No. 04-1144

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 PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the First Circuit Court of Appeals correctly held that the New Hampshire Parental Notification Prior to Abortion Act, N.H. Rev. Stat. Ann. § 132:24-28 (2003), which criminalizes providing an abortion to a minor without written notice to a parent or guardian, is unconstitutional because it lacks an exception for the preservation of a pregnant minor's health.

2. Whether the First Circuit Court of Appeals correctly held that neither a judicial bypass nor other existing New Hampshire state laws serve as an adequate substitute for a health exception.

STATEMENT PURSUANT TO RULE 29.6

Respondent Planned Parenthood of Northern New England does not have a parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Respondent Concord Feminist Health Center does not have a parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Respondent Feminist Health Center of Portsmouth does not have a parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Respondent Wayne Goldner, M.D., is an individual.

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STATEMENT OF THE CASE

A. Facts

In June 2003, the New Hampshire Legislature passed the Parental Notification Prior to Abortion Act (the "Act"). N.H. Rev. Stat. Ann. ("RSA") 132:24-28 (2003). The Act prohibits performance of an abortion upon an unemancipated minor unless the physician or his or her agent provides at least forty-eight hours advance notice of the abortion to one of the minor's parents. RSA 132:25, I. The forty-eight hour notice period begins to run from the time of delivery of the notice. Notice may be delivered in person to the parent's residence or by certified mail. If sent by certified mail, the

notice is deemed delivered at noon on the next day on which regular mail delivery takes place subsequent to mailing. RSA 132:25, II & III. These requirements may be dispensed with if the parent certifies in writing that he or she has been notified. RSA 132:26, I(b).

In lieu of parental notification, a minor may petition a court of competent jurisdiction for a waiver of the notice requirement. The court must grant the waiver if it finds that the minor is mature and capable of giving informed consent to the abortion, or the performance of an abortion without parental notification is in the minor's best interests. RSA 132:26, II. The trial court has seven calendar days to rule on the minor's petition. RSA 132:26, II(b). A minor may appeal an adverse decision. After the appeal is docketed, the appellate court has another seven days to rule on the appeal. RSA 132:26, II(c).

The Act states that "[p]roceedings in the court under this section shall be confidential," and a "confidential appeal shall be available," but no specific procedures are set forth in the statute to effectuate this right of confidentiality. RSA 132:26, II(b), (c).

For minors facing medical emergencies, a physician may dispense with the Act's requirements of notice and delay only when the attending physician can "certif[y] . . . that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice." RSA 132:26, I(a). The Act lacks any exception for medical emergencies short of imminent death.

Violation of the Act is a misdemeanor and grounds for a civil action by a person wrongfully denied notification. RSA 132:27.

The uncontested declaration of Wayne Goldner, M.D., explained that delays caused by the Act could endanger the health of pregnant minors.

B. Proceedings Below

On November 17, 2003, Planned Parenthood of Northern New England, Concord Feminist Health Center, Feminist Health Center of Portsmouth and Wayne Goldner, M.D., filed a complaint in the United States District Court for the District of New Hampshire seeking a declaratory judgment that the Act was unconstitutional and an injunction to prevent its enforcement once it became effective on December 31, 2003. Plaintiffs asserted that the Act was unconstitutional because it lacks a health exception to the parental notification requirement. Plaintiffs also contended that the Act's exception to prevent death was unconstitutionally narrow and that the confidentiality provisions for the judicial bypass proceedings were constitutionally deficient.

The district court declared the Act unconstitutional on its face and enjoined its enforcement. *See* Pet. App. 25a. The district court found that it is undisputed that pregnant minors subject to the Act could suffer medical conditions requiring an immediate abortion to protect their health. *See* Pet. App. 49a n.4, 51. It then ruled that without a health exception to protect these minors, the Act was unconstitutional. *See* Pet. App. 38a. It also held that the Act was unconstitutional because its death exception was too narrow. *See* Pet. App. 35a-36a. Although the district court found that the Act's confidentiality provisions raised constitutional questions, it declined to rule on their validity in view of the fact that it held the Act otherwise unconstitutional. *See* Pet. App. 37a-38a.

The court of appeals affirmed. Citing *Stenberg v. Carhart*, 530 U.S. 914, 929-30 (2000), it held that the Supreme Court has identified "a specific and independent constitutional requirement that an abortion regulation must contain an exception for the preservation of a pregnant woman's health." Pet. App. 9a. The First Circuit emphasized that under *Stenberg* this requirement is in addition to and independent of the constitutional requirement

that an abortion regulation not impose an undue burden on a woman's right to terminate her pregnancy. *See* Pet. App. 9a-10a. The First Circuit expressly rejected Petitioner's claims that the judicial bypass procedure or other provisions of New Hampshire law could serve as the functional equivalent of an explicit health exception. *See* Pet. App. 16a-17a. The court of appeals also found that the Act was constitutionally infirm because its death exception was too narrowly drawn. *See* Pet. App. 17a-21a. Finally, like the district court, the court of appeals held it was not necessary to evaluate the adequacy of the Act's confidentiality provisions because it had "already found the Act in its entirety unconstitutional on other grounds." Pet. App. 22a.

REASONS FOR DENYING THE WRIT

A. The First Circuit's Determination That the Act Unconstitutionally Fails to Provide a Health Exception is Squarely in Line With This Court's Jurisprudence and Other Circuit Court Decisions.

Review is not warranted on the question of what standard applies in determining whether an abortion restriction requires a health exception because this Court has directly addressed the issue and there is no conflict among the circuits. Petitioner claims there is a circuit split regarding whether the "large fraction" test established in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), has replaced the "no set of circumstances" standard from *United States v. Salerno*, 481 U.S. 739 (1987), in facial challenges to abortion regulations. *See* Pet. Br. at 10-11. In fact, neither standard applies to the issue in this case: whether an abortion restriction requires a health exception. Under this Court's decisions, a health exception is an independent constitutional requirement in abortion regulations, and all appeals courts to have addressed the issue agree that a health exception is the *sine qua non* of validity for parental involvement laws.

1. This Court's precedent makes clear that an abortion regulation that lacks an exception to preserve the health of the pregnant woman is unconstitutional.

This Court's decisions required the First Circuit to conclude that the Act was invalid because it lacked an exception to preserve the health of the pregnant woman. In an unbroken line of cases running from *Roe v. Wade* to *Planned Parenthood v. Casey* to *Stenberg v. Carhart*, this Court has consistently held that laws that restrict access to abortion are unconstitutional unless they contain adequate exceptions to protect women's health and lives. *Roe v. Wade*, 410 U.S. 113, 164-65 (1973); *Casey*, 505 U.S. at 846, 879-80; *Stenberg*, 530 U.S. at 931.

In addition to recognizing that the Constitution guarantees women the right to abortion prior to fetal viability, 410 U.S. at 153, 163-64, *Roe v. Wade* held that even post-viability abortion bans must contain a health exception, *id.* at 164-65.

In *Casey*, this Court held that Pennsylvania's abortion restrictions – which included a parental consent requirement – would have been unconstitutional without an adequate health exception since "the essential holding of *Roe* forbids a State to interfere with a woman's choice to undergo an abortion . . . if continuing her pregnancy would constitute a threat to her health." *Casey*, 505 U.S. at 880.

Just four years ago, this Court reaffirmed that, to pass constitutional muster, abortion regulations must contain a health exception. *Stenberg*, 530 U.S. at 930 (holding that because "the law requires a health exception . . . to validate even a postviability abortion regulation, it at a minimum requires the same in respect to [a] previability regulation"). In *Stenberg*, this Court held that a Nebraska law that prohibited certain methods of abortion except where necessary to save the woman's life was unconstitutional because it "lack[ed] any exception for the preservation of the

. . . health of the mother." *Id.* (internal quotations and citation omitted).[1]

Furthermore, *Stenberg* made clear that the health exception requirement is separate and independent from the requirement that regulations not impose an undue burden on a woman's right to terminate her pregnancy. In striking down the Nebraska law, this Court found it was unconstitutional "for at least two *independent* reasons. First, the law lacks any exception for the preservation of the . . . health of the mother. Second, it imposes an undue burden . . . ." (emphasis added) (internal quotations and citations omitted); *see also Stenberg*, 530 U.S. at 947-48 (O'Connor, J., concurring) ("First, the Nebraska statute is inconsistent with *Casey* because it lacks an exception . . . to preserve the health of the mother. . . . Second, Nebraska's statute is unconstitutional on the alternate and independent ground that it imposes an undue burden . . . .").[2] Consequently, there is no need to address whether the "undue burden" for a "large fraction" of affected women test established in *Casey* has replaced the "no set of circumstances" standard from *Salerno*.

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[1] *Hodgson v. Minnesota*, 497 U.S. 417 (1990), upheld a parental notification statute with no health exception, but as the First Circuit correctly observed, the necessity of a health exception was not before the Court. *See* Pet. App. 13a n.6. Both *Casey* and *Stenberg*, cases decided after *Hodgson*, have unequivocally established the need for a health exception.

[2] *Stenberg* also makes clear that a health exception is constitutionally required regardless of the state's interest underlying an abortion regulation. As the First Circuit explained, "[i]n considering an abortion regulation based on interests other than the one identified in *Roe*, . . . the Supreme Court has determined that it 'cannot see how the interest-related differences could make any difference to the . . . application of the 'health' requirement.' *Stenberg*, 530 U.S. at 931. . . . Thus, regardless of the interests served by New Hampshire's parental notice statute, it does not escape the Constitution's requirement of a health exception." Pet. App. 12a.

2. There is no circuit split regarding the necessity of a health exception in parental involvement laws.

Since *Stenberg*, two circuit courts in addition to the First Circuit have applied the health exception requirement to parental involvement laws. Both struck down parental involvement laws because they lacked an adequate exception to protect the health of the pregnant minor. As no court of appeals after *Casey* or *Stenberg* has upheld a parental involvement law without a health exception, there is no split in the circuit courts regarding the necessity of a health exception.

The Tenth Circuit reviewed the constitutionality of a Colorado parental notice law. Like the New Hampshire Act, the Colorado law contained an exception for circumstances where an abortion was necessary to prevent death, but no exception for circumstances where a minor needs a prompt abortion to preserve her health. *See Planned Parenthood v. Owens*, 287 F.3d 910 (10th Cir. 2002). The Tenth Circuit held that the law was "unconstitutional because it fail[ed] to provide a health exception as required by the Constitution of the United States." *Id.* at 927.

The Ninth Circuit reviewed an Idaho parental consent law with a limited health exception. In finding the statute's exception unconstitutionally narrow, the Ninth Circuit held that "[a] health exception is as requisite in statutory or regulatory provisions affecting only minors' access to abortion as it is in regulations concerning adult women." *Planned Parenthood v. Wasden*, 376 F.3d 908, 923 (9th Cir. 2004), *cert. denied*, 73 U.S.L.W. 3338 (U.S. Mar. 28, 2005) (No. 04-703); *see also id.* at 922 ("An adequate health exception . . . is a *per se* constitutional requirement."); *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 203 (6th Cir. 1997) ("any abortion regulation that might delay an abortion must contain a valid medical emergency exception").

3. A judicial bypass procedure does not save the Act from the lack of a constitutionally required health exception.

Although Petitioner claims that the judicial bypass provision of the Act obviates the need for a health exception, *see* Pet. Br. at 11-12, this Court's decision in *Casey* forecloses such a conclusion. And because no appeals court – or indeed any court – has upheld a judicial bypass as a stand-in for a health exception, there is no circuit split on this issue.

In *Casey*, this Court considered the constitutionality of a Pennsylvania law that required minors to obtain parental consent or a judicial bypass and required all women to delay their abortions for twenty-four hours after receiving state-mandated information. In evaluating Plaintiffs' claim that the health exception in the Pennsylvania statute was too narrow, this Court held that a health exception that "foreclose[d] the possibility of an immediate abortion despite some significant health risks" would be unconstitutional. *Casey*, 505 U.S. at 879. Yet this is exactly what may happen under a judicial bypass procedure. The courts below held that some minors may suffer significant health risks without a prompt abortion. The Act, however, allows courts seven calendar days to rule on a minor's petition, and another seven days after docketing to rule on an appeal. As the First Circuit correctly held in finding a bypass to be an insufficient substitute, "[e]ven when the courts act as expeditiously as possible, those minors who need an immediate abortion to protect their health are at risk." Pet. App. 17a. No post-*Casey* appeals court has ever disagreed. Thus, a bypass procedure cannot save the Act from the lack of a constitutionally required health exception, and there is no need to review the First Circuit's decision to this effect.[3]

[3] Petitioners also claim that the judicial bypass procedure makes the death exception constitutional. *See* Pet. Br. at 12. But for the same reasons

B. The Question of Whether New Hampshire Statutes RSA 153-A:18, RSA 676:6, VII(b) and RSA 627:3 Provide a Functional Equivalent of a Health Exception Is Not Constitutionally Important.

Nor is there any need for this Court to decide whether a statute regulating abortion must contain an explicit health exception or whether the Constitution may be satisfied by reading in a health exception from other provisions of state law. Contrary to Petitioner's suggestion, *see* Pet. Br. at 11, this question was not reached by the First Circuit. The First Circuit assumed that the health exception need not be included in the parental notification statute itself. It then held that the New Hampshire statutes proffered by Petitioner did not create an adequate health exception,[4] and that in any case under New Hampshire rules of statutory construction they could not be read into the parental notification law. This ruling does not present important constitutional issues.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

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discussed above, the bypass procedure can no more save the death exception than it can the health exception.

[4] These statutes are RSA 153-A:18, RSA 676:6, VII(b) and RSA 627:3.

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