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**

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ARGUMENT

I. Respondents' facial attack on New Hampshire's Parental Notification Act fails because the Act is not unconstitutional in all its applications.

A. Respondents have proposed a standard of review that would require a court to strike down an abortion regulation if it operated in an unconstitutional manner in even one hypothetical situation.

Respondents have conceded that New Hampshire's Parental Notification Prior To Abortion Act ("Act") operates constitutionally in the vast majority of cases, and that the Act is not unconstitutional even in a "large fraction of cases." Resp. Br. at 25 n.13. Nonetheless, they urge this Court to strike down the entire Act on its face. Respondents urge this Court to adopt a standard of review that would require the Court to strike down an abortion regulation if the law could be applied in an unconstitutional manner in even one hypothetical scenario. This turns the traditional standard for facial challenges on its head. This Court has never recognized a rule as far-sweeping as respondents press, even in the context of overbreadth challenges based on the First Amendment.[1] This Court should reject such a radical new test.

Despite the dispositive nature of this issue, respondents attempt to mask the significance of the standard of review by framing it as a question of "remedy" rather than constitutional review. *See* Resp. Br. at 22. Having framed their attack as a facial challenge, however, the burden is on respondents to demonstrate that the statute is invalid in *all* its applications, not merely in certain hypothetical medical emergencies. *See United States v. Salerno*, 481 U.S. 739, 745 (1987).

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[1] *See Virginia v. Hicks*, 539 U.S. 113, 119-20 (2003); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984) ("[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge."); *New York v. Ferber*, 458 U.S. 747, 772 (1982).

To the extent respondents tackle this issue head on, they do so by asserting that this Court has already held – in *Planned Parenthood of S. Pa. v. Casey*, 505 U.S. 833 (1992), and *Stenberg v. Carhart*, 530 U.S. 914 (2000) – that the lack of a medical emergency exception in the Act renders the Act *facially* invalid. Respondents are misreading those decisions. *See* Pet. Br. at 35-37; *see also* U.S. Br. at 16-18. Neither *Casey* nor *Stenberg* stand for the proposition that a statute lacking a medical emergency exception is invalid on its face merely because its application in certain situations would be unconstitutional.

The *Casey* joint opinion held – as a matter of substantive law – that an abortion regulation may not be applied in a manner that places a woman's health at risk. That holding did not address the standard for facial challenges and did not implicitly alter it. To the contrary, the *Casey* joint opinion did not state that the mere *possibility* of unconstitutional applications would render the statute facially invalid; rather, it stated that if a medical emergency definition is drawn too narrowly the Court would have "to invalidate the *restrictive operation* of the provision." *Casey*, 505 U.S. at 880 (emphasis added). Thus, even if a regulation "forecloses the possibility of an immediate abortion despite some significant health risks," such a regulation is not facially invalid, but invalid only as applied to situations where an immediate abortion is necessary to preserve the life or health of the mother. *Id.*

Nor does the portion of the *Casey* joint opinion addressing the spousal notification provision support respondents' position. In holding that provision unconstitutional, the plurality observed that it is "likely to prevent a significant number of women from obtaining an abortion." *Id.* at 893. Here, by contrast, respondents ask this Court to strike down New Hampshire's entire statute even though they concede it does not place an undue burden on a significant number of minors or even a large fraction of cases.[2]

[2] Similarly, *Stenberg* does not support respondents' position that an entire abortion regulation must be invalidated on its face based on a

(Continued on following page)

B. A pre-enforcement as-applied challenge to the Act would address the rare case of a minor in the throes of a medical emergency.

Throughout their brief, respondents paint the picture of a hypothetical minor in the throes of a medical crisis, and argue that requiring the minor to wait to challenge the Act until she is facing an emergency would endanger her health. This argument misses the mark. It demonstrates the need for early access to the courts, not for altering the standard for facial challenges. And as explained by the United States, mechanisms, such as a pre-enforcement as-applied challenge, exist through which persons seeking to challenge New Hampshire's statute can obtain early access to the courts without distorting the standard for facial challenges. U.S. Br. at 14-16.

Respondents argue that a pre-enforcement as-applied challenge would be unavailing because a healthy minor would not have standing to challenge a statute's lack of a medical emergency exception, and a doctor would not have standing to bring an action on a woman's behalf until faced with a particular woman in crisis. Resp. Br. at 27-28. Yet respondents themselves point out, *id.* at 29 n.15, that physicians have standing to challenge abortion regulations on their own behalf, as well as their patients', and therefore would not have to wait until faced with an actual medical emergency before bringing suit. *See Doe v. Bolton*, 410 U.S. 179, 188 (1973).

Similarly, a New Hampshire doctor would have standing to bring a pre-enforcement as-applied challenge

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single, hypothetical unconstitutional application. In fact, the opinion makes clear that Nebraska's statute was unconstitutional because it "create[d] a *significant* health risk" for women by banning altogether dilation and extraction ("D&X") abortions, 530 U.S. at 930 (emphasis added), and because the statute applied to dilation and evacuation ("D&E") abortions, which is the "most commonly used procedure," *id.* at 924, 938-39. In this regard, *Stenberg* is consistent with *Casey* because Nebraska's statute imposed an undue burden on "a significant number of women." *Casey*, 505 U.S. at 983, 984.

if he could establish a real likelihood that the health of a minor facing a medical emergency would be at risk if the doctor had to comply with the Act. This is precisely how the plaintiff in *Stenberg*, at least initially, pursued his challenge to Nebraska's ban on partial-birth abortion. *See Carhart v. Stenberg*, 972 F. Supp. 507, 522 (D. Neb. 1997) ("For purposes of his preliminary injunction request, Carhart limited his challenge to how the law is 'applied' to him and his patients."); *see also Carhart v. Stenberg*, 11 F. Supp.2d 1099, 1100 (D. Neb. 1998). Thus, the procedural history of this Court's most recent abortion case directly contradicts respondents' suggestion, Resp. Br. at 27, that it is unrealistic to require a plaintiff to bring a pre-enforcement as-applied challenge.

Respondents also argue that a pre-enforcement as-applied challenge would be inadequate because the relief in such a case would only apply to the particular condition faced by the particular minor who brought the challenge, and not protect all minors facing a medical emergency. Resp. Br. at 30-32. This argument fails as well. As Professor Wright has observed, whether a plaintiff seeking to declare a statute unconstitutional "proceeds as an individual or on a class-suit basis, the requested relief generally will benefit not only the claimant but all other persons subject to the practice or rule under attack." 7A Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE § 1771 (3d ed. 2005). This Court's decisions in cases upholding as-applied challenges confirm that observation. *See United States v. Grace*, 461 U.S. 171, 183 (1983); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 507 (1985); *cf. Washington v. Glucksberg*, 521 U.S. 702, 709 n.6 (1997) (analyzing ban on physician-assisted suicide as applied not just to plaintiffs that brought the action but to the entire class of terminally ill mentally competent patients); *Wisconsin v. Yoder*, 406 U.S. 205, 235-36 (1976) (noting that its holding granted "an exemption to the Amish" from complying with compulsory attendance laws).

Accordingly, a ruling that application of New Hampshire's parental notification statute is unconstitutional in circumstances of a medical emergency would have the

practical effect of applying to all minors needing an emergency abortion, not only those named as plaintiffs in a lawsuit. Limiting the relief only to the unconstitutional applications will adequately protect the constitutional rights of the minors affected by the state statute.

Finally, respondents contend that a facial challenge to the parental notification statute is necessary because a trial court's decision regarding the constitutionality of the statute would not have *stare decisis* effect on future cases. Resp. Br. at 30. There can be little doubt, however, that any trial court ruling on the constitutionality of an abortion statute would be appealed. And there is no dispute that appellate court rulings have *stare decisis* effect that would inure to other similarly-situated individuals. *See, e.g., Perez v. Volvo Car Corp.*, 274 F.3d 303, 313 (1st Cir. 2001); *Horton v. Goose Creek Independent School Dist.*, 690 F.2d 470, 487 n.32 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983). As a practical matter, therefore, a remedy in an as-applied challenge would protect all similarly situated minors.

Because respondents' concerns about early access to court can be addressed through a pre-enforcement challenge to the Act as applied to emergency situations, there is no justification for departing from the *Salerno* standard in the abortion context. Respondents' facial challenge fails the *Salerno* test, or even a "large fraction" test, because the Act is not unconstitutional in all, or even a large fraction, of its applications.

C. Applying the *Salerno* standard would allow the Court to give effect to the intent of the New Hampshire Legislature.

Respondents seek to avoid the unprecedented nature of the rule they advocate by attempting to recast the issue as one of severability. This argument fails on its own terms. At bottom, it amounts to the remarkable proposition that, if given a choice, the New Hampshire Legislature would have preferred to have no notification statute at all to having a notification statute with an emergency

exception applicable in a small fraction of cases. This argument is utterly inconsistent with the severability clause contained within the Act, through which the legislature declared its intent that the statute should be enforced in all constitutional applications.

The severability clause states: "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 subdivisions are severable." N.H. REV. STAT. ANN. § 132:28 (emphasis added). By this language, the state legislature has declared that all valid applications of the statute must be given effect. This conclusion is buttressed by the Legislative Purpose and Findings, which state, in part, that "[t]he legislature . . . finds that parental consultation is usually desirable and in the best interest of the minor." 2003 N.H. Laws § 173:1, III (J.A. at 15). Thus, the state legislature has declared that in as many circumstances as possible a pregnant minor's parent should be notified about the decision to get an abortion. Limiting the scope of relief by granting only partial invalidation of the statute on an as-applied basis would give effect to this intent.

While respondents claim that the Act permits only the severance of unconstitutional provisions from the statute, Resp. Br. at 37, this is inconsistent with both the plain language of the statute and the legislative intent. Moreover, this Court has recognized that severability is not limited to simply excising specific provisions of the statute. Rather, where possible, this Court has limited the application of a statute to those situations in which the statute can operate constitutionally. *See, e.g.*, *Tennessee v. Garner*, 471 U.S. 1, 11 (1985); *Grace*, 461 U.S. at 179, 183; *Marsh v. Alabama*, 326 U.S. 501, 509 (1946).

In fact, in *Brockett v. Spokane Arcades, Inc.*, this Court pointed to a Washington severance clause similar to New Hampshire's as support for its holding that "[u]nless there are countervailing considerations, the Washington

law should have been invalidated *only insofar as the word 'lust' is to be understood as reaching protected materials*. . . ." 472 U.S. at 504 (emphasis added). By invalidating only the unconstitutional application of the statute, the Court noted that the law would still "validly reach the whole range of obscene publications." 472 U.S. at 505. This Court found that limiting the relief was consistent with the intent of the Washington legislature because the moral nuisance law contained a severability clause, which permitted the court to sever both unconstitutional *provisions* and unconstitutional *applications*. *Id.* at 506 & n.14. The Court concluded that "[i]n these circumstances, the issue of severability is no obstacle to *partial invalidation*, which is the course the Court of Appeals should have pursued." *Id.* (emphasis added).

Reviewing the Act on an as-applied basis would enable the court to limit relief – if any is necessary – to address only those unconstitutional applications. As in *Brockett*, "partial invalidation" of the parental notification statute on an as-applied basis would be consistent with the intent of the New Hampshire Legislature.

Contrary to respondents' contention, Resp. Br. at 34-37, granting relief on an as-applied basis would not require this Court to rewrite the Act in a way that would intrude on the province of the legislature. Rather, the relief granted would be a commonplace order prohibiting the unconstitutional applications of the statute found by the Court. Such relief would require only the application of the relevant constitutional rule (and not the drafting of a statutory exception, *see* Resp. Br. at 33), and would respect legislative prerogatives far more than invalidating on its face a statute that could constitutionally be applied in the vast run of cases. *See Steffel v. Thompson*, 415 U.S. 452, 474 (1974).

Finally, respondents and *amici* argue that severability of the applications is inappropriate because the New Hampshire Legislature purposely crafted the Act without an emergency exception knowing that it would be declared unconstitutional. Resp. Br. at 39; Brief of *Amici Curiae*

NARAL Pro-Choice America Foundation *et al.* at 7-8. The official legislative record directly contradicts respondents' position, and establishes that the legislature was conscious of its obligation to enact legislation that passed constitutional muster. *See* Report of the N.H. House Jud. Comm. on HB763-FN, *reprinted in* N.H. House Jour. 496-99 (Mar. 25, 2003) (hereinafter "House Jour."); Senate Debate on HB763-FN, *reprinted in* N.H. S. Jour. 831-62 (2003) (hereinafter "S. Jour."). In fact, Rep. Phyllis L. Woods, one of the sponsors of the legislation speaking on behalf of the House Judiciary Committee, recognized that this Court upheld an identical parental notification statute. *See* House Jour. at 496. Rep. Woods also noted that the bill contained a judicial bypass provision. *Id.* at 497. Indeed, the Senate ultimately defeated an effort to amend the bill to remove the judicial bypass provision. *Id.* at 860-61. Members of the Senate recognized that this Court has upheld the constitutionality of a parental notification statute with judicial bypass provision. *See* S. Jour. at 849-50. Thus, the legislative history supports the conclusion that the legislature wanted the statute to conform to constitutional mandates and to operate in as many applications as possible.

II. Even if this Court holds that *Salerno* does not apply to abortion regulations, New Hampshire's Act is facially constitutional.

There is no dispute that an abortion regulation may not be applied in a manner which "impose[s] significant health risks" on women. *Stenberg*, 530 U.S. at 931. The only issue in dispute is whether an abortion regulation must contain an explicit emergency health exception or whether New Hampshire's statutes can operate in a manner that protects a woman's life or health without an express health exception. This Court's case law does not provide that an express emergency health exception is the sole statutory mechanism for safeguarding the health of women seeking abortions. Because application of New Hampshire's law would not endanger the life or health of

any pregnant minor, no explicit emergency health exception is required.

A. There is no *per se* rule that parental notification provisions must contain emergency health exceptions.

This Court has never held that a parental notification provision must contain an emergency health exception. To the contrary, this Court has held "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*." *Casey*, 505 U.S. at 899 (emphasis added). New Hampshire's Parental Notification Act contains a judicial bypass procedure which adequately protects the health and life of minors in medical emergencies; therefore, the Act is constitutional.

Respondents rely on *Casey* for the proposition that "laws that require parental involvement and that create delay must contain an exception for emergencies in which a prompt abortion is necessary to preserve a woman's health." Resp. Br. 7-8. The issue presently before this Court, however, was not directly considered by the *Casey* Court. In *Casey*, the Commonwealth conceded below that its abortion regulations would be constitutionally deficient without a medical emergency exception. *Planned Parenthood of S. Pa. v. Casey*, 947 F.2d 682, 699 (3d Cir. 1991). Thus, the Court did not consider whether a medical emergency exception is always required in a parental involvement provision that allows for a judicial bypass since the parties did not dispute that issue. Rather, presuming that one *was* required, the Court considered whether the definition of medical emergency in that case was constitutionally sufficient. *Casey*, 505 U.S. at 879-80. *Casey* does not, therefore, stand for the proposition asserted by respondents that parental involvement laws that create any delay whatsoever require an express exception for medical emergencies.

Contrary to respondents' contention, Resp. Br. at 9-10, *Stenberg* does not impose a *per se* requirement that all abortion regulations must contain an explicit health exception

either. *Stenberg* is readily distinguishable from the Act here for two reasons. First, the Court pointed to the evidence and findings in that case, including "substantial medical authority" that established, in the context of that case, that Nebraska's statute, which imposed an absolute ban on D&X abortions, created "a significant health risk" in those situations where D&X abortion was the safest procedure available. *Stenberg*, 530 U.S. at 938. Second, because Nebraska's law imposed an absolute prohibition on D&X abortions, there was no other mechanism in the law to protect the woman's health in those situations where the procedure was medically necessary. In contrast, New Hampshire's Act does not impose a ban to a woman getting appropriate medical treatment. Moreover, the judicial bypass mechanism provides an alternative to accommodate the woman's health that was not available in *Stenberg*. *Cf. id.* ("By no means must a State grant physicians 'unfettered discretion' in their selection of abortion methods.").[3] Thus, as discussed, *infra*, even if medical emergency exceptions may be constitutionally required in some abortion regulations, they are only required when the regulation at issue creates significant health risks to women. *Id.* at 938; *Casey*, 505 U.S. at 880. New Hampshire's Act is not such a statute.

B. An emergency health exception is not required in the Act because it does not create significant health risks for women.

Contrary to respondents' assertions, the State has never conceded that its Act will operate to prevent doctors

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[3] For the same reason, respondents' reliance on *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), is unavailing. The statute at issue in *Thornburgh* did not contain a judicial bypass mechanism such as the one contained in New Hampshire's Act. Unlike the second physician requirement at issue in *Thornburgh* which contained no mechanism to ensure that an immediate abortion could be performed in an emergency, New Hampshire's Act permits a parent to waive the 48 hour waiting period or a physician to immediately contact a judge for permission to perform an abortion. New Hampshire's Act therefore causes no delay.

from providing appropriate treatment to minors in emergency situations. Resp. Br. at 14 n.8. Rather, the State has consistently taken the position that its Act ensures that an emergency abortion may be performed on a pregnant minor if necessary to preserve the woman's health. Specifically, the Act protects the health of a pregnant minor in a medical crisis by (1) mandating around-the-clock access to a judge, thereby ensuring that an emergency abortion may be performed if medically necessary, N.H. REV. STAT. ANN. § 132:26, II; and (2) permitting an immediate abortion in the event the woman or her doctor attempt with reasonable diligence to contact a parent to obtain a waiver of the 48 hour waiting period, but are unable to reach the parent, N.H. REV. STAT. ANN. § 132:26, I(b), § 132:27. And finally, in the unlikely event that a parent refuses to waive the 48 hour waiting period despite having been notified that his or her daughter is in medical crisis,[4] and/or the minor refuses to notify her parent and there is insufficient time to accomplish a judicial bypass, a doctor who performs an emergency abortion under such circumstances would not be subject to either criminal prosecution or civil liability because his or her conduct would not only be constitutionally protected, but would also be independently justifiable under State law. *See* N.H. REV. STAT. ANN. § 627:3, I; N.H. REV. STAT. ANN. § 627:1.

1. The judicial bypass allows for an immediate abortion in the case of a medical emergency.

Respondents criticize the operation of the judicial bypass procedures contained in the Act without any evidence of how the Act will operate. Because the District Court enjoined enforcement of the Act two days before its effective date, there is no evidence about the operation of

[4] Such refusal would arguably amount to neglect given the minor's need for immediate medical treatment. *See* N.H. REV. STAT. ANN. § 169-C:3, XIX, (b) (2002).

the judicial bypass procedure. On its face, the Act requires the court to "reach a decision promptly and *without delay* so as to serve the best interest of the pregnant minor." N.H. REV. STAT. ANN. § 132:26, II(b) (emphasis added). This express language in the statute directly undermines respondents' facial attack on the statute.

Despite this statutory mandate, respondents contend that the judicial bypass necessarily implies delay. Resp. Br. at 14. Respondents now try to take advantage of their own request for injunctive relief by making assumptions about how the Act would operate. Resp. Br. at 15-16. Respondents should not be allowed to benefit from the fact that, by enjoining the statute before it took effect, they prevented state officials from fulfilling their obligation to implement a system that protected the best interests of the minor. *See Bellotti v. Baird*, 443 U.S. 622, 645 n.25 (1979) (relying on state court's assurances that it would eliminate any undue burden in application of judicial bypass procedure by promulgating appropriate rules or issuing orders); *see also Thornburgh*, 476 U.S. at 833 (O'Connor, J., dissenting). This Court should not strike down the entire parental notification statute on its face without giving the state officials an opportunity to provide prompt access to the courts. The New Hampshire Supreme Court may develop protocols[5] which give access to judges' home phone numbers to hospital emergency rooms and to medical providers who perform abortions so that there is no delay in locating a judge in order to obtain immediate approval for an emergency abortion.[6]

[5] It is the State's understanding that the Supreme Court was in the process of developing protocols and was close to finalizing them before the Act was declared unconstitutional by the United States District Court for the District of New Hampshire two days before the Act's effective date.

[6] ACOG, an *amicus* in support of respondents, also claims that the judicial bypass provisions in the Act will not work without citing any evidence. In Minnesota, an identical judicial bypass provision has been in operation for fifteen years, and there is no evidence that any woman has been harmed because of the operation of that provision.

Respondents also argue that the Act causes delay because it requires a judge to "make in writing specific factual findings and legal conclusions supporting the decision." NH REV. STAT. ANN. § 132:26, II(b). This contention is also unavailing. There is nothing in the Act to prevent a judge from making an immediate ruling and then later issuing written findings and legal conclusions supporting his or her decision. *See* 49 C.J.S. *Judgments* § 108 (2005) (recognizing that judgment is effective when pronounced orally, even though court order may later be reduced to writing).[7]

The affidavit of Dr. Goldner says nothing about the operation of judicial proceedings under the Act, nor could it because he has had no experience with it. Absent any evidence, it must be assumed that protocols and procedures can be put in place "so that the court may reach a decision promptly and without delay so as to serve the best interest of the pregnant minor." N.H. REV. STAT. ANN. § 132:26, II(b). Indeed, Justice Stevens recognized the importance of evaluating a parental notification statute in light of its actual implementation in *Akron II*:

> The question in this case is whether that statutory protection for the exceptional case is so obviously inadequate that the entire statute should be invalidated. I am not willing to reach that conclusion before the statute has been implemented and the significance of its restrictions evaluated in the light of its administration.

[7] Respondents also claim that delay ensues in finding a lawyer. Resp. Br. at 15. Nothing in the Act requires a minor be appointed with a lawyer before the court can grant an emergency request for an immediate abortion. Moreover, the declaration of Jaime Ann Sabino, Esq., states that in Massachusetts organizations came together to devise a system for educating clinics and minors about the bypass process and for assisting young women with that process. A lawyer's panel was developed to assist expectant young mothers seeking judicial bypass. (J.A. at 37-38). It is reasonable to assume that the procedure would operate in a similar manner in New Hampshire.

Ohio v. Akron Ctr. for Reproductive Health, Inc., 497 U.S. 502, 521 (Stevens, J., concurring).

Because respondents cannot show that the judicial bypass provisions of the Act are inadequate to preserve the health of the pregnant minor, the Act is constitutional.

2. In the event that a minor or her doctor attempt to contact a parent and are unable to do so, the Act permits the doctor to immediately perform an emergency abortion.

A judicial bypass is only necessary if a minor "elects not to allow the notification of her parent. . . ." N.H. REV. STAT. ANN. § 132:26, II. Unless a minor in a medical emergency insists that her parents not be contacted, a doctor can simply request a parent to waive the 48 hour waiting period. *See* N.H. REV. STAT. ANN. § 132:26, I(b).[8] If the doctor is unable to immediately contact the parent, he would not be liable for performing a medically necessary emergency abortion because he or she "attempted with reasonable diligence to deliver notice, but [was] unable to do so." N.H. REV. STAT. ANN. § 132:27.

3. The State's competing harms defense protects the doctor who performs the emergency abortion from both civil and criminal liability.

Because the state officials were not given an opportunity to implement the judicial bypass mechanism, this

[8] N.H. REV. STAT. ANN. § 132:26, I(b) does not specify when the written certification must be made; therefore, the provision can reasonably be construed to allow a parent to orally agree to waive the 48 hour waiting period in an emergency situation, with the written certification occurring after the abortion has occurred. *Planned Parenthood Assn. of Kansas, Missouri, Inc. v. Ashcroft*, 462 U.S. 476, 493 (1983) ("Where fairly possible, courts should construe a statute to avoid a danger of unconstitutionality.").

Court must make an assumption that there is some set of circumstances in which the judicial bypass could not be utilized in a timely manner before the Court could strike down the parental notification statute. In order for this hypothetical worst-case scenario to arise, the following must occur: (1) the minor experiences one of a limited number of serious medical conditions which require an immediate abortion; (2) the condition is so severe as to require an immediate abortion to avoid the risk of severe and permanent damage to the minor's health, yet is not so severe as to be life-threatening; (3) the minor either does not wish to notify her parents, or her parents refuse to waive the 48 hour waiting period despite knowing that such a delay will cause severe and permanent damage to their daughter's health; and (4) the minor, or a physician on her behalf, is unable to obtain an immediate judicial bypass, despite the Act's mandate that the court be accessible "24 hours a day, 7 days a week" and that the court "reach a decision promptly and without delay so as to serve the best interest of the pregnant minor." N.H. REV. STAT. ANN. § 132:26, II(b). Faced with the above hypothetical situation, no competent doctor would hesitate to perform an immediate abortion on a minor in such a medical crisis because the doctor's actions would be completely justified under New Hampshire's competing harms defense.[9]

[9] Respondents contend that the State has abandoned its argument that other provisions of New Hampshire law may be considered in evaluating the constitutionality of the Act. Resp. Br. at 13 n.8. To the contrary, the State argued in its initial brief to this Court that the judicial bypass mechanism acts to preserve the health of minors in *all* situations, including medical emergencies. In their brief, respondents argue that there is insufficient time for a minor or her doctor to accomplish a judicial bypass in a medical emergency. This argument is based entirely on a hypothetical situation, unsupported by any facts in the record. If this Court entertains this concern, the Court must also consider the existing New Hampshire law, including the competing harms defense, because state law addresses respondents' concern.

New Hampshire law ensures complete protection from both civil and criminal liability through its competing harms defense. N.H. REV. STAT. ANN. § 627:3, I, provides, in part,

> Conduct which the actor believes to be necessary to avoid harm to himself or another is justifiable if the desirability and urgency of avoiding such harm outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the statute defining the offense charged. . . .

See also N.H. REV. STAT. ANN. § 627:1 (justification constitutes a complete defense to any civil action based on the justifiable conduct). The New Hampshire Supreme Court has summarized the requirements for the availability of a competing harms defense as follows:

> [First], [t]he otherwise illegal conduct must be urgently necessary, [second] there must be no lawful alternative, and [third] the harm sought to be avoided must outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the violated statute.

State v. L'Heureux, 846 A.2d 1193, 1196 (N.H. 2004) (quoting *State v. O'Brien*, 567 A.2d 582, 584 (N.H. 1989)); *see also id.* at 1197. Once a doctor claims his actions were justified based on the emergent situation, the State has the burden to prove beyond a reasonable doubt that the doctor's actions were not justified. *See id.* at 1196-97; *see also Simopoulos v. Virginia*, 462 U.S. 506, 510 (1983). A doctor who performed an emergency abortion in the circumstances outlined above would be justified under the competing harms defense.[10] *Cf. Thornburgh*, 476 U.S. at

[10] Unlike the Nebraska Attorney General in *Stenberg*, 530 U.S. at 940-41, in New Hampshire the Attorney General's opinion that N.H. REV. STAT. ANN. § 627:3, I, precludes prosecution of doctors who perform emergency abortions under circumstances where there is insufficient time to either notify a parent or accomplish a judicial bypass and an immediate abortion is necessary to preserve a pregnant minor's health, controls all prosecutions in the state and cannot be disregarded by individual county attorneys. *See Wyman v. Danais*, 147 A.2d 116, 118 (N.H. 1958); *Eames v. Rudman*, 333 A.2d 157, 158 (N.H.

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812 n.8 (White, J., dissenting) (noting that Pennsylvania's general justification statute would provide a defense to noncompliance with the second-physician rule where an abortion was necessary to save the life of the pregnant woman).

The First Circuit rejected this argument based on a clearly erroneous ruling of law. Although the First Circuit recognized that the State's competing harms statute "has the potential to protect against criminal liability under the Act," it incorrectly held that the statute "cannot preclude civil liability." *Planned Parenthood of Northern New England v. Heed*, 390 F.3d 53, 61 (1st Cir. 2004). To the contrary, N.H. REV. STAT. ANN. § 627:1 makes clear that conduct which is justifiable under the competing harms statute "constitute[s] a complete defense to any civil action based on such conduct." *Id.*; *see also In re Fasi*, 567 A.2d 178, 181 (N.H. 1989). The First Circuit should have concluded that the availability of the competing harms defense sufficiently counters any chilling effect the Act could possibly have on doctors in the worst-case hypothetical scenario where an emergency abortion is necessary and there is insufficient time to notify a parent or accomplish a judicial bypass. Because justification is a complete defense which relieves the doctor of any criminal or civil liability, the Act puts no woman's health at risk and no doctor in jeopardy under the penalty provision.[11]

1975). Moreover, a doctor is entitled to rely on the Attorney General's interpretation of the law. *See* N.H. REV. STAT. ANN. § 626:3, II (1996).

[11] The First Circuit's further concern that "the provision would leave providers uncertain whether, in any given circumstance, providing an abortion in violation of the Act would meet the 'ordinary standards of reasonableness'" is misplaced. For the same reasons discussed below in the context of the death exception, *see infra* Section III, there is no ambiguity when a doctor is required to determine whether his or her actions were necessary to protect the health of the minor.

III. The requirement that a doctor certify that the abortion is necessary to prevent the minor's death is not unconstitutionally vague.

Respondents' contention that use of the word "necessary" in the death provision of the Act is vague and fails to safeguard the abortion provider's good-faith judgment is without merit as this argument has previously been resolved by this Court. *See Doe v. Bolton*, 410 U.S. at 191 (stating that the vagueness argument concerning meaning of the word "necessary" is set at rest by the decision in *United States v. Vuitch*, 402 U.S. 62, 71-72 (1971)). In the abortion context, concerning preservation of the mother's life or health, "doctors are encouraged by society's expectations, by the strictures of malpractice law and by their own professional standards to give their patients such treatment as is necessary to preserve their health." *Vuitch*, 402 U.S. at 71. "[W]hether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered." *Id.* at 72; *see also Francoeur v. Piper*, 776 A.2d 1270, 1275 (N.H. 2001). "Necessary . . . cannot refer to an absolute necessity or to absolute proof," but rather whether the procedure is necessary, in appropriate medical judgment. *Stenberg*, 530 U.S. at 937. "'[A]ppropriate medical judgment' must embody the judicial need to tolerate responsible differences of medical opinion. . . ." *Id.* (quoting *Casey*, 505 U.S. at 879). Use of the word "necessary" in the death provision of the Act, without further modification, plainly provides a sufficiently clear standard for New Hampshire abortion providers to follow that accounts for their good faith professional judgment. Therefore, the provision's commands are clear and discretion broad. *See Colautti v. Franklin*, 439 U.S. 379, 393-94 (1979).

Respondents cite to *Colautti* for the proposition that "the word 'necessary' suggests that a particular technique must be indispensable to the woman's life or health – not merely desirable – before it may be adopted." Resp. Br. at 47 n.33 (quoting *Colautti,* 439 U.S. at 400, but omitting "In this

context . . . " at the start of the quotation). Respondents rely on this quote to support their contention, improperly adopted by the First Circuit, *see Heed*, 390 F.3d at 63 n.7, that the word "necessary" in the New Hampshire statute is narrow and has a limiting effect on a physician's choices. Respondents' reliance is misplaced as a full reading of *Colautti* demonstrates that the Court's concern regarding the word "necessary" was explicitly limited to the context of its use as a limitation in the standard of care provision of the Pennsylvania viability statute at issue. *See Colautti*, 439 U.S. at 393-94 ("[T]he viability-determination requirement . . . is readily distinguishable from the requirement that an abortion must be 'necessary for the preservation of the mother's life or health,' upheld against a vagueness challenge in *United States v. Vuitch*. . . .").

Similarly, respondents' argument that the Act is drawn too narrowly because of the perceived concern that abortion providers would gamble with their patients' lives in hopes of complying with the notice requirement before death becomes inevitable is misplaced. Nowhere is it required that the provider must determine that death has become "inevitable." Rather, the provider must determine whether the procedure is necessary, in his or her appropriate medical judgment, to prevent the death of the minor prior to the running of the Act's notice requirement. This is the type of judgment a physician is called upon to make routinely and is in no way a call to gamble with the patient's life. *See Vuitch,* 402 U.S. at 71. The existence of this clearly constitutional interpretation, based on the words of the Act and this Court's prior rulings, precludes a finding that the Act is unconstitutional merely because an alternative interpretation is possible. *See Frisby v. Schultz,* 487 U.S. 474, 483 (1988).

IV. Respondents are not entitled to remand on the issue of whether the statute protects a minor's right to confidentiality.

Finally, respondents argue that if this Court reverses the First Circuit decision, they are entitled to a remand on

the issue of whether the statute protects a minor's right to confidentiality. Resp. Br. at 49. Respondents' request must be denied because, on its face, the Act plainly requires that "[p]roceedings in the court under this section shall be confidential. . . ." N.H. REV. STAT. ANN. § 132:26, II(b); *see also id.* § 132:26, II(c) (requiring that "[a]n expedited confidential appeal" be available to the minor). They cannot challenge the application of those provisions without giving the state officials an opportunity to implement a system to protect the minor's right to confidentiality. *See Bellotti*, 443 U.S. at 645 n.25. Thus, their facial challenge based on the confidentiality provision is not ripe for adjudication. *See Thomas v. Union Carbide Agric. Product Co.*, 473 U.S. 568, 580-81 (1985).

CONCLUSION

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

Respectfully submitted,

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