been sensitive to the risk that the doctrine itself might sweep so broadly that the exception to ordinary standing requirements would swallow the general rule." *Vincent*, 466 U.S. at 799.

> The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision; a statute apparently governing a dispute cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution. *Marbury v. Madison*, 1 Cranch 137 (1803). But this vital responsibility, broad as it is, does not amount to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them.

In exercising its Article III jurisdiction, this Court "'is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Raines*, 362 U.S. at 21 (quoting *Commissioners of Emigration*, 113 U.S. at 39). When courts focus on concrete factual situations, they face "flesh-and-blood legal problems with data relevant and adequate to an informed judgment." *Ferber*, 458 U.S. at 768 (citations and quotations omitted). This "practice of adjudicating difficult and novel constitutional questions only in concrete factual situations," results in "adjudications [that] tend to be crafted with greater wisdom. Hypothetical rulings are inherently treacherous and prone to lead [the Court] into unforeseen errors; they are qualitatively less reliable than the products of case-by-case adjudication." *Id*. at 780-81 (Stevens, J., concurring); *see also J.H. Munson Co.*, 467 U.S. at 985 (Rehnquist, J., dissenting, joined by Burger, C.J., Powell, J., and O'Connor, J.) ("[M]isunderstanding and ungrounded speculation are

the natural hazards of overbreadth analysis. When the Court's sights are not focused on the actual application of a statute to a specific set of facts, its vision proves sadly deficient.").

Consistent with these principles, the *Salerno* standard favors as-applied relief, permitting total facial invalidity only where the challenger can establish no set of circumstances under which an act can operate validly. This practice respects coordinate branches of government by limiting courts' review to concrete cases and controversies, and "reflect[s] the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick*, 413 U.S. at 610-11; *see also Akron II*; *Raines*, 362 U.S. at 22 ("The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined."). As-applied adjudication also "fulfills a valuable institutional purpose: it allows state courts the opportunity to construe a law to avoid constitutional infirmities." *Ferber*, 458 U.S. at 768.

B. There Is No Valid Reason Why The *Salerno* Test Should Not Apply To Abortion Regulations.

There is no justification to depart from these traditional practices in reviewing the constitutionality of abortion regulations. This Court has itself applied the *Salerno* standard in upholding abortion regulations against facial challenges, *see Rust*, 500 U.S. at 173; *Akron II*, 497 U.S. at 502; and the plurality in *Casey* did not change this well-established rule for facial challenges in the abortion context. Federal courts' pronouncements on the constitutionality of state statutes regulating abortion

should go no further than what is necessary to adjudicate the rights in particular cases between the litigants brought before the Court.

1. *Casey*'s Undue Burden Standard Does Not Replace The *Salerno* Test For Facial Challenges To Abortion Regulations.

Casey established as the measure of constitutionality of an abortion regulation whether "its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion . . . ," therefore creating an undue burden on a woman's right to choose. 505 U.S. at 878. The plurality's application of the "large fraction" test in invalidating the spousal notification provision in *Casey* has created confusion as to whether the undue burden standard replaces the *Salerno* test for facial challenges to abortion regulations. It does not. The *Salerno* test is not in tension with the undue burden test, and the "large fraction" test used by the *Casey* plurality at most demonstrates an intent to apply overbreadth analysis to spousal notification provisions, not to reject the *Salerno* standard in its entirety in the abortion context. Had the Court intended to depart so drastically from the longstanding rule governing facial challenges, one would expect an explicit holding on the issue.

Casey did not overrule the *Salerno* standard for abortion cases; rather, it simply identified that the measure of constitutionality is the "undue burden" test. *Salerno* is compatible with this test. *See Manning v. Hunt*, 119 F.3d 254, 268 n.4 (4th Cir. 1997) ("In order to succeed, Appellants are required to show that under no set of circumstances can the Act be applied in a manner which is not an undue burden . . . "). *Casey* no more creates a new

standard of review for facial challenges to abortion regulations than does the "reasonable foundation test" for INS regulations. *See Reno v. Flores*, 507 U.S. 292, 301, 309 (1993) (invoking *Salerno* standard and measuring the constitutionality of the regulation under the "reasonable foundation test"); *see also Anderson v. Edwards*, 514 U.S. 143, 155 n.6 (1995) (citing the *Salerno* rule); *Babbitt v. Sweet Home Chapter of Communities for Great Oregon*, 515 U.S. 687, 699 (1995) (facial challenge asserts that a challenged statute or regulation is invalid "in every circumstance"); *Rust v. Sullivan*, 500 U.S. at 173 (applying the *Salerno* rule to the facial challenge of an abortion-related regulation); *Akron II* (same); *New York State Club Assn., Inc.* 487 U.S. at 11-12 (noting that facial challenges are based on the claim that a statute is unconstitutional in all of its applications).

In any event, even if the plurality in *Casey* intended to create an abortion-regulation exception to the *Salerno* test through the "large fraction" test, that test only applies to challenges to the constitutionality of a spousal notification provision. The "large fraction" test does not appear in the plurality's discussion defining an "undue burden," *see Casey*, 505 U.S. at 877, and is only applied by the plurality in addressing the constitutionality of the spousal notification provision. *Casey* did not apply the "large fraction" test in upholding Pennsylvania's parental consent statute. 505 U.S. at 899. In fact, *Casey* explicitly declared that its invalidation of the spousal notice provision, through application of the "large fraction" test, "in no way" called into question parental involvement statutes. 505 U.S. at 895. Nor did the *Stenberg* Court apply the "large fraction" test in striking down Nebraska's ban on partial birth abortions. 530 U.S. at 938-46 (discussing undue burden

Nebraska partial birth abortion statute places on women without mentioning large fraction test).

Any exception adopted by the *Casey* plurality through application of the "large fraction" test is limited to challenges to spousal notification provisions. Respondents in this case do not raise such a challenge to the constitutionality of New Hampshire's Act; therefore, the traditional *Salerno* standard, not the "large fraction" test, applies. Under that standard, the Act may not be struck down in its entirety as facially unconstitutional simply because in some conceivable situations it may be applied unconstitutionally. Thus, even if this Court finds that New Hampshire's Act fails to preserve the health or life of minors in certain emergency situations, the statute is only unconstitutional as applied to that discrete group of individuals.

2. Even If *Casey*'s "Large Fraction" Test Applies, New Hampshire's Act Passes Constitutional Muster.

New Hampshire's Parental Notification Act clearly passes constitutional muster even under *Casey*'s large fraction test. Under the large fraction test, an abortion regulation constitutes an undue burden, and is therefore invalid, if "in a large fraction of cases in which [it] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Casey*, 505 U.S. at 895. Applied to the respondent's claim that the Act fails to preserve the health or life of pregnant minors, this standard requires a showing that the abortion restriction at issue will create significant health risks in a large fraction of cases in which it is relevant. *See Casey*, 505 U.S. at 880 (noting that an abortion restriction would be invalid if its operation creates "significant health risks").

In determining whether a regulation creates significant health risks in a "large fraction" of cases, "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Casey*, 505 U.S. at 894. Thus, in measuring New Hampshire's Parental Notification Act for consistency with the Constitution, the controlling class of women is those minors seeking abortions who do not wish to notify a parent and who do not qualify for a waiver of notice under N.H. REV. STAT. ANN. § 132:26. *See Casey*, 505 U.S. at 895 (selecting as the class of women affected by the spousal notification provision "married women seeking abortions who do not wish to notify their husbands of their intentions and who do not qualify for one of the statutory exceptions to the notice requirement").

Because N.H. REV. STAT. ANN. § 132:26 waives the notice requirement in cases where an "abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice," the most serious medical emergencies are unaffected by the notification requirement and a life-saving abortion may proceed immediately. In addition, the judicial bypass provision removes from the control group those minors who are "mature and capable of giving informed consent" and those minors, regardless of maturity, for whom performance of an abortion without parental notification would be in their best interests. N.H. REV. STAT. ANN. § 132:26, II. The group of women for which the Act constitutes a restriction, therefore, is those minors who are not mature and capable of giving informed consent on their own, and whose best interests would not support waiving the parental notification requirement. The vast majority of these women would face no health complications related to their pregnancies,

and in those cases where complications arose, the vast majority of those situations would not require an immediate abortion in order to preserve the health of the mother.

Moreover, the respondents have failed to identify *any* fraction, let alone a *large fraction*, of cases in which New Hampshire's Parental Notification Act would create significant health risks to women. Although Dr. Goldner's declaration describes medical complications which may occur during pregnancy requiring prompt or immediate termination of the pregnancy, he does not identify a single circumstance in which he has actually needed to perform such an emergency abortion. Nor do the respondents point to any studies indicating that emergency abortions are sometimes necessary to preserve the health of a woman. In contrast, the District Court in *Casey* "heard the testimony of numerous expert witnesses, and made detailed findings of fact regarding the effect of [the spousal notification provision]." *Casey*, 505 U.S. at 888. In addition, this Court noted that the District Court's findings were "supported by studies of domestic violence." *Id*. at 891.

There is clearly no "large fraction" of unemancipated pregnant minors who would face significant health risks as a result of this Act. To facially invalidate a statute based upon a declaration of one abortion provider who states that a medical emergency may occur which would require a prompt abortion, without any evidence that the abortion provider himself has *ever* experienced such a situation or is aware of *any* other physician who has experienced such a situation, is error. Because New Hampshire's Parental Notification Act will not create significant health risks in a large fraction of cases in which the Act is relevant, the Act is facially valid even under *Casey*'s large fraction test.

3. There Is No Sound Reason For The Court To Create An Abortion-Regulation Exception To The *Salerno* Test.

The exception to the general rule of facial invalidity set forth in *Salerno* is the overbreadth doctrine of the First Amendment. *See Salerno*, 481 U.S. at 745; *Vincent*, 466 U.S. at 796-99. The Court recognized the overbreadth exception in the First Amendment context because of the special significance First Amendment rights have to a free and open government, setting them apart from other constitutional rights and liberties. *See* Kevin Martin, Note, *Stranger in a Strange Land: The Use of Overbreadth in Abortion Jurisprudence*, 99 Colum. L. Rev. 173, 201-08 (1999). As this Court stated in *Thornhill v. Alabama*, 310 U.S. 88 (1940),

> The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. . . . Abridgement of freedom of speech and of the press . . . impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government.

Id. at 95; *see also Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring) (citing Justice Holmes for the proposition that there is a "'preferred position of freedom of speech'" because "those liberties of the individual which history has attested as the indispensable conditions of an

open as against a closed society come to this Court with a momentum for respect. . . ."); *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939) (noting the belief of the framers of the Constitution that exercise of First Amendment rights "lies at the foundation of free government by free men"). "[T]he transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" *Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972) (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)).

Other fundamental constitutional rights, while important to individuals, are simply not as important to a free and open government. This does not mean individuals claiming violations of other constitutional rights are without relief. As-applied relief is sufficient to protect individual's constitutional rights, since courts are capable of adjudicating as-applied challenges expeditiously without impairing constitutional rights. Yet, some commentators argue that the *Salerno* standard is not workable in abortion cases due to the time sensitive nature of pregnancy. *See* Michael C. Dorf, *Facial Challenges to State & Federal Statutes*, 46 Stan. L. Rev. 235, 270 (1994) ("Due to pregnancy's temporary nature, pregnant women may find case-by-case relief from abortion restrictions particularly impractical"). This argument should be rejected by this Court as it presumes judicial foot dragging, even though courts act promptly in numerous emergent situations. It also "ignores the reality of how abortion litigation takes place." Martin, *supra*, at 212. Most challenges, such as the present case, are brought by abortion providers, who have

not been hesitant to bring such suits. *See Casey*, 505 U.S. at 845 ("Before any of these provisions took effect, the petitioners, who are five abortion clinics and one physician representing himself as well as a class of physicians who provide abortion services, brought this suit seeking declaratory and injunctive relief."). In *Singleton v. Wulff*, 428 U.S. 106 (1976), this Court upheld the standing of abortion providers to vindicate the rights of their patients. Just as in the case of a judicial bypass, nothing would prevent an abortion provider from bringing an expedited case to enjoin the application of a statute against a particular woman. Martin, *supra*, at 213.[6] Moreover, extending the overbreadth doctrine to abortion cases to allow facial invalidation of statutes which are capable of constitutional application "impermissibly interferes with the state process of refining and limiting – through judicial decision or enforcement discretion – statutes that cannot be constitutionally applied in all cases covered by their language." *Ada v. Guam Soc'y of Obstetricians and Gynecologists*, 506 U.S. 1011 (1992) (Scalia, J., dissenting from denial of certiorari, joined by Rehnquist, C.J., and White, J.). This Court has declined to do so even when an abortion statute with a manifestly unconstitutional scope may nevertheless be applied constitutionally in some set of circumstances. *See Connecticut v. Menillo*, 423 U.S. 9 (1975) (per curiam) (upholding a substantially similar statute as that which was invalidated in *Roe* against non-physicians). Total invalidation of a statute, such as New Hampshire's Act, which has many constitutional applications, does not serve

[6] An as-applied challenge also has the impact of stare decisis. Therefore, women who are similarly situated will not necessarily have to bring their own challenge to an abortion regulation.

the public interest because doing so would place beyond the reach of the law those whose conduct is not constitutionally protected. *See* Alfred Hill, *Some Realism about Facial Invalidation of Statutes*, 30 Hofstra L. Rev. 647, 665 (2002).

As Justice Kennedy observed in his dissent in *Stenberg*, the federal court's act of enjoining the enforcement of the state statute before it was applied or interpreted by the state "denied each branch of Nebraska's government any role in the interpretation or enforcement of the statute." 530 U.S. at 979 (Kennedy, J., dissenting, joined by Rehnquist, C.J.). Having noted that "*Casey* is premised on the States having an important constitutional role in defining their interests in the abortion debate," *id*. at 961, Kennedy lamented that, "[t]his cannot be what *Casey* meant when it said we would be more solicitous of state attempts to vindicate interests related to abortion. *Casey* did not assume this state of affairs," *id*. at 979.

4. Even If The New Hampshire Parental Notification Act Is Found Unconstitutional In Cases Of Medical Emergency, Those Unconstitutional Applications Of The Act Are Severable.

The *Salerno* test presumes that unconstitutional applications of a statute may be severed from its constitutional applications. Such a presumption is especially appropriate where a state statute contains an express severability provision. Severability is a state law issue, *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (per curiam), and here the New Hampshire legislature has specifically expressed its desire that the statute be severed so as to

preserve its constitutional applications. This Court should respect that state judgment.

The New Hampshire Parental Notification Act contains a severability provision which provides:

> If any provision of the subdivision *or the application thereof to any person or circumstance* is held invalid, such invalidity shall not affect the provisions or applications of this subdivision which can be given effect without the invalid provisions or applications, and to this end, the provisions of this subdivision are severable.

N.H. REV. STAT. ANN. § 132:28 (emphasis added).

In New Hampshire "[t]he well recognized rule of statutory construction to be employed merely adopts the more probable intention of the legislature that the invalid part shall not produce entire invalidity if the valid part may be reasonably saved." *Fernald v. Bassett*, 107 N.H. 282, 285, 220 A.2d 739, 742 (N.H. 1966). This rule of construction allows severance of both invalid provisions and invalid *applications*. *See Woolf v. Fuller*, 174 A. 193, 196 (N.H. 1934) (recognizing "principle of construction that when a statute . . . is valid in some of its applications but not in others, it is to be read as though the latter were excepted from its operation"); *see also Opinion of the Justices*, 190 A. 801, 806 (N.H. 1937) (noting that even if "some specified details or applications" of a bill may be objected to on constitutional grounds, such unconstitutionality "would not invalidate the act in its entirety if its general purpose can still be given effect"); *Aldrich v. Wright*, 53 N.H. 398, 399 (1873) (as the legislature is not presumed to have intended to pass a void act, a statute with unconstitutional applications is nevertheless "held valid by giving it a construction compatible with the

constitution, making it applicable only to those cases to which it can be constitutionally applied."); *Opinion of the Justices*, 41 N.H. 553, 555 (1861) ("The rule of construction universally adopted is, that when a statute may constitutionally operate upon certain persons, or in certain cases, and was not evidently intended to conflict with the constitution, it is not to be held unconstitutional merely because there may be persons to whom, or cases in which it cannot constitutionally apply; but it is to be deemed constitutional, and to be construed not to apply to the latter persons or cases, on the ground that courts are bound to presume that the legislature did not intend to violate the constitution."). Therefore, the judiciary must uphold the constitutionality of legislative enactments where it is possible to invalidate only the unconstitutional application of a statute.

Here, the most the respondents have alleged is that the statute might conceivably operate unconstitutionally in a very small percentage of situations where a medical emergency is present. Even if true, that does not justify facial invalidation of the entire statute in all its applications. As-applied relief, rendering unconstitutional only those applications where a medical emergency is present, would preserve the health and life of pregnant minors without unnecessarily intruding on the state legislature's prerogative and completely negating the legitimate state interests underlying the law. *See J.H. Munson Co.*, 467 U.S. at 977 (Rehnquist, J., dissenting, joined by Burger, C.J., Powell, J., and O'Connor, J.) (recognizing the benefits of refining a law on a case-by-case basis by preventing improper applications, rather than suspending enforcement of the statute entirely, because in the meantime the interest underlying the law can still be served by its enforcement within constitutional bounds).

It is clear that the overall purpose of the statute in notifying parents so that they can assist their minor children in the resulting impact on the minor's physical and mental health and so that necessary medical information may be given to the medical provider will be preserved if this Court invalidates the Act only as applied to circumstances of medical emergency. Invalidating the entire statute when it can be constitutionally applied in the vast majority of situations is unnecessary and contrary to the well-established *Salerno* rule limiting facial invalidation to only those situations where the unconstitutional applications of a statute can not be severed from its constitutional applications.

CONCLUSION

The decision of the First Circuit Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

STATUTORY PROVISIONS INVOLVED

New Hampshire Parental Notification Prior to Abortion Act

[N.H. REV. STAT. ANN. § 132:24
effective December 31, 2003.]

132:24 Definitions In this subdivision:

I. "Abortion" means the use or prescription of any instrument, medicine, drug or any other substance or device intentionally to terminate the pregnancy of a female known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove an ectopic pregnancy or the products from a spontaneous miscarriage.

II. "Commissioner" means the commissioner of the department of health and human services.

III. "Department" means the department of health and human services.

IV. "Emancipated minor" means any minor female who is or has been married or has by court order otherwise been freed from the care, custody and control of her parents.

V. "Guardian" means the guardian or conservator appointed under N.H. REV. STAT. ANN. § 464-A, for pregnant females.

VI. "Minor" means any person under the age of 18 years.

VII. "Parent" means one parent of the pregnant girl if one is living or the guardian or conservator if the pregnant girl has one.

[N.H. REV. STAT. ANN. § 132:25
effective December 31, 2003.]

132:25 Notification Required

I. No abortion shall be performed upon an unemancipated minor or upon a female for whom a guardian or conservator has been appointed pursuant to N.H. REV. STAT. ANN. § 464-A because of a finding of incompetency, until at least 48 hours after written notice of the pending abortion has been delivered in the manner specified in paragraphs II and III.

II. The written notice shall be addressed to the parent at the usual place of abode of the parent and delivered personally to the parent by the physician or an agent.

III. In lieu of the delivery required by paragraph II, notice shall be made by certified mail addressed to the parent at the usual place of abode of the parent with return receipt requested and with restricted delivery to the addressee, which means the postal employee shall only deliver the mail to the authorized addressee. Time of delivery shall be deemed to occur at 12 o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing.

[N.H. REV. STAT. ANN. § 132:26
effective December 31, 2003.]

132:26 Waiver of Notice

I. No notice shall be required under N.H. REV. STAT. ANN. § 132:25 if:

(a) The attending abortion provider certifies in the pregnant minor's medical record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice; or

(b) The person or persons who are entitled to notice certify in writing that they have been notified.

II. If such a pregnant minor elects not to allow the notification of her parent or guardian or conservator, any judge of a court of competent jurisdiction shall, upon petition, or motion, and after an appropriate hearing, authorize an abortion provider to perform the abortion if said judge determines that the pregnant minor is mature and capable of giving informed consent to the proposed abortion. If said judge determines that the pregnant minor is not mature, or if the pregnant minor does not claim to be mature, the judge shall determine whether the performance of an abortion upon her without notification of her parent, guardian, or conservator would be in her best interests and shall authorize an abortion provider to perform the abortion without such notification if said judge concludes that the pregnant minor's best interests would be served thereby.

(a) Such a pregnant minor may participate in proceedings in the court on her own behalf, and the court may appoint a guardian ad litem for her. The court shall, however, advise her that she has a right to court-appointed counsel, and shall, upon her request, provide her with such counsel.

(b) Proceedings in the court under this section shall be confidential and shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best

interest of the pregnant minor. In no case shall the court fail to rule within 7 calendar days from the time the petition is filed. A judge of the court who conducts proceedings under this section shall make in writing specific factual findings and legal conclusions supporting the decision and shall order a record of the evidence to be maintained including the judge's own findings and conclusions.

(c) An expedited confidential appeal shall be available to any such pregnant minor for whom the court denies an order authorizing an abortion without notification. The court shall make a ruling within 7 calendar days from the time of the docketing of the appeal. An order authorizing an abortion without notification shall not be subject to appeal. No filing fees shall be required of any such pregnant minor at either the trial or the appellate level. Access to the trial court for the purposes of such a petition or motion, and access to the appellate courts for purposes of making an appeal from denial of the same, shall be afforded such a pregnant minor 24 hours a day, 7 days a week.

[N.H. REV. STAT. ANN. § 132:27
effective December 31, 2003.]

132:27 Penalty. Performance of an abortion in violation of this subdivision shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied notification. A person shall not be held liable under this section if the person establishes by written evidence that the person relied upon evidence sufficient to convince a careful and prudent person that the representations of the pregnant minor regarding information necessary to

comply with this section are bona fide and true, or if the person has attempted with reasonable diligence to deliver notice, but has been unable to do so.

[N.H. REV. STAT. ANN. § 132:28
effective December 31, 2003.]

132:28 Severability. If any provision of this subdivision or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect the provisions or applications of this subdivision which can be given effect without the invalid provisions or applications, and to this end, the provisions of this subdivision are severable.