No. 04-1144

In The Supreme Court of the United States

KELLY A. AYOTTE,
Attorney General of the State of New Hampshire,

Petitioner,

v.

PLANNED PARENTHOOD
OF NORTHERN NEW ENGLAND, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the First Circuit

AMICUS CURIAE BRIEF OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER

John W. Whitehead
Counsel of Record
James J. Knicely
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, Virginia 22901
(434) 978-3888

Date: July 29, 2005

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTIONS PRESENTED

1. Did the United States First Circuit Court of Appeals apply the correct standard in a facial challenge to a statute regulating abortion when it ruled that the *undue burden standard* cited in *Planned Parenthood of S.W. Pa. v. Casey*, 505 U.S. 833, 876-77 (1992) and *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) applied rather than the "no set of circumstances" standard set forth in *United States v. Salerno*, 481 U.S. 739 (1987)?

2. Whether the New Hampshire Parental Notification Prior of Abortion Act, N.H. Rev. Stat. Ann. § 132:24-28 (2003) preserves the health and life of the minor through the Act's judicial bypass mechanism and/or state statutes?

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing free legal representation to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have represented parties before the Court in numerous First Amendment cases such as *Frazee v. Dept. of Employment Sec.*, 489 U.S. 829 (1989), *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998), *Good News Club v. Milford Central School District*, 533 U.S. 98 (2001) and *Owasso Indep. School District v. Falvo*, 534 U.S. 426 (2002). The Institute has also filed briefs as an *amicus* of the Court on many occasions. Institute attorneys currently handle over one hundred cases nationally, including many cases that concern the interplay between the government and its citizens.

The Rutherford Institute is participating as *amicus* herein because it regards this case as an extraordinary opportunity for the Court to apply principles of law that acknowledge the rights reserved to states and the people to protect minors who confront serious life-changing decisions such as abortion.

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[1] Counsel of record to the parties in this case have consented to the filing of an *amicus curiae* brief by The Rutherford Institute, and letters reflecting said consent have been filed with this Brief. Counsel for the parties did not author any part of this brief. No person or entity, other than the Institute, its supporters or its counsel, made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

This brief incorporates by reference the statement of facts contained in the principal brief of the Petitioner, Ayotte.

SUMMARY OF ARGUMENT

The New Hampshire Parental Notification Prior to Abortion Act does not radically change the relationship between parents and their children. The Act merely seeks to defend the firmly rooted tradition of parents being involved in the major life decisions of their minor children by affirming parents in their role as guides and caregivers. The instant case questions whether a minor's extraordinary decision about abortion should be governed by a set of special, judge-made rules that exempt minors from routine parental involvement required generally in American law.

The Respondents challenge the facial validity of the New Hampshire Parental Notification Prior to Abortion Act and ask this Court to strike it down because, they assert, in some hypothetical circumstances it may be invalid. This Court, however, does not recognize application of the "overbreadth" doctrine "outside the limited context of the First Amendment." *United States v. Salerno*, 481 U. S. 739, 746 (1987). The prudential policy limiting overbreadth challenges to Free Speech cases is designed to prevent Federal Courts from ranging freely as "councils of revision" over state legislative action. It is rooted in the separation of powers and deference to the coordinate powers granted by the Constitution to the democratically elected branch of government. In cases involving non-First Amendment-related facial challenges, as this one, the Court has been careful to focus on the "pressing societal problem" that legislation seeks to address and to weigh whether the individual's "strong interest in liberty" may, "in circumstances where the government's interest is sufficiently

weighty, be subordinated to the greater needs of society." *Id.* at 750-51. Here the Respondents cannot establish that "no set of circumstances exists under which the Act would be valid." *Id.* at 745. In other words, the Respondents cannot succeed in their facial challenge because, on its face, the New Hampshire legislation is rationally related to a legitimate state objective and the means are reasonable in achieving the objective. *Id.*

In this case, the State of New Hampshire is advancing a bedrock principle that is widespread in American law. The legal system in the United States has historically protected minors when making important life decisions by requiring parental consent for those choices. Medical procedures provide one of the strongest examples of the parental consent requirement, since parents must consent for most medical care for their minor children. Additionally, the New Hampshire legislature, like many other states, carries the protection of minors even further by placing significant restrictions on minors' decisions; for example, completely prohibiting minors from engaging in activities such as tattooing. N.H. Rev. Stat. Ann. § 314-A:8 (2004). Even though certain exceptions are carved out from these general rules, the overarching policy of protecting minors remains firmly intact, especially for critical life decisions such as abortion.

The nature and language of abortion testifies to the extraordinary character of the decision, lifting it to a higher standard than tattoos. Since the law regularly requires minors to obtain parental consent for most life decisions, the standard should not be obliterated for an important medical decision such as abortion. To alleviate fears about the abortion decision being unduly burdened or overridden by a parent, the Act does not require *consent* of *both* parents, but only *notification* of a *single* parent. This lower standard still protects the tradition of parental involvement, while lessening any ostensible or hypothetical burden on the minor.

If the Court does not reverse the First Circuit's decision in the instant case, irreparable damage will be done to the parent-child relationship in one of the most traumatic of life decisions, whether to terminate what this Court has termed as "potential life."

ARGUMENT

INTRODUCTION.

The New Hampshire Parental Notification Prior to Abortion Act imposes criminal penalties on a physician's failure to provide 48 hours advance notice to parents of their child's impending abortion.[2] The Respondents allege that the Act is constitutionally invalid "on its face" because it fails to provide an exception for the health of the pregnant child. This brief addresses the important state interests the New Hampshire legislature has consistently advanced in legislation affecting the health and welfare of children and the proper standard of review to be applied in a "facial" challenge to the New Hampshire legislature's requirement of parental notification.

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[2] N. H. Rev. Stat. Ann. §§ 132:24 et seq. (2004). The New Hampshire legislature required forty-eight hours advance notice to a child's parent before an abortion can be performed, unless a parent waives notice in writing. Notice may be given in person or by certified mail, but is not required if the child confidentially petitions a court (in expedited proceedings) for waiver of notice. Notice may also be waived if a physician certifies that an abortion is necessary to prevent a minor's death and time is insufficient to provide notice. Failure to follow the notice procedures of the Act subjects the violator to a misdemeanor.

I. RESPONDENTS CANNOT PREVAIL IN THIS FACIAL CHALLENGE TO THE NEW HAMPSHIRE ACT BECAUSE THEY CANNOT MEET THE STANDARD OF REVIEW SET FORTH IN *UNITED STATES V. SALERNO*.

When the constitutionality of a statute is challenged on its face in a non-Free Speech case, this Court applies the standard of review set forth in *United States v. Salerno*, 481 U. S. 739, 746 (1987). In *Salerno,* this Court declared that "[a] facial challenge to a legislative Act is... the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Id.* at 745. It is not enough that an Act's unconstitutionality under *some* circumstances might render it invalid; rather, the Court requires a showing that the law is invalid in virtually *all* of its applications. Thus, the "overbreadth" doctrine is not recognized "outside the limited context of the First Amendment." *Id.* This rule of judicial self-restraint serves as a prophylactic obstructing the Federal courts from ranging freely as "councils of revision" over state legislative action. It is rooted in the separation of powers and deference to the coordinate powers granted in the U. S. Constitution to the democratically elected branches of government, Federal and State. In such cases, the Court has been careful to focus on the "pressing societal problem" that legislation seeks to address and to weigh whether the individual's "strong interest in liberty" may, "in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society." *Id.* at 750-51. Thus, in reviewing this facial challenge to the New Hampshire legislature's parental notification requirement, the central issue is whether the legislation is rationally related to a legitimate state objective and the means reasonable in achieving the objective. *Id.* More specifically, are the Act's procedures rationally related to legitimate legislative concerns for the parent-child

relationship, and are the means chosen reasonably related to achieving that objective?

The judicial restraint reflected in the *Salerno* standard of review is now tested here in the context of abortion. The larger jurisprudential question in this case is whether the rule of law will be the same as in other overbreadth challenges in non-First Amendment cases, or whether this Court will promulgate a special set of rules for abortion. *Cf. Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 98 (1976) (The "normal rules of law and procedure and constitutional adjudication suddenly become irrelevant solely because a case touches on the subject of abortion.") (White, J., dissenting); *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747 (1986) (The Court's abortion decisions threaten an institutionally debilitating effect by the adoption of special rules for abortion.) (O'Connor, dissenting). Assuming that the "normal" rules do apply in this case, the alleged overbreadth of the New Hampshire Act must be adjudged in light of the legitimate state interests it seeks to advance. Unless the Respondents can establish no set of circumstances under which the Act would be valid, the Act survives facial challenge and Respondents may prevail only after offering proof at trial, by clear and convincing evidence, that the parental notification procedures set forth in this Act do, in fact, "unduly burden" a child in seeking an abortion. *Hodgson v. Minnesota,* 497 U.S. 417 (1990).

Here, New Hampshire is acting pursuant to long-established societal concerns over the rights of parents to care for their children. This interest is rooted in ancient religious and moral codes,[3] in our country's history and in

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[3] For example, the Judeo-Christian tradition exhorts parents to bring up children in the way in which they want them to succeed. Proverbs 22:6 ("Train up a child in the way he should go, and even when he is old he will not depart from it."), 29:15 ("[A] child left to himself causeth shame to his mother."), The Tanakh (Jewish Bible); Ephesians 6:1-2 ("Children, obey your parents in the Lord, for this is right. Honor thy father and mother

well-established constitutional precedent. Not only did the Constitution forsake any express limitations on parental control of children—leaving such matters to the States and to the people under the Tenth Amendment—this Court has also interpreted the Bill of Rights as providing affirmative protection of the parent-child relationship, setting limits on State power that would otherwise interfere with the parental prerogative. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Employment Division v. Smith*, 494 U.S. 872 (1990); *Troxel v. Granville*, 530 U.S. 57 (2000). Accordingly, Justice Powell declared that "it is a cardinal principal with us that the custody, care and nurture of the child reside first with the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (plurality opinion), *quoting Prince v. Massachusetts*, 321 U.S. 166 (1944). The Court has endorsed this principle in numerous other cases, such as *Parham v. J.R.*, 442 U.S. 584, 602 (1979), where the majority stated:

> Our jurisprudence has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children.... The law's concept of the family rests on the presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More importantly, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

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which is the first commandment with promise that it may be well with thee. . . ."), Colossians, 3:20-21 ("Children, obey your parents in all things: for this is well-pleasing unto the Lord. Fathers, provoke not your children to anger, lest they be discouraged."), The Holy Bible (King James Version).

In the context of abortion, the Court has noted that parental involvement in the abortion decision is widely sanctioned in the states. *Hodgson v. Minnesota*, 497 U.S. 417, 425, n. 5 (thirty-eight states require participation in the minor's decision to terminate a pregnancy). This right of parental participation, as Justice Stephens has observed, stems from the "serious and personal consequences of major importance to a [person's] future" that flow from these decisions. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. at 781.

New Hampshire's parental notification requirement is thus grounded in constitutional tradition that reserves to the states and people the definition of the parental prerogative. As will be seen below, the New Hampshire parental notification requirement is but one facet of New Hampshire's far broader regime of law affirming parental involvement in decisions affecting the welfare of children. The Respondents would have the Federal courts minimize, overrule or revise these important legislative concerns in the abortion context. Without offering an evidentiary record or clear and convincing evidence that the Act inhibits the exercise of constitutional rights, Respondents ask this Court, in effect, to assume the role of super-legislature with the power to veto or rewrite legislative acts based upon hypothetical applications of allegedly defective procedures. This Court should decline this invitation. Respondents should be required to demonstrate, as all litigants must in facial challenges, that there is "no set of circumstances" under which the Act is valid. Because Respondents cannot do so on this record, the decision below should be reversed.

II. AMERICAN LAW FIRMLY PROTECTS MINORS BY REQUIRING PARENTAL CONSENT FOR IMPORTANT DECISIONS.

An overwhelming principle of American law is that minors cannot consent or participate in most socially

significant activities without parental input or guidance. Federal, State and local laws have developed a series of rules to protect minors from making poor decisions in situations with serious societal implications. These protections operate robustly, especially in the arena of medical care. Not only has New Hampshire limited a minor's ability to consent to most medical procedures, it has also enacted several statutes designed to safeguard the decisions of minors. While there are certain exceptions, they govern situations markedly different from the instant case. Thus, public policy, the common law and state statutes affirm the protection of minors and the parent-child relationship. Parental involvement in the decisions of minors is the norm, as is seen below in long-established common law rules.

A. TRADITIONAL COMMON LAW RULES PROTECT MINORS FROM IMPRUDENT CHOICES.

American law regards the right to control one's body and destiny as one of a person's most sacred rights. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891). Even with the sacred reverence for the right of bodily control, minors are generally not allowed to control their bodies with respect to medical decisions. Thus, with regard to most medical decisions, parents must consent for their minor children.

Indeed, the American constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). *See also Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). As this Court wrote in Parham, 442 U.S. at 603-04:

Surely, this includes a "high duty" to recognize symptoms of illness and to seek and follow medical advice. The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience and capacity for judgment required for making life's difficult decisions. More important, historically it has been recognized that natural bonds of affection lead parents to act in the best interests of their children. 1 W. Blackstone, Commentaries *447; 2 J. Kent, Commentaries on American Law *190.

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Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state. The same characterizations can be made for a tonsillectomy, appendectomy or other medical procedure. Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can, and must, make those judgments. Here, there is no finding by the District Court of even a single instance of bad faith by any parent of any member of appellees' class. We cannot assume that the result in *Meyer v. Nebraska, supra,* and *Pierce v. Society of Sisters, supra,* would have been different if the children there had announced a preference to learn only English or a preference to go to a public, rather than a church, school. The fact that a child may balk at hospitalization or complain about a

> parental refusal to provide cosmetic surgery does not diminish the parents' authority to decide what is best for the child. *See generally* Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy,* 86 Yale L.J. 645, 664-668 (1977); Bennett, *Allocation of Child Medical Care Decisionmaking Authority: A Suggested Interest Analysis,* 62 Va. L. Rev. 285, 308 (1976). Neither state officials nor federal courts are equipped to review such parental decisions.

Therefore, the importance of protecting minors in making potentially life-changing decisions has long been recognized. On one hand, the law vigorously protects the right to control one's own body. On the other hand, an entire segment of the population is excluded from exercising that right without the consent of others. The protection of the minor and regard for the parent-child relationship explains this seeming inconsistency. The right to control one's body is so important in America that the law attempts to ensure the people exercising that right are mature and competent. In order to protect minors from harmful decisions and safeguard the control over their bodies, the common law gives the duty of medical consent to parents.

Another principle that protects minors from harmful decisions hails from contract law. Minors are unable to create binding contracts like adults; instead, minors may only create voidable contracts. Restatement (Second) of Contracts § 14 (1981). Thus, minors do not hold the same status as adults under the law. The law creates this distinction in recognition that minors lack the same foresight and prudence of adults and may unwisely bind themselves to harmful contracts. For these reasons, the law allows minors only to create voidable contracts.

Tort law provides a third and more explicit example where minors are protected from destructive decisions and actions. In order to compensate for their reduced capacity in decision-making, the law applies a lower standard of care to determine whether a minor's behavior was negligent. Minors are judged according to the standard of "a reasonable person of like age, intelligence, and experience under like circumstances." Restatement (Second) of Torts § 283A (1965). The precise justification given for this lower standard of care is society's interest in the welfare and protection of children. Restatement (Second) of Torts § 283A cmt. b (1965).

These three areas of law—medical consent, contracts and torts—establish robust protection for minors. The law compensates for lack of maturity by requiring parental consent for medical procedures, allowing minors only to create voidable contracts and lowering the applicable standard of care in torts cases. It is not surprising, therefore, that the New Hampshire legislature would apply similar protection by requiring parental notification of an impending abortion.

B. THE NEW HAMPSHIRE LEGISLATURE HAS ALSO ENACTED RESTRICTIONS ON CHOICES AVAILABLE TO MINORS.

In addition to common law restrictions on a minor's decision-making prevailing generally throughout the country, New Hampshire has adopted other measures to protect minors from harmful decisions. Various policies enacted by the legislature require parental consent for choices by minors or even remove the minor's choice altogether. These statutes impose requirements similar to prior parental notification of abortion decisions by minors, but no court would ever suggest strict scrutiny or the invalidation of these requirements as being unduly burdensome on a minor child's control of his or her body.

New Hampshire law restricts a minor's choice in obtaining body art. It forbids the "branding" or "tattooing" of anyone under the age of eighteen. N.H. Rev. Stat. Ann. § 314-A:8 (2004). In its complete ban on tattoos, regardless of parental consent, the statute stands as a sort of upper limit on the protection of minors from poor decisions. A second provision requires parental consent for minors to obtain a body piercing. If consent is granted, the parent must not only be physically present when the piercing takes place but must also present evidence of parenthood and sign a document consenting to the procedure. *Id.* These strict requirements illustrate the strong desire of the New Hampshire legislature to protect minors and involve parents in decisions concerning their bodies.

New Hampshire likewise requires parental consent for anyone under eighteen to patronize a tanning salon. N.H. Rev. Stat. Ann. § 313-A:31 (2004). The statute requires the same consent procedure as body piercing, although the parent need only sign a form at the minor's first visit, which provides consent for twelve sessions. *Id.* The restrictions on body tanning provide an even stronger example of New Hampshire's desire to protect minors, since children under fourteen can only use tanning facilities with a written doctor's order. *Id.* In order to protect minors from the harmful effects of prolonged tanning, the legislature has enacted both parental and doctor consent provisions, which support the overall goal of ensuring parental involvement in the decisions of young people.

New Hampshire also restricts minors who seek to make anatomical gifts of bodily remains. While adults can simply fill out a form along with their driver's license[4], a

[4] Minors in New Hampshire cannot obtain a driver's license without written parental consent. N.H. Rev. Stat. Ann. § 263:17 (2004).

minor must obtain written consent from a parent or guardian. N.H. Rev. Stat. Ann. § 263:41 (2004). This policy falls perfectly in line with the general common law rule that minors cannot consent to medical procedures. It also illustrates New Hampshire's dedication to the protection of minors and the parent-child relationship.

The criminal law of New Hampshire also contains important protections for minors. No minor under age seventeen can plead guilty or waive the right to counsel without parental consent. N.H. Rev. Stat. Ann. § 605:1 (2004). The state seeks to ensure that minors make wise decisions and receive counsel in life-altering decisions that take place during criminal proceedings by requiring parental consent to the choices that are made.

Another New Hampshire provision, and perhaps most directly applicable to this case, is the protection of minors reflected in provisions of the New Hampshire criminal code. In New Hampshire, statutory rape is defined as sexual penetration with someone (other than your spouse) who is between thirteen and sixteen years old or any sexual contact with someone other than your spouse who is under thirteen years; these offenses constitute Class B felonies. N.H. Rev. Stat. Ann. § 632-A:3 (2004). The New Hampshire Supreme Court has firmly interpreted this statute to mean that minors under age sixteen cannot consent to sex. *See State v. Berry*, 373 A.3d 355, 357 (N.H. 1977). The legislature's protection of children thus extends into the realm of reproductive behavior. Furthermore, the court required that this law should be "applied to those under the age of consent regardless of their maturity and the fact that a female's apparent maturity may mislead a man ...." *Id.* It does not matter how mature a fifteen-year-old might be or how mature she might appear. If a man engages in sexual

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Furthermore, a minor's license may be cancelled upon notice that the consenting adult died. *Id.*

penetration, he commits a Class B felony. In such cases, the minor's pregnancy provides evidence that someone committed a crime of sexual intercourse with a minor under age sixteen. Allowing the minor to abort the child without parental notification may even destroy critical evidence of criminal activity and shield perpetrators from prosecution. New Hampshire's statutory rape law thus operates as a strong bulwark against the abuse of minors and robustly supports requiring parental notification for abortion. If a minor cannot consent to sexual intercourse or routine medical procedures, it is difficult to understand why a minor should be able to obtain an abortion secretly without parental notice, let alone parental involvement.

C. NARROW EXCEPTIONS ALLOW MINORS TO CONSENT ONLY IN LIMITED CIRCUMSTANCES.

New Hampshire admittedly provides certain exceptions where minors can give consent, but these are limited to decisions made in specially defined circumstances. The first two situations allow minors to consent to medical treatment for drug addictions and sexually transmitted diseases. In both instances, the New Hampshire legislature allows minors to consent to such medical treatment without parental consent. N.H. Rev. Stat. Ann. § 318-B:12-a (2004) (drug addiction); N.H. Rev. Stat. Ann. § 141-C:18 (2004) (sexually transmitted diseases). However, age requirements still apply. To consent to treatment of drug addiction, the minor must be at least twelve-years-old, § 318-B:12-a, while treatment for sexually transmitted diseases requires the minor to be at least fourteen-years-old. § 141-C:18. Even though some minors may, therefore, consent for medical treatment in these cases, most minors still cannot.

The cases of consent for treatment of drug dependency and sexually transmitted diseases stand in stark contrast to abortion. The former are almost universally regarded as desirable treatment for universally recognized

adverse medical conditions. The treatment of these conditions also benefits society by helping rid it of a significant social problem. Moreover, the treatment for these conditions, if successful, will not likely have long-term adverse consequences. With abortion, not only is society polarized over whether it is sound social policy to permit the early termination of a pregnancy and when, and the means and methods therefor, but the abortion decision is an elective procedure, deserving of deliberation and fraught with long-term consequences. While it may be socially beneficial for minors to obtain necessary medical treatment for drug dependency or sexually transmitted disease without parental involvement, controversial and life-altering medical procedures such as abortion have more grave consequences.[5]

New Hampshire law also permits minors to receive emergency care without parental consent. Licensed emergency care providers and health professionals cannot be held civilly liable for lack of consent when administering emergency care to minors, if a parent or guardian is not available to consent. N.H. Rev. Stat. Ann. § 153-A:18 (2004). The statute, however, does not empower minors to consent but rather admits their inherent incapacity to consent, seeking at the same time to protect healthcare professionals from civil liability for acts undertaken in protecting them. Furthermore, the statute applies to "any person, regardless of age." *Id.* This emergency care statute protects minors and

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[5] The narrow exceptions for treatment of drug dependency and sexually transmitted diseases do not evidence any intent by the New Hampshire legislature to extend to minors the general right to consent to medical treatment. During its debates over the drug dependency statute, § 318-B:12-a, language was proposed that would give minors the ability to consent to surgical and dental treatment, but the New Hampshire legislature expressly rejected this proposal. 1 Journal of the Senate 694 (N.H. 1971) *cited in* N.H. AG Lexis 21, 2-3 (1985). The legislature's rejection confirms its intent to limit the scope of minor consent only to treatment of drug dependency and sexually transmitted disease.

provides an exception to the consent rule, but does not permit minors to obtain general medical care without parental involvement.

Married minors do gain the power to consent, but only in limited circumstances. In American law, marriage emancipates a minor. *Paju v. Ricker*, 266 A.2d 836, 837 (N.H. 1970). However, "[t]he meaning of emancipation is not that all the disabilities of infancy are removed, but that the infant is freed from parental control...." *Commonwealth v. Graham*, 31 N.E. 706, 707 (Mass. 1892). Most importantly, marriage only removes disabilities of infancy when specifically provided for in statutes. *Paju*, 266 A.2d at 837. Therefore, the New Hampshire legislature still asserts its traditional right to regulate the ability of married minors to consent to defined social relationships.[6]

III. ABORTION DECISIONS DEMAND MORE GUIDANCE THAN EVERYDAY CHOICES.

As seen by the series of common law rules and New Hampshire state statutes, most decisions by minors are subject to parental consent requirements. Abortion does not fit into the array of everyday decisions made by minors; it is more serious and arguably requires even more parental guidance.

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[6] New Hampshire provides a fair amount of autonomy for married minors. Married minors, regardless of their age, are free to engage in consensual sexual relations. *Id.* Married minors can also consent to donate blood without obtaining consent from their parents. N.H. Rev. Stat. Ann. § 571-C:1 (2004). Likewise, the Parental Notification Prior to Abortion Act includes married minors as emancipated minors who do not need parental notification to obtain an abortion. N.H. Rev. Stat. Ann. § 132:24 (2004). Thus, under the terms of the Act, marriage provides minors with presumptive emancipation and, hence, the power to consent.

A. ABORTION CONSTITUTES MEDICAL TREATMENT WHICH REQUIRES PARENTAL PARTICIPATION.

On a rudimentary level, abortion would appear to fall in line with medical and body treatments provided to minors. According to information supplied by the Respondent Planned Parenthood of America (a leading provider of abortions), the three types of abortion—chemical, surgical and vacuum aspiration[7]—all require the participation of a doctor or someone else licensed and skilled in the procedure and qualified to prescribe medication. As with other medical treatment, these state regulatory requirements are in place because of the serious nature of the procedures in question and the possibility of grave complications. Under New Hampshire law, parents must consent for a minor's medical treatment and even to a minor's receiving body art and piercing. Abortion thus naturally falls into the normal range of activities affecting a minor's medical well-being and bodily autonomy, activities that under New Hampshire law normally require extensive parental involvement.

In a deeper sense, obtaining an abortion has far greater lifetime implications than most other medical treatment. This Court has stated that abortion has "potentially grave emotional and psychological consequences...." *H.L. v. Matheson*, 450 U.S. 398, 412-413 (1981). Therefore, if a minor's abortion decision implicates heightened consequences, it is not unreasonable to impose greater requirements for parental involvement than those permitted for less consequential matters. Of course, in the present case, the legislature has only required *notification*, not the *consent* required by New Hampshire in other less

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[7] *Choosing Abortion - Questions and Answers, at* http://www.plannedparenthood.com/pp2/portal/files/portal/medicalinfo/abortion/pub-abortion-q-nd-a.xml (July 14, 2005).

consequential situations. At the very least, the medical nature of the abortion procedure, combined with its emotional and psychological effects, argues for parental notification before a minor obtains an abortion, especially in light of the potential impact on a minor's sphere of reproductive autonomy.

B. MINORS DO NOT HAVE UNFETTERED REPRODUCTIVE AUTONOMY.

The previous discussion indicates that under New Hampshire law, and the common law, minors have no general power to consent to many social activities, particularly for medical decisions like abortion. Combining New Hampshire's sexual assault statutes along with the general rule against minors consenting to medical treatment, minors have only a tiny sphere of reproductive autonomy. As indicated, most minors do not have the power to consent to sexual intercourse, the essential key to reproduction. *See* N.H. Rev. Stat. Ann. § 632-A:3 (2004). More importantly, a pregnant minor in New Hampshire does not even have the power to consent to medical treatment concerning the pregnancy. If a girl becomes pregnant and decides to carry a child to term, she must obtain consent from her parents in order to receive medical treatment.[8]

Since most minors cannot consent to sexual intercourse, and all must obtain parental consent for medical treatment during pregnancy, it would be wholly incongruent, let alone highly unwise, to deny parental involvement in connection with an abortion. Furthermore, the New Hampshire exception for the treatment of sexually transmitted diseases, N.H. Rev. Stat. Ann. § 141-C:18 (2004), far from expanding reproductive autonomy, simply

[8] At least one state, Utah, specifically allows a pregnant minor to consent to medical treatment. Utah Code Ann. § 78-14-5(4)(f) (2005). However, New Hampshire does not have such a statute, requiring the default consent from parents in the event of a minor's pregnancy.

provides a means for prompt, effective treatment of highly contagious diseases for the benefit of the minor and to prevent the spread of the disease in society.

C. PARENTAL INVOLVEMENT DOES NOT CONSTITUTE AN UNDUE BURDEN.

In assessing evidence of a statute's impact on abortion, this Court has employed the "undue burden" standard. *Planned Parenthood v. Casey*, 505 U.S. 833, 876 (1992). In the Court's own terms, undue burden means "that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877.

The New Hampshire Act is challenged on its face as not meeting the undue burden standard. However, in assessing this contention, as mentioned earlier, the challengers must show first that the New Hampshire Act is not valid under any set of circumstances. *United States v. Salerno,* 481 U. S. at 746. The Respondents cannot do this because the Act presents a measured approach to parental notification containing appropriate safeguards, such as judicial bypass and health safeguards. It cannot be said to be invalid in virtually every set of circumstances, let alone substantially overbroad. Moreover, the "undue burden" analysis requires the Respondents to show by clear and convincing evidence that the statute and its implementation actually impose an "undue burden" on abortion, something the Respondents have not done in this facial challenge.

In the context of other legislation enacted in New Hampshire restricting the reproductive and medical rights of minors, the parental notice statute can hardly be said to unduly burden abortion. The meaning of the term "undue" is "excessive." Black's Law Dictionary 1239 (7th ed. abridged 2000). The common understanding of "excessive" is "exceeding the usual, proper, or normal ...[or] greater than

usual...." Webster's Dictionary 792 (3rd ed. 1986). The numerous New Hampshire enactments limiting the rights of minors and requiring parental involvement in a wide variety of situations involving sexual and bodily autonomy demonstrate that the procedure for parental notification for a minor's abortion is not "excessive," but is in accord with usual and proper laws governing minors' behavior and rights. Minors simply do not have the general power of consent, especially for medical procedures. Merely requiring *notification* of a minor's parent before an abortion does not exceed the usual, normal or proper procedures protecting minors. Nor is it excessive or otherwise an "undue burden" on abortion, most certainly not on a bare facial challenge to the Act with little or no record.

As previously discussed, minors must routinely obtain parental consent for most decisions in their lives, especially those decisions related to medical care. Moreover, the law properly recognizes that most minors are immature and lack the full capacity to understand the significance of certain decisions. Thus, it requires safeguards, for example, voidable contracts, even with parental consent. To require mere notification of a parent for a minor to obtain an abortion is not a "substantial obstacle," but merely a safeguard that the minor will evaluate all of the consequences of the abortion decision. While some parents might react strongly when notified about their child's upcoming abortion, the notification does not necessarily prevent an abortion or even significantly delay it, but ensures that the child's decision will be well-considered in light of the potential consequences that follow, whatever that decision may be.

CONCLUSION

All of the foregoing statutes and decisions evidence the strong principle in American law that minors must obtain parental consent for their decisions. The law seeks to

protect minors from poor choices due to their lack of maturity, while at the same time strengthening the family. This Court summarized the concept well when it said, "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." *Parham v. J.R.*, 442 U.S. 584, 602 (1979). Minors need the involvement of parents when making difficult decisions. Without this assistance, they stand on the precipice of destructive decisions and poor choices. New Hampshire's Parental Notification Prior to Abortion Act only requires notice to one of a minor's parents forty-eight hours prior to an abortion. This Court should uphold the decision of the democratically elected branch to protect and preserve the vital parent-child relationship. America's parents, sons and daughters deserve no less when confronted with the decision to terminate the life of an unborn human being.

Respectfully submitted,

John W. Whitehead (*Counsel of Record*)
James J. Knicely
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, Virginia 22901
(434) 978-3888

Date: July 29, 2005