No. 04-1144

In The
Supreme Court of the United States

KELLY A. AYOTTE, Attorney General
of the State of New Hampshire
in her official capacity,

Petitioner,

v.

PLANNED PARENTHOOD OF
NORTHERN NEW ENGLAND, *et al.*,

Respondents.

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

BRIEF AMICUS CURIAE OF THE FAMILY RESEARCH COUNCIL, INC. AND FOCUS ON THE FAMILY IN SUPPORT OF THE PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The First Circuit's Opinion Relied Upon Mistaken Understandings of *Casey* and *Stenberg*, and Upon False Comparisons to Statutes Involving Adult Women, Not Minor Girls 3

II. The Fallacious Reasoning by Analogy to Regulations of Adult Women's Abortions Exposed 7

III. The Touchstone of this Court's Abortion Jurisprudence – Free and Sovereign Individual Self-Determination – Has Diminished Relevance to the Unemancipated Minor 11

IV. "Jane" – The Typical Unemancipated Teenage Girl at the Heart of This Case – Described 13

V. "Jane" Faces the Decision of Her Life 20

VI. This Court's Precedents Call For Parental Involvement as "Jane" Faces this Momentous Decision; the First Circuit Would Instead Abandon Her 21

VII. New Hampshire's Law Fits Comfortably Within Constitutional Bounds, and Is Typical of How the Law in our Country Provides for Minors Making Important Decisions 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES:

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Roper v. Simmons, 543 U.S. ___ (2005)..... 18

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STATUTES:

N.H. REV. STAT. ANN. § 132:25 (2003) 20

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TABLE OF AUTHORITIES – Continued

Page

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Page

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Page

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Page

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INTEREST OF THE AMICUS CURIAE[1]

Family Research Council, Inc. [hereinafter "FRC"] is a non-profit, research and educational organization dedicated to articulating and advancing a family-centered philosophy of public life. In addition to providing policy research and analysis for the legislative, executive, and judicial branches of the federal government, FRC seeks to inform the news media, the academic community, business leaders, and the general public about family issues that affect the nation.

FRCs legal and public policy experts are continually sought out by federal and state legislators for assistance and advice. FRC has participated in numerous amicus curiae briefs in the United States Supreme Court, lower federal courts, and state courts.

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Focus on the Family [hereinafter "FOF"] is a non-profit communications and educational organization dedicated to the preservation of marriage, parenting, and

[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

the nurturing home. FOF produced a number of national and international radio broadcasts on family and cultural issues, publishes a number of magazines for family members of various ages and stages and a wider range of books as well as a website: www.family.org. Millions of families in America and abroad rely on FOF for help in understanding the dynamics of their own family as well as what is happening with the family culturally and how they help strengthen both.

SUMMARY OF THE ARGUMENT

The First Circuit's decision striking down New Hampshire's parental notice law rested on reasoning by parity: *if* a "health" exception is required for adults, *then* it is for minor girls, too. But no law requires adult women to consult their parents about an abortion. Only minors are so encumbered, and *precisely* for reasons – youth, immaturity, lack of life experience, financial and emotional dependence – which, this Court has often said, conclusively distinguish them from adults.

The question about parental involvement laws therefore has to be answered from the ground up. The First Circuit never examined, however, the policies, interests, and empirical data which this Court's precedents (*Hodgson*[2] and *Casey*[3] among them) examined in sustaining parental involvement laws. (The lower court ignored *Hodgson* in an even more important way: the statute

[2] Hodgson v. Minnesota, 497 U.S. 417 (1990).

[3] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 803 (1992).

upheld there is indistinguishable from the New Hampshire statute at issue in this case). If the lower court had considered all the pertinent interests – and if the court had considered how the law treats minors across the range of important life decisions – it would have seen what this Brief shows: New Hampshire's parental notice law fits comfortably within constitutional bounds.

ARGUMENT

I. The First Circuit's Opinion Relied Upon Mistaken Understandings of *Casey* and *Stenberg*, and Upon False Comparisons to Statutes Involving Adult Women, Not Minor Girls.

The First Circuit struck down New Hampshire's parental notification law because its "death" exception was inadequate and because it had no "health" exception at all. The challenged "death" exception is indistinguishable, however, from those upheld by this Court in *Hodgson v. Minnesota*[4] and *Planned Parenthood v. Casey*.[5] Nothing in this Court's most recent cases suggests that a broader exception should now be required. This part of the First Circuit decision should be reversed on the basis of settled authority.

[4] 497 U.S. at 426 (quoting the exception as "necessary to prevent the woman's death").

[5] 505 U.S. at 902 (quoting the exception in the statute as "necess[ary] . . . to avert her death"). The First Circuit faced identical language in the New Hampshire statute, the pertinent part of which stated "necessary to prevent the minor's death." Planned Parenthood v. Heed, 390 F.3d 53, 62 (1st Cir. 2004).

Hodgson also upheld a parental notice law which, like New Hampshire's, had no "health" exception. The First Circuit disregarded this part of *Hodgson*, too, saying that it was unconsidered. The court dismissed other cases upholding statutes like the New Hampshire statute, saying that they were "distinguishable." *Heed*, 390 F.3d at 60. The First Circuit chose instead to follow two federal circuit court decisions requiring a "health" exception to parental involvement laws.[6] More than that: the First Circuit held that the Constitution requires a "health" exception *per se*: any "statute regulating abortion must contain a health exception in order to survive constitutional challenge." 390 F. 3d at 59.

The court offered no argument in favor of this novel constitutional requirement. The court did not consider all the interests served by a parental notice statute, as this Court has repeatedly done in upholding such laws. The court adduced no empirical evidence whatsoever of high-risk pregnancies among minors, of minors' capacities to gauge those risks, or of the special benefits to minors of parental involvement in high-risk pregnancies. In fact, apart from its claimed dependence upon *Stenberg v. Carhart*[7] and *Casey*, the First Circuit's new *per se* rule rested upon that court's undefended assertion.

That dependence is misplaced.

Neither *Casey* nor *Stenberg* articulated a *per se* rule. Neither explicitly said that a "health" exception to parental

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[6] Planned Parenthood of Idaho, Inc. v. Wasden, 376 F.3d 908, 922-24 (9th Cir. 2004); Planned Parenthood of the Rocky Mountain Serv., Corp. v. Owens, 287 F.3d 910, 915-16 (10th Cir. 2002).

[7] 530 U.S. 914 (2000).

involvement laws is constitutionally necessary. Neither said that *Hodgson* was overruled, or even imperiled.

Stenberg did hold that a health exception to an abortion regulation was constitutionally necessary. But that regulation was not a parental notice law. It was a state ban on all partial-birth abortions. *Stenberg* never addressed the issues raised in this litigation.

Casey did say that "foreclos[ing] the possibility of an immediate abortion despite some significant health risks" would violate "the essential holding of *Roe*." 505 U.S. at 880. The court below focused on this passage from *Casey*. It is true, too, that this excerpt from *Casey* was talking about, *inter alia*, a parental consent provision. But *Casey* did not mention *Hodgson* in or near that passage, scarcely a signal that *Hodgson* was being modified, much less overturned.

The *Casey* Court understood itself in the quoted passage, not to be making new law, but to be summarizing what *Roe* wrought. According to Casey, *Roe* held that a state may not "interfere with a *woman's choice* to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." 505 U.S. at 880 (emphasis added). This case involves no "woman's choice" with which the state could "interfere." It involves teenage girls who are legally presumed to be immature, and to lack the capacity to choose an abortion. *Roe* said nothing about minors' access to abortion or their parents' participation in it.

In its haste to invalidate New Hampshire's parental notification law, the First Circuit baldly declared this distinction to be irrelevant. Following the Ninth Circuit, the court lapsed into misguided reasoning by parity: 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." *Heed*, 390 F.3d at 61 (quoting *Wasden*, 376 F.3d at 922-24). The First Circuit thus implicitly repudiated the holdings of this Court in a slew of cases, including *Bellotti I* and *II*; *Akron I* and *II*; *Hodgson*; and *Casey*. All these cases say that the constitutionality of laws governing minors' access to abortion is one thing, and the access of adults, another.

Adult cases which speak of a health exception presuppose precisely that which parental involvement laws do not: a pregnant female *capable of giving legally effective consent* to an abortion. The adult woman calling for a health exception is mature. She is capable of exercising her liberty interest under *Roe* – and she has. Having registered her choice to abort, she stands under the umbrella of "privacy." Her legal situation without a health exception would be: the woman says "yes"; the state says "no." According to this Court's precedents, that simply will not do. The State may not "interfere" with a woman's settled determination to have an abortion. *See e.g., Roe v. Wade*, 410 U.S. 113 (1973), *reaff'd Casey*, 505 U.S. at 879 (plurality opinion).

The pregnant minor is an altogether different case. She is presumed to be incapable of saying "yes." Her stated desire for an abortion is inert, legally ineffective. It is a provisional indication, revisable, a wish – no matter how subjectively certain she might feel herself to be, no matter how strongly voiced is her wish. The pregnant teen's say-so about abortion is *not* effective, final, settled. Thus far considered the surgeon who lays hands upon her commits a battery. The state is thus *not* saying "no" to the woman's "yes." The teen's "yes" is, at most, inchoate consent. The state is saying instead to the pregnant girl:

"here is a legal process set up for you whereby, with the assistance of your parents and if need be our judges, you may *acquire* the legal capacity to say 'yes.' "

The First Circuit closed its eyes to the radical difference between minors and adult women. It is the difference which gives rise to a constitutional question in this case. It is the difference which this Court has on many occasions endorsed as the basis for abortion regulations which discriminate sharply between girls and women. *Casey* upheld parental notice and consent provisions, because they are "based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart. We cannot adopt a parallel assumption about adult women." 505 U.S. at 895.

II. The Fallacious Reasoning by Analogy to Regulations of Adult Women's Abortions Exposed

A more formal way to express the ineptitude of the First Circuit's reasoning is this: suppose it to be true that the two groups of persons – adult women and unemancipated girls – stand on the same constitutional footing when it comes to abortion regulations. Reasoning by parity – *if* women, *then* girls – can tell you what is constitutionally required in a given situation, but only so long as two conditions are met. The first is that you must somehow figure out the answer regarding one of the subject classes. Only then could you know what is due the other class. The First Circuit reckoned that minors are entitled to a "health" exception *because* women are. The court took it as settled that women must have a "health" exception to . . . . . what? To which regulations? The First Circuit did not attempt to answer these questions.

The second condition is that the regulation itself must pertain to both groups. Identity of treatment is *impossible* with regulations unique to one or the other class. Reasoning by parity cannot reveal anything about what members of Group A deserve if there is no counterpart regulation in Group B's world. For example, a married female is considered in law to be an adult, no matter how old she is. No spousal notice requirement applies to minor girls; any exception for health to such a requirement could therefore tell us nothing about this case.

Similarly, here: because New Hampshire's parental notice law has no application to or counterpart in the adult world, it is idle to say that girls must have a health exception *because* adult women do.[8] Adult women are not subject to parental notice. We cannot even imagine that there *would be* a health exception to a parental notice law for women – if some hypothetical legislature were to pass one – because we know that law would be unconstitutional. We know *that* because we know that the whole starting point for parental notice laws is that minors are presumed to be immature and to lack the capacity to consent to medical treatment including abortion. We know that adult women are presumed to be mature and capable of consent.

Someone might object: there *is* an adult counterpart to the New Hampshire law; parity of reasoning *can* work. *Two* counterparts, actually, and an example of each can be found in *Casey*. The first is Pennsylvania's "informed consent" provision: "At least 24 hours before performing an abortion a physician [must] inform the woman of the nature of the procedure, the health risks of the abortion

[8] Actually, a close counterpart would be the treatment of women over the age of 18 who are incompetent, and the New Hampshire statute does, in fact, treat them in common.

and of childbirth, and the probable gestational age of the unborn child," except in case of "medical emergency." *Casey*, 505 U.S. at 881.

This objection gains some initial plausibility from the fact that the same "medical emergency" which excuses this informational session also excuses, according to the Pennsylvania law, the parental consent requirement for minors. *Id*. at 899. The surface similarity is that both laws aim (loosely speaking) to help a pregnant female make sure that she knows what she is doing when she chooses abortion. But there the comparison ends. It does not go nearly far enough to justify parity of reasoning.

Though a "medical emergency" would deprive adult women of some relevant information and of time for reflection upon it, they are – even without the information and time – *mature* and entirely *able* to decide what to do. A "medical emergency" may make their decision less informed and, in that sense, an imperfect choice. But a free and competent choice it still is.

A "medical emergency" deprives a pregnant minor, on the other hand, of parental advice or judicial counsel or both. In all events she remains what she was before the onset of medical complications: incapable of consenting to an abortion. Or worse: a minor's already immature judgment is likely to be impaired, not improved, by the news that (in the language of Pennsylvania's definition of "medical emergency") she faces "a serious risk of substantial and irreversible impairment of major bodily function."[9] *Id*. at 902.

[9] Pennsylvania's law contemplates "medical emergenc[ies]" which render a woman (or girl) unconscious, or at least incommunicado, and thus absolutely incapable of registering her wishes, one way or another.

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The second alleged counterpart: *Casey* looked at and struck down a spousal notification provision. This law might casually be said to do what New Hampshire's law did: promote family involvement and solidarity in deciding about abortion. And so our objector might reason: *if* there must be a health exception to laws requiring spousal notice, *then* there has to be an exception for minors bound by parental notice laws.

The problem is that the two laws really serve vastly different points. Parental notice is mainly intended to assist an immature minor to make as mature a decision about childbirth or abortion as possible. The Pennsylvania legislature said that its spousal notice rule was meant to "promot[e] the integrity of the marital relationship and to protect a spouse's interests in having children within marriage and in protecting the prenatal life of that spouse's child." *Id*. at 908.

The First Circuit's reasoning by parity is a transparent evasion, a trick, a black hole full of words which cannot do any analytical work. Its misguided analysis is no more likely to yield the right answer than is turning over cards, or flipping a coin. It is reasoning by parody, not parity.

Unfortunately, almost everything in the First Circuit's opinion besides this parody is irrelevant to the problem at hand, too. Not only does the Great Counterpart – adult women and their "health" exceptions – tell us nothing. The

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"Where a medical emergency compels the performance of an abortion, the physician shall inform the woman, prior to the abortion if possible, of the medical indications supporting his judgment that an abortion is necessary to avert her death or to avert substantial and irreversible impairment of major bodily function." *Id*. at 903.

central constitutional test in the vicinity – *Casey*'s "undue burden" standard – is also inapposite. It, too, presupposes what remains to be established: a legally effective *choice* for abortion by a competent female. And the core value beneath the abortion liberty itself – sovereign, self-defining choice upon matters central to personal identity – is largely unavailable to minors, as we shall now see.

III. The Touchstone of this Court's Abortion Jurisprudence – Free and Sovereign Individual Self-Determination – Has Diminished Relevance to the Unemancipated Minor.

Though *Roe* said a great deal about the role of medical personnel in abortion decisions, this Court left no doubt who was in charge: the pregnant woman. Though the *Roe* Court said that the woman is not isolated in her pregnancy, this Court left no doubt whose judgment is final: the pregnant woman's. This Court has said many times that states may pursue valuable interests, chiefly that in protecting unborn human beings, by and through abortion regulations. But those interests are, according to this Court, subordinate to the woman's choice. When all is said and done, it is almost impossible to overstate the centrality of sovereign and free individual choice to this Court's abortion jurisprudence.

But this touchstone's relevance to minors is much attenuated.

The *Casey* Court said that, in the decision to bear a child once conceived, "the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law." *Casey*, 505 U.S. at 852. *Casey*, again: "the destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in

society." *Id*. at 852. The problem is, a teenage girl's "spiritual imperatives" are a work in progress for which, in other situations, the law supplies damage control. The complication is that the unemancipated minor's "place in society" is largely to operate under parental authority. The girl's legal disabilities arises, though, not *by* operation of law. They owe instead to inescapable realities of youth – inexperience, shortsightedness, dependence, poor judgment, character-in-progress – which the law recognizes but does create.

What makes this case so perplexing is that the minor girl is not existentially able to participate in the abortion liberty nearly as adult women do. Consider, for example, *Roe's* checklist of matters pertinent to a "woman's" decision about abortion:

> Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.

Roe, 410 U.S. at 153.

How is the pregnant girl supposed to intelligently and freely exercise *this* liberty? The unemancipated minor lives at home and relies upon her parents for financial and emotional support. Will they be able to support her as a single mother, both financially and emotionally? Will they

want to? Will they be willing to share the burden of caring for the child, so that she may finish high school and, perhaps, go on to college? The pregnant teen knows even less about adoption and state financial assistance options than an adult woman. Will her parents help her find out what her options are? She has no way of knowing – and thus no way of making a knowing choice – if her parents have no idea she is seeking an abortion.

Other matters in orbit around the girl's deliberations cut much more deeply. The *Casey* Court highlighted that parents may discuss in private "the consequences of her decision in the context of the values and moral and religious principles of their family." 505 U.S. at 899-900. Who but her parents can provide the needed spiritual guidance in what has to be the most trying moment of a young girl's life? What is the morally *right* decision? What does my church (or synagogue or temple) say about abortion? Will family members criticize me for having an abortion? Will they criticize me if I do not?

Any serious effort to answer the question posed – does the Constitution require a "health" exception to a parental notice law? – will have to be cobbled together from the ground up, looking at all the relevant legal and empirical data, in light of all the pertinent constitutional values. Any answer must recognize, too, that the central aspiration of thirty-two years of abortion jurisprudence is scarcely within reach of minors.

IV. "Jane" – The Typical Unemancipated Teenage Girl at the Heart of This Case – Described

So far we have not really described the lead character in this story. So far we have referred to her generically as an "unemancipated minor" or as a "pregnant teen." We

can, however, put a more human face on our subject. We can flesh out the characteristic person that the New Hampshire statute covers.

Let us call her "Jane."

Jane is close to her sixteenth birthday, or has just turned sixteen. She is beginning her sophomore year of high school.[10] She is most likely to live with her two parents at home.[11] She is probably a low achiever in school, and a serious dropout risk.[12] Due to the recent downturn in the teenage job market, Jane is unlikely to be employed during the school year or even be able to find a summer job at the end of her sophomore year.[13] If Jane is lucky

[10] *See* CTR. FOR DISEASE CONTROL AND PREVENTION, REPORTED LEGAL ABORTIONS OBTAINED BY ADOLESCENTS BY KNOWN AGE AND STATE OF OCCURRENCE – SELECTED STATES, UNITED STATES (1995) (giving the national percentage of adolescent abortions as 9% by those teenagers under 15 years old, 17.4% by those teenagers 15 years of age, 30% of abortions by those 16 years old, and 43.2% by those 17 years of age, for an average age of 16 years old for the teenager under 18 who has an abortion); ALAN GUTTMACHER INST., U.S. TEENAGE PREGNANCY STATISTICS: OVERALL TRENDS, TRENDS BY RACE AND ETHNICITY, AND STATE-BY-STATE INFORMATION 12 (2004) (giving an estimate in New Hampshire of 20 abortions by teenagers under the age of 15 and 230 abortions by teenagers between 15 and 17 years of age per year, for an average age of just under 16 years old as the average age for an abortion by a teenager under the age of 18).

[11] *See* U.S. CENSUS BUREAU, LIVING ARRANGEMENTS OF CHILDREN 3 fig. 1 (2001) (finding nationally that 77% of Caucasian children are living with two parents); U.S. CENSUS BUREAU, NEW HAMPSHIRE QUICKFACTS (2000), *available at* http://quickfacts.census.gov/qfd/states/33000.html (finding 96% of the New Hampshire population to be Caucasian).

[12] *See* Jennifer Manlove, *The Influence of High School Dropout and School Disengagement on the Risk of School-Age Pregnancy*, 8 J. RES. ADOLESCENCE 187, 187-220 (1998).

[13] *See* CTR. FOR LABOR MKT. STUDIES, NORTHEASTERN UNIVERSITY, THE SUMMER JOB MARKET FOR U.S. TEENS 2000-2003 AND THE

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enough to find employment, her earning potential as a high school student will be very low: even with full-time employment Jane will be unlikely to bring in more than $1300 a month, or $15,600 a year.[14] Finally, Jane is likely to believe that she does not have the ability to change her circumstances and will fail to understand how her personal choices affect her quality of life.[15]

Here is Jane, as our law sees her.

Jane is free to entertain the opinions and to hold the convictions of her choosing. But her *actions* upon them are limited by laws which either require her parents' consent before acting, or deny her the freedom to act altogether. In these situations the rest of the adult world acts at its legal peril. With prescription drugs, alcohol, sexual relations, financial transactions, medical treatment, and more: the law's message is unmistakable: Jane is no free agent. No solo flights allowed. *Caveat maiores*. This customer (patient, seller) operates under parental supervision – or not at all.

Jane's body is not entirely her own. Even with activities just slightly dangerous to her health – such as providing an aspirin or transporting her on a field trip – school officials across the nation must obtain the consent of her

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PROJECTED OUTLOOK FOR THE SUMMER OF 2004, 8 (2004) (describing the paltry 36.5% employment rate for those 16-19 years of age and the causes for the worst teenage unemployment rate since before World War II).

[14] *See* U.S. CENSUS BUREAU, WHAT'S IT WORTH? FIELD OF TRAINING AND ECONOMIC STATUS 6 tbl. D (2001) (listing $1300 per month as the average earnings for an 18-29 year old without a high school diploma).

[15] *See* Tamera M. Young et al., *Internal Poverty and Teen Pregnancy*, 36 ADOLESCENCE 289, 296-97 (2001).

parents before acting.[16] Laws throughout the country require parents' consent to such activities as body piercing or tattooing.[17] Many states prohibit Jane from using artificial sun tanning facilities without her parents' written consent.[18] In at least one state, school administrators must have a parent's note before they are allowed to apply sunscreen to Jane.[19] Regarding abortion – a surgical procedure involving a much greater health risk to Jane than sun tanning or providing an aspirin[20] – at least forty-four of the fifty

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[16] *See, e.g.*, WILLIAM D. VALENTE, 2 EDUCATION LAW: PUBLIC AND PRIVATE § 19.23 at 212 (1985).

[17] In 33 states, minors under the age of 18 are either absolutely prohibited from getting body piercings or are only allowed to obtain such if a parent consents. Brief for the Juvenile Law Center app. B at B5, Roper v. Simmons, 543 U.S. ___ (2005) (No. 03-633). Regarding tattoos, 42 states either absolutely prohibit youth under the age of 18 from obtaining a tattoo, or only allow a youth to obtain a tattoo if a parent consents. *Id*. at B27.

[18] *Id*. at B26.

[19] *See* Daniel de Vise, *Bill Would Legislate Maryland Students' Use of Sunscreen*, WASH. POST., Mar. 29, 2005, at B1.

[20] While the actual health risks of abortion are hotly debated, abortion researchers have reached a consensus that teenagers are one of the highest risk groups for post-abortion psychological harm. *See, e.g.*, N.E. Adler et al., *Psychological Factors in Abortion: A Review*, 47 AM. PSYCHOLOGIST 1194 (1992); H.M. Babikian & A. Goldman, *A Study in Teen-Age Pregnancy*, 128 AM. J. PSYCHIATRY 755 (1971); N.B. Campbell et al., *Abortion in Adolescence*, 23 ADOLESCENCE 813 (1988); W. Franz & D. Reardon, *Differential Impact of Abortion on Adolescents and Adults*, 27 ADOLESCENCE 161 (1992); C.D. Martin, *Psychological Problems of Abortion for Unwed Teenage Girls*, 88 GENETIC PSYCHOL. MONOGRAPHS 23 (1973); J.S. Wallerstein et al., *Psychological Sequelae of Therapeutic Abortion in Young Unmarried Women*, 27 ARCHIVES GEN. PSYCHIATRY 828 (1972). In addition to psychological harm, there exists the usual possibility for physical complications that attend any non-trivial surgical procedure.

states have laws which require some form of parental involvement.[21]

The law presumes Jane's immaturity in many other areas, too. All 50 states and the District of Columbia deny Jane the ability to make a valid will[22] and will allow her to void an otherwise valid contract.[23] Forty-seven states and the District of Columbia prohibit her from participating in lotteries, bingo games and/or pari-mutual betting,[24] while ten states prohibit Jane from engaging in many other forms of gambling.[25] The use of alcohol and tobacco by Jane is prohibited in all 50 states.[26] Forty-six states and the District of Columbia restrict the delivery of many types of firearms and/or prohibit the possession of certain firearms by Jane.[27] Jane cannot drive a car free of all restrictions in 42 states until she is 18,[28] and many states also prohibit transactions between pawnbrokers and Jane.[29]

The law's wariness of Jane's decision-making extends to constitutionally protected activities. Forty-seven states either absolutely prohibit the sale or delivery of pornography to Jane or only allow sale or delivery if her parents consent.[30] Her ability to freely associate is significantly curtailed, as four out of five U.S. cities with a population of

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[21] H.R. REP. NO. 109-051, pt. 1, at 6 (2005).

[22] Brief of the Juvenile Law Center app. B at B30, *Roper* (03-633).

[23] Id. at B9.

[24] *Id*. at B16-B19.

[25] *Id*. at 9.

[26] *Id*. at B4, B7.

[27] *Id*. at B13-B14.

[28] *Id*. at B12.

[29] *Id*. at B24.

[30] *Id*. at B25.

more than 30,000 impose a nighttime curfew for anyone under 18.[31]

All these laws illustrate what this Court has often recognized: compared to adults, Jane's capacity for reasoned judgment and for understanding and appreciating the full consequences of her choices is much diminished. As this Court has reaffirmed just recently, "any parent knows [that a] 'lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.'" *Roper v. Simmons*, No. 03-633, slip op. at 15 (U.S. Mar. 1, 2005) (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)). As compared to adults, "'minors often lack the experience, perspective, and judgment' expected of adults." *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982) (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)).

Common sense confirms the law's tutelage of Jane. (Ask any parent.) Science confirms the law's wisdom as well. Recent studies comparing teenage and adult decision-making have found that when asked to evaluate hypothetical decisions, teenagers were less likely than adults to mention possible long-term consequences, to evaluate both risks and benefits, and to examine possible alternative options.[32] In these studies adults performed

[31] U.S. CONFERENCE OF MAYORS, A STATUS REPORT ON YOUTH CURFEWS IN AMERICA'S CITIES: A 347-CITY SURVEY 1 (1997).

[32] *See* Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-making Competence in Adolescents and Adults*, 22 APPLIED DEV. PSYCH. 257, 264-70 (2001); *see also* Elizabeth Cauffman & Laurence Steinberg, (*Im*)*maturity and Judgment in Adolescence: Why Adolescents May be Less Culpable Than Adults*, 18

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significantly better regarding the ability to weigh options available and resolve an issue than teenagers like Jane.[33]

Jane's reduced ability to assess probability is one factor in her poor decision-making.[34] Her lack of life experience is another.[35] She habitually fails to see the consequences of a particular course of action.[36] The ill-effects of her shortsightedness are aggravated by Jane's typically high sensitivity to peer influences.[37] State parental notification laws, then, just make compulsory what science and common experience already tell us: the best interests of Jane lie in having her parents involved in her decision-making process.[38]

BEHAV. SCI. & L. 741, 757 (2000) (noting that teenagers on average were "less responsible, more myopic, and less temperate than the average adult").

[33] Halpern-Felsher & Cauffman, *supra* note 32, at 268; *see also* Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEV. REV. 1, 1 (1992).

[34] Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEV. REV. 339, 344 (1992).

[35] *Id*. at 351-53 (finding that a teenager's more limited life experience makes it more likely that she will be unable to fully appreciate the future consequences of her action).

[36] *See, e.g.*, Cauffman & Steinberg, *supra* note 32, at 748, 754; Jari-Erik Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 DEV. REV. 1, 28-29 (1991).

[37] *See, e.g.*, B. Bradford Brown, *Peer Groups and Peer Cultures*, *in* AT THE THRESHOLD: THE DEVELOPING ADOLESCENT 171 (S. Shirley Feldman & Glen R. Elliot eds., 1990) (noting that teenagers are more susceptible to peer influence than adults); *see also* Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescent Decision Making*, 20 L. & HUM. BEHAV. 249 (1996) (noting that teenagers have *lesser capacity* in the following elements of decision-making: *autonomous choice*, self-management, risk perception, and calculation of future risks).

[38] *See, e.g.*, Planned Parenthood Fed'n of Am., Inc., Fact Sheets: Teenagers, Abortion, and Government Intrusion Laws, *at*

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V. "Jane" Faces the Decision of Her Life.

Now Jane faces the most difficult and unnerving decision of her young life. She is pregnant, perhaps "surprisingly" so. She is by definition unmarried; a teenager who marries is thereby "emancipated" under the New Hampshire law.[39] No spouse is on hand with whom Jane can share her thoughts. None is there to care for Jane, or for the child. Jane is considering abortion; at least she is in touch with a doctor willing to perform one on her. But no matter what she thinks or feels or says, she has *not* chosen to abort. For she cannot: the law treats her desire for an abortion as tentatively as it does her wish for a tattoo, for her own checking account, for surgery: none of these can she choose for herself. Her parents must be involved.

Doctors inform Jane that her pregnancy and expectant motherhood – challenging and rattling as they are – are complicated by a serious health risk which, doctors say, has to be dealt with *now*. Delay of even two days, they say, is dangerous. Though she is free to call out to her parents for help, Jane does not wish to do so, at least not yet.

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http://www.plannedparenthood.org/library/ABORTION/laws.html (last visited June 23, 2005) ("Few would deny that most teenagers, especially younger ones, would benefit from adult guidance when faced with an unwanted pregnancy. Few would deny that such guidance ideally should come from the teenager's parents."); *see also* Nat'l Abortion and Reprod. Rights Action League, Young Women: Reproductive Rights Issues, *at* http://www.naral.org/Issues/youngwomen/index.cfm (last visited June 23, 2005) ("Responsible parents should be involved when their young daughters face a crisis pregnancy.").

[39] N.H. REV. STAT. ANN. § 132:25 (2003).

The doctors keep telling her to *choose* now. They are not proposing only a major medical procedure on her. That would be a big enough deal. If that were all there was to it, there would be no interesting legal question: in any other medical context, the doctors would have to obtain her parent's consent, or submit their best medical judgment to the tender mercies of emergency treatment laws. The distinguishing factor which takes *this* decision so utterly beyond her ken is that it will kill the child *in utero*. Jane carries a life within. She now holds it in her hands.

In this unsurpassably portentous setting, fraught with danger to mind, body and spirit what is the *outer limit* of the law? What help for Jane and her family does the Constitution permit? What assistance is absolutely ruled out? Is New Hampshire's handling of it within the field of acceptability? Or without?

Once the phony comparison to adult women is abandoned, and when we accept that abortion jurisprudence swings at an oblique angle from the case of the pregnant minor, one thing is for sure: comparisons to the adult world have nothing to say about it.

VI. This Court's Precedents Call For Parental Involvement as "Jane" Faces this Momentous Decision; the First Circuit Would Instead Abandon Her.

In *Hodgson* this Court identified "[t]hree separate but related interests – the interest in the welfare of the pregnant minor, the interest of the parents, and the interest of the family unit" as relevant to a notice requirement. 497 U.S. at 444. *Hodgson* later observed that a waiting period "provides the parent the opportunity to consult with his or her spouse and a family physician, and it permits the

parent to inquire into the competency of the doctor performing the abortion, discuss the religious or moral implications of the abortion decision, and provide the daughter needed guidance and counsel in evaluating the impact of the decision on her future." *Id*. at 448-9.

How did the First Circuit follow through on these directions? The court in passing mentioned what it took to be the interests at stake. They were two. Instead of the "unborn child," the opinion below spoke of "the potentiality of life," and the court said nothing about the impact of abortion upon the child or even upon Jane of the decision to end the child's life. Where this Court spoke of parents' opportunity to aid their daughter's deliberations the lower court spoke tellingly of "protecting minors from undertaking the risks of abortion without the advice and support of a parent" – as if parents were introduced simply to help her get through an abortion presumed to be inevitable. *Heed*, 390 F.3d at 59. If that were so, parental notice laws would have nothing to do with effective consent (as they do). There would be no such thing as parental consent laws. There would be no need for any judicial bypass. In this corner of the First Circuit's world, it appears that minors are presumed, after all, to *be* grown-ups.

Perhaps one can imagine a legal response to Jane's predicament along those lines. Perhaps some state might declare that the minor who, a moment ago, was presumed incompetent is now competent to choose abortion. The occasion for this dramatic turn would be the fact, and only the fact, that her pregnancy has blossomed into a full-blown health crisis. Though your *amici* cannot think of anything to recommend this approach, maybe it is constitutionally permissible. But nothing in constitutional law

makes this desperate resort to fiction mandatory upon the states.

The First Circuit's conclusion held no suspense for the reader. "Regardless of the interests served by New Hampshire's parental notice statute, it does not escape the Constitution's requirement of a health exception." *Id*. at 60. And a peculiar "health" exception it is. The lower court referred often to cases, such as *Casey*, in which restrictive definitions of "health" were on offer. But the First Circuit never set out or adopted any definition. Nowhere in the opinion did the court say or suggest that the abortion doctor needed the minor's inchoate agreement – even if still not effective legal consent – to go ahead and abort. In this corner of the lower court's opinion, it seems that we have a wholesale transfer of legal authority over a pregnant teen and her unborn child to the treating physician. If the minor is still presumed to be incompetent, and the statute's call for parents or judges to help is deemed expendable, what else can it be called *but* a transfer of legal authority? Whenever the doctor judges that "health" risks call for an immediate abortion, there is no consultation with parents or a judge. The abortion will be done.

This "health" exception is all the more curious because it is supererogatory. Note that the alleged need for a health exception arises when treating medical personnel present think an abortion should be performed on a patient who is incapable of consenting to it. This is scarcely an exotic situation. New Hampshire law provides expressly authorized emergency medical treatment for any person "unable to give consent for any reason, including

minority," and where there is no one available legally authorized to consent.[40]

The New Hampshire Attorney General argued that these generally applicable provisions for emergency care without consent provided a "functional equivalent" to a health exception. *Heed*, 390 F.3d at 61. The Attorney General also drew the court's attention to general defenses to criminal liability for acts of "necessity." *Id*. The First Circuit granted that these statutes "could be cobbled together to preclude all civil and criminal liability for medical personnel who violate the Act's notice requirements in order to preserve a minor's health." *Id*. The court nevertheless denied that they were the functional "equivalent" of a health exception.

The articulated basis for this response was curious, too. The court said that the parental notice law superseded all these more general provisions, notwithstanding assurances of the state's chief legal officer that they did not. The First Circuit was also worried that in no case whatsoever might those performing an abortion be less than certain they were acting with utter legal impunity. Why this tiny fraction of the medical profession should enjoy legal immunities for performing surgery on non-consenting patients denied to all others practicing medicine in New Hampshire, the court did not explain.

The question taken up and answered by the First Circuit, then, is not really whether a "health exception" to the notice law is required. That was never disputed, as the Attorney General's submission made crystal clear. The

[40] N.H. REV. STAT. ANN. § 153-A:18 (2003).

court held instead that an *exception* to the normal exceptions – and nothing less – was constitutionally required. At this point the puzzle is not so much *that* the First Circuit required a "health" exception. It is instead: what could that court possibly *mean* by a "health" exception?

Whatever exactly the court's "health" exception is supposed to mean, it surely means a release from parental and judicial brakes upon Jane's desires for an abortion, or her abortion provider's desires for her to have one, or, perhaps, some unstated and unstable amalgam of the two. It is a permissive rule; more abortion rather than fewer would thenceforth be performed on the "Janes" of New Hampshire.

What supports this expansive rule? Nothing from this Court's abortion cases. Nothing in popular opinion or extant legal practice.[41] And nothing in available data on what, in fact, women with high-risk pregnancies actually choose. The vast majority of women who have high risk pregnancies *do not* choose abortion merely because of the high risk of physical injury. For every 1,000 women who have live births, 246 women choose to have an abortion.[42] Of those 246 women, less than 3% – or 8 women – have an abortion because of a health reason.[43] In contrast, for every

[41] *See supra* Part IV.

[42] CTR. FOR DISEASE CONTROL AND PREVENTION, ABORTION SURVEILLANCE – UNITED STATES, 2000, tbl. 2 (2003), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5212a1.htm (last visited July 11, 2005). Both the abortion rate and the high risk pregnancy rate are based off of Year 2000 numbers.

[43] Aida Torres & Jacqueline Darroch Forrest, *Why Do Women Have Abortions?*, 20 FAM. PLAN. PERS. 169, 170 tbl. 1 (1988). Recent state surveys have reported an even drastically lower percentage of women who chose abortion because of health reasons. *See, e.g.*, Ariz. Dep't of Health Serv., Characteristics of Women Receiving Abortions,

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1,000 women who have live births, more than 152 women are exposed to a serious health risk during pregnancy, such as eclampsia, anemia, hypertension, and hydramnios.[44] Thus, out of 152 women who have a high risk of physical injury during pregnancy, 95% of them will *not* end their pregnancy and choose abortion because of a serious health risk.[45]

The permissive effect of the First Circuit's zealous opinion, then, is nothing less than this: according to the best statistical evidence, many "Janes" in New Hampshire – and across the United States depending on what this Court does – will receive abortions which they do not really want.

1993-2003, tbl. 1D-1, *at* http://www.azdhs.gov/plan/report/ahs/ahs2003/xls/t1d1.xls (last visited July 12, 2005) (finding that the mother's health was the reason given in only .5% of abortions where the woman reported the reason for termination between 1993-2003); FLA. DEP'T OF HEALTH, FLORIDA VITAL STATISTICS ANNUAL REPORT, 2003, tbl. T-2 (2003), *available at* http://www.doh.state.fl.us/Planning_eval/vital_statistics/03Vitals/termination.pdf (last visited July 11, 2005) (finding a health reason for termination of an abortion in only .5% of abortions with a reported reason for termination in 2003).

[44] CTR. FOR DISEASE CONTROL AND PREVENTION, NATIONAL VITAL STATISTICS REPORT, 2000, at 57 tbl. 26 (2002).

[45] This is not inconsistent with the New Hampshire Act's permission to doctors to perform an immediate abortion where delay might kill the mother. Though many women would run even that risk for the benefit of their child *in utero*, most probably would not. The restrictive abortion laws before *Roe* also held that, in such tragic conflicts, mothers could justifiably preserve themselves. This history as well as the morality of the situation surely support the view that such a systematic legal preference for the mother is constitutionally permissible. But neither what is commonly chosen today nor legal history nor morality supports a systematic preference to abort the child *in utero* wherever there is a health risk.

VII. New Hampshire's Law Fits Comfortably Within Constitutional Bounds, and Is Typical of How the Law in our Country Provides for Minors Making Important Decisions.

There *is* an "if-then" form of reasoning at the center of sound thinking about Jane, her pregnancy, and abortion. It is not the First Circuit's question-begging adult-minor syllogism. It is instead the realm of true counterparts to pregnancy and abortion. These comparable matters resemble Jane's present challenge because they are big decisions, laden with long-term consequences. They resemble abortion in another way; in fact, they are part of the same set of issues. According to New Hampshire law – here, typical of laws across the country – Jane may not marry the father of her child *in utero*; have any surgery at all during pregnancy; or give her baby up for adoption *without* her parents' consent. And, being just now on the cusp of her sixteenth birthday, the sexual intercourse by which she came to be with child was *per se* illegal. Not even parental license can dispense with the criminal law's absolute and conclusive presumption that girls under sixteen cannot consent to sex. It is known as statutory rape.

New Hampshire's general provision for parental authority is typical of the national legal consensus, too: a "parent" has the "duty and authority to make important decisions in matters having a permanent effect on the life and development of the child."[46] Their guardianship empowers them to withhold medical treatment of Jane –

[46] N.H. REV. STAT. ANN. § 169-C:3(XIV) (2003).

no matter how much *she* wants it – for all "major medical, psychiatric and surgical treatment."[47]

Many of the girls covered by New Hampshire's law – all those under 16 – are conclusively presumed to be incapable of consenting to sexual intercourse, no matter how much they desire it, no matter how willing nearby adults may be to accommodate them, and no matter how much good all present think it would be for any such willing girl.[48] New Hampshire law also stipulates that a birth mother less than eighteen years of age – Jane, for example – may surrender her parental rights, subject to the court's authority to require her parents' "assent."[49] Of course Jane *may* consult her parents about abortion. This case supposes that she does not wish to. But why should the law be bound to treat *that* desire as mature, well-considered, and legally effective? The law is not bound to do so in any other medical or sexual or family context.

This context is all the more serious because Jane is not alone. It is not just about long-term consequences to *her*. An unborn child's life is involved. *Casey* said that the law's insistence upon informed consent furthers the "legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed," especially with regard to its impact upon the unborn child. 505 U.S. at 882.

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[47] *Id*. § 169-C:3(XIV)(a)(3) (2003).

[48] *Id*. § 632-A:3(II).

[49] *Id*. § 170-B:5(I)(a).

It is easy to see that a girl accepting the burdens of motherhood is making a life-altering decision. Perhaps that is why some observers, perhaps including the court below, prefer that she forego such lasting responsibilities at her age. But the choice to abort lasts, too. It is, according to every statement of this Court on the matter, a paramount *moral* choice with lasting *spiritual* effects. The decision will linger in Jane's character; it will make her into a certain kind of person. She may be free after abortion to pursue interests and pleasures and dreams which being a mother would have postponed. But she is not necessarily free of memory and – as *Casey* suggests – regret and even guilt. Indeed, Jane's choice to carry the baby to term can be undone, in that she can choose adoption at any point thereafter. But Jane's choice to abort her baby is beyond revision or recall.

These intensely personal aspects of the abortion decision have been at the ground of this Court's decisions keeping the heavy hand of government at bay. But those decisions do not imply nor do they suggest that Jane – an unemancipated minor – must be left *alone*. She need not be. She should not be. And, were it not for the New Hampshire parental notification law, Jane would face the gravest crisis of her life without guidance from the two people who know her the most intimately: her mother and her father. Without their help, she is unlikely to foresee the possible psychological, physical, social, educational, and economic ramifications of her choice. Without an appreciation of the future consequences of her abortion decision, Jane may be making no choice at all. She may be held hostage by her – and her peers' – worst fears and suspicions.

If Jane's parents are in the dark, she may be effectively denied a real opportunity to choose, as surely as if the state made the decision for her.

CONCLUSION

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

Respectfully submitted,

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