THE PEW FORUM ON RELIGION & PUBLIC LIFE

The Supreme Court Returns to the Abortion Debate

Ayotte v. Planned Parenthood of Northern New England

On November 30, 2005, the U.S. Supreme Court will hear oral argument in *Ayotte v. Planned Parenthood of Northern New England,* a case that challenges New Hampshire's Parental Notification Prior to Abortion Act. *Ayotte* is the first abortion case the court has taken up in five years, and it is the first such case that the new chief justice, John G. Roberts Jr., will hear.

Under the act in question, an abortion cannot be performed on a minor or a woman for whom a guardian or conservator has been appointed until at least 48 hours after written notice has been delivered to at least one parent or guardian. However, a judge can waive the notification requirement under certain circumstances, including if the attending abortion provider certifies that terminating the pregnancy is necessary to prevent the woman's death and there has not been sufficient time to provide the required notification (the so-called "death exception").

Planned Parenthood of New England and several other abortion providers challenged the New Hampshire law on the grounds that it does not include an explicit waiver that would allow an abortion to be performed to protect the *health* of the woman. The respondents also argued that the act's death exception is too narrowly drafted and could leave physicians confused about their legal responsibilities in cases where a woman might die before abortion providers had a chance to comply with the provision.

New Hampshire Attorney General Kelly Ayotte maintains that the act's judicial bypass procedure and other state statutes sufficiently protect the health of the minor. The Supreme Court will review this and other arguments, and consider whether the U.S. Court of Appeals for the First Circuit applied the correct standard of review when it ruled the statute unconstitutional in 2004.

THE FORUM IS A PROJECT OF THE PEW RESEARCH CENTER

NOVEMBER 2005

LEGAL BACKGROUNDER

A History of the Abortion Debate

Reproductive issues were largely a private affair early in American history. Although abortion was deemed illegal under English common law, the state rarely took any interest in prosecuting those cases that became public.

Public attitudes changed dramatically in the early 19th century, driven in part by new social trends sweeping the nation. Early American feminists and others began to argue that women should have control over their reproductive lives, bringing such issues as birth control and abortion into the public arena for the first time.

As the subject of abortion gained public attention, it became increasingly acceptable for doctors, midwives and others to publicly advertise their services for helping to end unwanted pregnancies. Powders, herbs and other substances meant to induce miscarriage became widely available. But at a time when the medical profession and the drug industry were relatively primitive and largely unregulated, many women who sought abortions were harmed or even killed in the process.

In 1821, Connecticut became the first state to criminalize abortion, followed by New York seven years later. These and subsequent laws passed by other states targeted those who performed abortions rather than the pregnant women who sought to have them. The aim was to protect pregnant women (and their fetuses) from injury, not to prosecute them.

By the beginning of the 20th century, most states had outlawed abortion, except in cases when a woman's life was in danger. Although a few states enacted more liberal laws, allowing for exceptions when a woman's life or health was in danger, it was not always clear what health concerns would justify an abortion.

Despite the near universal prohibition on abortion, social forces were pushing the country toward greater political and sexual freedom for women. The increasingly vocal and influential women's suffrage movement (which succeeded in securing the vote for women in 1920) strengthened efforts to encourage the widespread availability of birth control and fostered new notions of sexuality that emphasized its pleasurable nature. Moreover, as American society was becoming more urban and affluent, men and women were opting for smaller families.

By the mid- to late 1960s, the nation was undergoing a sexual revolution, and a new women's liberation movement was gathering steam. For movement leaders, the right to an abortion was a key demand, on par with equality in the workplace, in marriage and in other areas of society. In 1967, Colorado became the first state to greatly broaden the circumstances under which a woman could legally receive an abortion. By 1970, 11 additional states, including California and Massachusetts, had made similar changes to their criminal codes and another four states — New York, Washington, Hawaii and Alaska — had completely decriminalized abortion during the early stages of pregnancy.

Meanwhile, abortion rights advocates launched a series of court challenges to many older state laws, usually arguing that they were overly vague or that they violated the right to privacy or equal protection guaranteed under the Constitution. These early challenges were largely rejected by state and lower federal courts.

Roe v. Wade

In the early 1970s, the Supreme Court agreed to hear two abortion cases. In *Roe v. Wade*, the Court considered a challenge to a Texas law

outlawing abortion in all cases except those in which the life of the mother was at risk. The second case, *Doe v. Bolton*, focused on a more lenient Georgia law that allowed a woman to terminate her pregnancy in cases when either her life or health was in danger. In both cases, lower federal courts had declared the statutes unconstitutional, ruling that denying a woman the right to decide whether to carry a pregnancy to term violated basic privacy and liberty interests contained in the Constitution.

In a pair of companion 1973 decisions, the Supreme Court, by a vote of 7-2, affirmed the lower courts' conclusions and struck down both statutes. In *Roe*, the more important of the two decisions, the Court majority concluded that constitutional rights to privacy and liberty did indeed protect a woman's right to terminate her pregnancy. Writing for the majority, Justice Harry Blackmun acknowledged that while "the Constitution does not explicitly mention any right to privacy," a number of prior decisions have found "a guarantee of certain areas or zones of privacy." He added that this guarantee is grounded in several amendments in the Bill of Rights (the First, Fourth, Fifth and Ninth) and in the 14th Amendment's guarantee of liberty, which, taken together, create these zones of privacy in areas such as marriage, contraception, family relationships and child rearing.

Blackmun's privacy rationale in *Roe* grew out of earlier high court decisions, most notably *Griswold v. Connecticut* in 1965. In *Griswold*, Justice William Douglas, writing for the majority, struck down a Connecticut anti-contraception law on the grounds that it intruded on the right of marital privacy. The court asserted that "zones" of personal privacy are fundamental to the concept of liberty under "the protected penumbra of specific guarantees of the Bill of Rights."

Having concluded in *Roe* that abortion is a fundamental right, the Court declared that only a "compelling state interest" could justify the enactment of state laws or regulations that limited this right. Still, the court also recognized that the state had an "important and legitimate interest" in protecting the health of the mother and even "the potentiality of human life" inside her. So when did the state's legitimate concern for maternal and fetal protection rise to the level of a compelling interest?

To answer that question, Blackmun created a legal framework based on the nine-month period of pregnancy, breaking it into three distinct tiers and giving the state greater interest and regulatory latitude in each successive one. The first tier ran through the first trimester of a pregnancy. Given that during the first three months the risks associated with abortion are actually lower than those associated with childbirth, the state would have no real interest in limiting the procedure in order to protect a woman's health, Blackmun ruled. During this period, the state could only impose basic health safeguards — such as requiring that the procedure be performed by qualified health professionals — and could in no way limit access to abortion.

The second tier ran from the end of the first trimester to the point of fetal viability — between about 24 and 28 weeks. Here, Blackmun determined, the state has an interest in protecting maternal health. It can regulate abortion in furtherance of that interest, but only to protect the health of the mother. In other words, regulations enacted had to be directed toward ensuring maternal health and could not be aimed at protecting a fetus or limiting access to abortion services. So, for example, a state law requiring a doctor to receive a woman's informed consent before performing an abortion would

be constitutional as long as the requirement aimed to protect maternal health (describing the procedure and risks, etc.) and was not created to dissuade a woman from terminating her pregnancy.

The third tier encompassed the period after fetal viability, which was defined as that time when the fetus can survive outside the womb, either naturally or through artificial means. At this point, the majority wrote, the state had an interest in protecting "potential life." Indeed, after viability, the state could even proscribe abortion, as long as the procedure was still allowed in cases when the life or health of the mother was at risk.

In *Doe*, the same seven-justice majority largely restated and fleshed out their ruling in *Roe*. Once again writing for the majority, Justice Blackmun determined that state regulations that could create procedural obstacles to abortion — such as requirements in this particular case that abortions be performed in hospitals or that they be approved by two doctors — violated a woman's fundamental right to terminate her pregnancy.

The Post-*Roe* Court

Roe proved to be one of the most significant decisions ever handed down by the Supreme Court, perhaps rivaled in the 20th century only by the landmark 1954 school desegregation case, *Brown v. Board of Education*. But unlike *Brown*, however, *Roe* has remained controversial in the decades since it was decided.

In the years immediately following *Roe*, the Supreme Court grappled with a host of issues that naturally arose from the decision, including questions concerning informed consent, parental-consent and spousal-consent requirements, as well as notification requirements and waiting periods. In these early cases, the Court generally struck down most laws regulating abortion and upheld only a few that, in the Court's view, did not significantly limit a woman's right to terminate her pregnancy. In these cases, the Court also affirmed *Roe* and its trimester-based framework.

The first small crack in *Roe* jurisprudence came in 1989, with the high court's decision in *Webster v. Reproductive Health Services*. At issue was a Missouri statute that barred public facilities from being used to conduct abortions and prohibited public health workers from performing abortions unless the life of the mother was at risk. The measure also defined life as beginning at conception and directed physicians to perform fetal viability tests on women seeking abortions who were 20 or more weeks pregnant.

In a highly fractured 5-4 decision, the Court upheld the constitutionality of the statute. Writing for the majority, Chief Justice William Rehnquist said the law's declaration that life begins at conception did not contradict *Roe* because it was contained in the statute's preamble, and thus had no real impact on access to abortion. The majority also held that prohibiting the use of government workers or facilities to perform abortions was acceptable because the right to an abortion established in *Roe* did not include an affirmative right to government assistance in obtaining one.

The majority also ruled that the requirement of viability testing at 20 weeks was constitutional, although for disparate reasons. Justice Rehnquist, joined by Justices Byron White and Anthony Kennedy, argued for dispensing with part of *Roe's* trimester system, which, in the second trimester allows only for laws aimed at protecting the mother's health. The framework

had come to resemble "a web of legal rules" rather than "constitutional doctrine," according to Rehnquist. The three justices also maintained that the state had an interest in protecting potential life even before viability, making the 20-week requirement valid even if fetal viability normally occurs after 20 weeks. "We do not see why the state's interest in protecting potential human life should come into existence only at the point of viability and should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability," Rehnquist wrote.

In a concurring opinion, Justice Antonin Scalia argued that the majority opinion was "indecisive" and "stingy" and that *Roe* should be overturned. Justice Sandra Day O'Connor, the fifth and final member of the majority, also concurred in the decision, but for very different reasons. Unlike her colleagues in the majority, O'Connor argued that *Roe's* trimester system, while problematic, should neither be modified nor overturned in this case. She determined rather that the testing requirement passed constitutional muster because it did not impose an "undue burden" on a woman considering an abortion.

In a blistering dissent, Justice Blackmun took Justices Rehnquist, White and Kennedy to task for attempting to overturn *Roe* by what he claimed were stealth tactics. "The plurality opinion is filled with winks, and nods, and knowing glances to those who would do away with *Roe* explicitly," he wrote.

Casey and *Stenberg*

Although *Roe* and its trimester system survived *Webster*, Blackmun's fears were at least partly realized. The *Webster* decision produced a new majority on the Court with a greater willingness to uphold state restrictions on abortion. The decision also set the stage for more significant changes in the *Roe* trimester framework, changes that would come a mere three years later in the 1992 decision *Planned Parenthood of Southeastern Pennsylvania v. Casey.*

As in *Webster*, *Casey* involved a challenge to a wide-ranging abortion law that included an informed consent requirement as well as a 24-hour waiting period for women seeking abortions. In addition, the statute required a minor to obtain the consent of at least one parent or guardian, and for a wife to inform her husband of her plans to terminate her pregnancy. In the cases of both the minor and spousal requirements, various waivers were made available for extenuating circumstances.

In *Casey*, the Court rendered an even more splintered decision than it had in *Webster.* The Court's three centrists — Kennedy, O'Connor and David Souter — took the unusual step of issuing a joint opinion authored by all three justices. They were joined by the Court's liberal wing — John Paul Stevens and Blackmun — in affirming *Roe's* core principle: that the state may not prohibit pre-viability abortions. The three centrists were then joined by the Court's more conservative wing — Rehnquist, Scalia, White and Clarence Thomas — in upholding all of the Pennsylvania statute's requirements except the provision concerning spousal notification.

In affirming *Roe*, the court argued in favor of maintaining the constitutional status quo for reasons that seemed to go beyond legal precedent. "The Constitution serves human values," wrote Justices Kennedy, O'Connor and Souter, "and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain costs of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed." In other words, the justices

were arguing, *Roe* has created expectations that should not easily be discarded.

At the same time, the Court partly dismantled and modified the trimester framework that *Roe* had created and lessened the legal standard by which laws restricting abortion would be evaluated. Under *Casey*, states could now regulate abortion during the entire period before fetal viability, and they could do so for reasons other than to protect the health of the mother.

Roe's essential prohibition on the regulation of abortion before the first trimester and its limitation on regulation between the end of the first trimester and the time of fetal viability were extinguished. A state's interest in potential life could now arguably extend throughout a woman's pregnancy.

The joint opinion also dispensed with the "strict scrutiny" standard of judicial review, which is the toughest and most rigorous legal standard when determining whether a law passes constitutional muster. Because *Roe* had declared access to abortion to be a "fundamental right" and had determined that states could only regulate it (prior to fetal viability) if there was a "compelling state interest," subsequent abortion statutes had been evaluated under strict scrutiny. As a result, in the years immediately following *Roe,* many abortion regulations were declared unconstitutional.

But the court in *Casey* replaced strict scrutiny with a new and less rigorous "undue burden" standard. From then on, a pre-viability abortion regulation would be deemed unconstitutional only if it imposed an undue burden on a woman's right to terminate her pregnancy.

Casey appeared to accommodate both sides in the abortion debate. By partly dismantling the trimester system and creating the less rigorous "undue burden" standard for determining the validity of an abortion regulation, the Court gave states greater latitude to regulate abortion in the first five to six months of pregnancy. Indeed, the Court in *Casey* applied the undue burden standard to the Pennsylvania laws and, with the exception of the spousal-consent requirement, found all to be constitutional.

But conservatives had viewed *Casey* as an opportunity to overturn *Roe,* and many believed the Court — bolstered by new Republican-appointed members Clarence Thomas and David Souter — would do so. By affirming *Roe*, however, the Court solidified the decision's status as legal precedent, thus affording it greater protection from future challenges. The addition of two abortion-rights supporters to the Court in the 1990s, Ruth Bader Ginsberg and Stephen Breyer, effectively eliminated the threat to *Roe* by creating a solid six-justice majority in favor of keeping abortion a fundamental right.

Since *Casey*, the Court has only decided one major abortion case, a challenge to a Nebraska law banning what opponents call the "partial birth" abortion procedure. The term partial birth refers to a medical procedure known as "dilation and extraction" (D&X), which involves terminating the pregnancy by partially extracting the fetus from the uterus, collapsing its skull and removing its brain. This procedure is usually performed late in the second trimester, between the 20th and 24th weeks of pregnancy.

In 2000, the Supreme Court accepted a case, *Stenberg v. Carhart*, challenging the constitutionality of a Nebraska law prohibiting partial-birth abortion. Violation of the law was made a felony and punishment included possible fines and jail-time, as well as the automatic

revocation of a convicted doctor's state license to practice medicine.

In a 5-4 decision, the Court ruled that the Nebraska law violated the Constitution as interpreted in *Casey* and *Roe*. Justice Breyer, delivering the majority opinion of the Court, stated that the statute lacked the requisite exception "for the preservation of the … health of the mother." Citing *Casey*, Breyer determined that the state may promote but not endanger a woman's health when it regulates the methods of abortion.

In addition, the majority in *Stenberg* found the wording of the law unclear, because it could be interpreted by doctors to include not only the D&X procedure but other abortion methods as well. This ambiguity imposed an "undue burden" on a woman's ability to choose an abortion, the majority ruled, as well as on all who perform abortion procedures using methods similar to partial birth, and who must fear prosecution, conviction and imprisonment.

The vote was unexpectedly close for a Court in which support for the basic right to abortion was expected to garner six votes. In a surprising shift, Justice Kennedy dissented, emphasizing what he described as the "consequential moral difference" between the dilation and extraction method and other abortion procedures.

The Court's decision effectively rendered similar bans in more than 30 states unenforceable. Even so, in 2003 Congress passed and President George W. Bush signed the first federal law banning partial-birth abortions. Abortion rights advocates immediately challenged the law, and lower courts, citing *Stenberg*, struck it down. The case has been appealed to the U.S. Supreme Court, which may grant cert in the coming months. But first, the Court will hear *Ayotte v. Planned Parenthood*.

Ayotte v. Planned Parenthood

Planned Parenthood of Northern New England and several other abortion providers in New Hampshire (the respondents) first challenged the parental notification law shortly after its passage in June 2003. In December 2003, a federal district court in New Hampshire concluded that the act is unconstitutional because it lacks a health exception and because its death exception is too narrow. In November 2004, the First Circuit Court of Appeals affirmed the district court's decision.

Health Exception

The need for a health exception in abortion regulations was first discussed in *Roe*. With regard to the state's interest in protecting fetal life after viability, the Court indicated that a state may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother. In *Stenberg*, the Court appeared to extend the health exception requirement to pre-viability abortion regulation. "Since the law requires a health exception in order to validate even a post-viability abortion regulation, it at a minimum requires the same in respect to pre-viability regulation," Justice Breyer wrote for the majority.

On appeal, the New Hampshire attorney general defended the act and its omission of a health exception on four grounds. First, the attorney general argued that parental notification statutes do not require a health exception because of the interests they protect; that is, while a health exception is necessary for a statute that prohibits a particular method of abortion, it is not needed in a parental notification requirement that protects minors from undertaking the risks of abortion without the advice and support of a

parent. The First Circuit disagreed with the attorney general, maintaining that the interests served by a statute do not affect the need for a health exception.

The attorney general's second argument focused on *Hodgson v. Minnesota*, a 1990 case in which the Supreme Court upheld Minnesota's parental notification statute despite the absence of a health exception. The First Circuit also rejected this argument, noting that the lack of a health exception was not raised by the petitioners as a reason to invalidate the statute in *Hodgson*. Moreover, the First Circuit reasoned that even if the Court had considered and accepted the absence of a health exception in *Hodgson*, the requirement now exists in light of subsequent decisions in *Casey* and *Stenberg*.

The attorney general's third argument involved the existence of other statutes that, the state argued, sufficiently protect the health of the minor in the absence of an explicit health exception. The attorney general identified various laws that preclude civil and criminal liability for health professionals who provide care under special circumstances. Under one statute, for example, a physician would be shielded from criminal liability if he or she provides emergency medical care when no one competent to consent to such care is available. Similarly, another statute would preclude civil liability for health professionals who render emergency medical care without consent.

The First Circuit rejected this argument as well. The court concluded that although the statutes would protect medical personnel who provide treatment without consent, they would not necessarily shield them from the parental notification requirement. The appeals court indicated that the clear and unambiguous language of the parental notification act identifies a number of exceptions to the parental notice requirement, including when abortion is necessary to prevent the minor's death and when a court grants a waiver. The First Circuit reasoned that it would be contrary to the basic standards of statutory interpretation that other provisions (like those presented by the attorney general) supersede the clear intent of the parental notification law, and allow other opportunities to avoid the notification requirement.

Finally, the attorney general argued that the act's judicial bypass procedure ensures protection of a minor's health by allowing for the prompt authorization of a health-related abortion without parental notice. The Supreme Court requires judicial bypass in all parental notification statues. This permits a court to authorize an abortion without notification if the woman demonstrates that she is mature enough to make her own decision or that the abortion without notification would be in her best interests.

The act's judicial bypass procedure provides for the prompt consideration of cases involving minors who do not want a parent to be notified. Under the act, a minor is afforded 24-hour, seven-day access to the courts, and a judge must rule on a minor's petition within seven calendar days from the time a petition is filed. If a decision is appealed, a ruling must be issued within seven calendar days.

But the First Circuit was not convinced that the judicial bypass procedure adequately protects a minor's health: "Delays of up to two weeks can … occur, during which time a minor's health may be adversely affected. Even when the courts act as expeditiously as possible, those minors who need an immediate abortion to protect their health are at risk." The First Circuit therefore determined that the bypass procedure was not an adequate substitute for the constitutionally required health exception.

In her latest petition for review of the First Circuit's decision, Attorney General Ayotte once again asserts that other New Hampshire statutes and the act's judicial bypass procedure adequately protect the health of the minor, thus eliminating the need for an explicit health exception. However, the respondents insist the Constitution requires an explicit exception that will ensure abortion regulations do not pose a significant threat to the life or health of a woman.

In addition to considering whether other New Hampshire statutes and the judicial bypass procedure together adequately preserve the health of the minor, the Court may explore whether a parental notification requirement should be distinguished from abortion regulations that actually prohibit abortion procedures. Ayotte maintains that *Stenberg* did not establish an explicit health exception requirement for all abortion regulations. Rather, the attorney general insists that the Court's holding in *Stenberg* was limited to the statute banning the dilation and extraction procedure.

The *Stenberg* court indicated that the type of conduct regulated by an abortion statute would not affect the need for a health exception. But at the same time, its articulation of a governing standard specifically tied to "methods of abortion" suggests a possible willingness to distinguish parental notification requirements from regulations that restrict abortion procedures such as partial-birth abortion.

Death Exception

Under the New Hampshire law, parental notification is not required when a physician can certify that an abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice. But the First Circuit concluded that the state's death exception is too narrow and fails to safeguard a physician's good-faith medical determination concerning whether a woman's life is at risk.

Because the course of medical complications cannot be predicted with precision, the circuit court ruled, a physician cannot always determine whether death will occur within the 48-hour time period contemplated by the act. Consequently, the death exception forces a physician to gamble with a patient's life in hopes of complying with the notification requirement, or risk violating the act by providing an abortion without parental notification. The First Circuit believed that the threat of sanctions that arises from such a choice would have a chilling effect on a physician's willingness to perform an abortion even when a minor's life is at risk. The court also found that the absence of a clear standard by which to judge a physician's decision to perform an abortion would have a similarly chilling effect on a physician's willingness to provide lifesaving abortions.

Attorney General Ayotte maintains that the circuit court should first have given New Hampshire state courts the opportunity to interpret the act and its death exception. She believes these courts would interpret the act to protect the good-faith judgments of abortion providers. The respondents, however, concur with the circuit court ruling and argue that the exception promotes "second guessing" and would chill physicians' willingness to provide lifesaving abortions.

Standard of Review

The New Hampshire attorney general also has asked the Supreme Court to consider whether the First Circuit properly considered the respondents' "facial challenge" to the parental notification act. Unlike an "as applied"

challenge, which considers the effect of a measure as applied to a particular individual, a facial challenge allows a claimant to challenge the legislation as a whole, and to do so before it has been applied in any particular case. The respondents maintain that a pre-enforcement, facial challenge is crucial to ensure constitutional relief before physicians are prosecuted or women suffer medical harm because their physicians are afraid to act.

In *United States v. Salerno*, a 1987 case involving the Bail Reform Act, the Supreme Court determined that when a statute is subjected to a facial challenge, it must be upheld if it can be constitutionally applied at least some of the time, even if it may be unconstitutional under other circumstances. Justice Rehnquist, writing for the Court, indicated that "[a] facial challenge … 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 [constitutionally] valid."

The Court ignored the *Salerno* standard, however, when it articulated and applied the "undue burden" standard in *Casey*. In *Casey,* and in *Stenberg* as well, the Court applied the undue burden standard to invalidate state abortion regulations on their face. The "undue burden" standard, applied as it was in *Casey*, is considerably more plaintiff-friendly, because it would render an abortion regulation facially invalid if, quoting the plurality in *Casey*, "in a large fraction of cases … it will operate as a substantial obstacle to a woman's choice to undergo an abortion." Among federal courts of appeals, only the Fifth Circuit (covering Texas, Louisiana and Mississippi) has continued to apply the *Salerno* standard to facial challenges to abortion regulations.

Although the First Circuit acknowledged that the Court has never explicitly addressed the tension between the *Salerno* approach to facial challenges and the contrasting adjudicative methodology in *Casey* and *Stenberg*, the Court of Appeals concluded that the act should be considered on its face under the undue burden standard. The First Circuit was persuaded by the Court's application of the standard in *Casey* and *Stenberg*, as well as by the use of the standard by a significant number of the other courts of appeals.

In her brief to the Supreme Court, the attorney general contends that the First Circuit should have applied the *Salerno* standard when it evaluated the state's parental notification act. Attorney General Ayotte cites *Ohio v. Akron Center for Reproductive Health* and *Rust v. Sullivan*, two abortion cases from 1990 and 1991 in which the Court applied the *Salerno* standard, to support her position that the *Salerno* standard is appropriate for evaluating abortion regulations. Moreover, the attorney general argues that the *Salerno* standard is consistent with the Court's traditional practice of adjudicating constitutional questions only in concrete cases and controversies. The respondents, however, insist that facial invalidation of the act is the only way to effectively protect the health of minors. They argue that minors challenging the act on an "as applied" basis would have to "delay getting appropriate and urgently needed medical treatment until they get a constitutional ruling permitting it."

The Court's application of the undue burden standard in *Casey* and *Stenberg* would seem to suggest that it no longer views the *Salerno* standard as appropriate for evaluating facial challenges to abortion regulations. The question is of the utmost importance in this case. If the Court does apply the *Salerno* approach to facial challenges, it is likely to reverse the First Circuit, since the absence of a health exception in the New Hampshire statute would not necessarily render the statute unconstitutional with respect to all minors whose health might require an

abortion. As applied, the statute may be unconstitutional only in those cases in which the delay necessary to obtain a judicial bypass to the notification requirement would impose an undue burden on a particular individual. Accordingly, a decision to follow *Salerno* would probably result in a facial validation of the law. If the law went into effect, a woman would need to challenge the act as it is applied and would have to argue that the law imposed an undue burden on her. Even if she prevailed, questions might remain about the scope of such a ruling, and the permissibility of applying the law to others in different situations.

The Court's decision in *Ayotte* is expected to clarify whether the *Salerno* approach to facial challenges will limit or replace the more rights-friendly method of adjudication adopted in *Casey* and seemingly solidified in *Stenberg*. If the Court follows *Salerno*, the process for adjudicating challenges to abortion regulations will likely be more difficult, even if the underlying substantive test of "undue burden" remains the same. If the Court does not follow *Salerno*, it will still have to decide whether the absence of a health exception in the New Hampshire notification law operates "as a substantial obstacle to a [minor's] choice to undergo an abortion."

It would be significant if the Court determined that an explicit health exception is not necessary because of the existence of the act's judicial bypass procedure and other New Hampshire statutes. Such a decision would likely have an impact on the parental consent and notification laws that exist in 42 states. It is possible that some state legislatures would amend their consent and notification requirements to remove existing health exceptions.

Finally, a decision that finds explicit health exceptions either wholly or partly unnecessary may also signal how the Court might decide a case involving the federal Partial-Birth Abortion Ban Act. Like the act in *Ayotte*, the federal measure does not include a health exception. If the Court concludes that an explicit health exception is not necessary, it seems possible that the Partial-Birth Abortion Ban Act could be upheld in spite of the absence of such an exception.

Released on November 28, 2005

This report was written by David Masci, a senior research fellow at the Pew Forum on Religion & Public Life, and Jon Shimabukuro, an attorney in the Congressional Research Service of the Library of Congress. The views expressed in this article are the authors' and do not reflect the views of the Congressional Research Service, the Library of Congress or the United States Congress.

1615 L STREET, NW SUITE 700 WASHINGTON, DC 20036–5610
202 419 4550 TEL 202 419 4559 FAX WWW.PEWFORUM.ORG