No. 04-1144

IN THE

Supreme Court of the United States

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KELLY A. AYOTTE, ATTORNEY GENERAL OF THE STATE OF NEW HAMPSHIRE,
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 FOR AMICUS CURIAE LIBERTY COUNSEL IN SUPPORT OF PETITIONER

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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 Southeastern Pennsylvania 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 to 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 other state statutes?

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INTEREST OF AMICUS CURIAE[1]

Liberty Counsel is a non-profit civil liberties education and legal defense organization devoted to preserving religious liberty, the sanctity of human life and traditional families. Liberty Counsel has worked on legislation, public policy and litigation throughout the country as part of its mission to preserve the Founding Fathers' commitment to the inalienable right to life. Liberty Counsel has also worked to protect the fundamental liberty interest of parents in the upbringing and direction of their children. The intersection of these issues in the present case creates a complex constitutional issue that will require thorough and thoughtful analysis to reach the proper balance of protected interests. Liberty Counsel respectfully submits this brief to assist the Court in its examination of these critical issues.

SUMMARY OF ARGUMENT

Long before this Court determined that there was a constitutional right to abortion it recognized that the fundamental right of liberty described in the Fifth and Fourteenth Amendment of the United States Constitution encompasses the fundamental right of parents to direct the upbringing of their children. *See Meyer v. Nebraska*,262 U.S.

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[1] Liberty Counsel files this brief with the consent of all parties. The letters granting consent of the parties are attached hereto with 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 *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

390, 399 (1923). These constitutional rights converge in New Hampshire's Parental Notification Prior to Abortion Act[2] (the "Act"). The Act balances parents' fundamental rights to direct the upbringing of their children with the right to seek an abortion by requiring that a parent of an unmarried, unemancipated minor be notified before her daughter obtains an abortion.

Because they integrate parents' fundamental rights with the right to seek an abortion, parental notification statutes such as New Hampshire's are in a different category and require different constitutional analysis than do statutes that regulate abortions for adult women. Since the Court can assume that adult women are mature enough to make an informed decision, it can uphold challenges to statutes restricting abortions for adult women solely on the basis that the legislation places an "undue burden" upon a woman's "choice." However, when the challenged statute is aimed at unmarried, unemancipated minors, then the assumption of maturity is no longer present, and the rights of the minor's parents become critical. Since state interference into the private realm of the family is seldom justified absent proof of harm,[3] a statute aimed at protecting parents' rights from interference is entitled to heightened protection against facial challenges. This Court has long afforded such heightened protection in the form of a stringent test that forecloses facial challenges unless "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

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[2] 2003 N.H. Laws 173, codified at N.H. Rev. Stat. Ann. § 132:24-28 (2003)

[3] *See Hodgson v. Minnesota*, 497 U.S. 417, 447 (1990)

The *Salerno* test has been used to reject facial challenges to abortion laws. *Rust v. Sullivan*, 500 U.S. 173, 183 (1991), *Webster v. Reproductive Health Services,* 492 U.S. 490, 524 (1989). More notably, *Salerno* and similar stringent standards have been used to reject facial challenges to parental notification laws. *Ohio v. Akron Center for Reproductive Health* ("*Akron II*"), 497 U.S. 502 (1990); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *H.L. v. Matheson,* 450 U.S. 398 (1981). This is in keeping with this Court's commitment to protection of the "private realm of family life which the state cannot enter."*Hodgson,* 497 U.S. at 447. As Justice Stevens has acknowledged, "The State's interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible." *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 102 (1976) (Stevens, J., concurring in part and dissenting in part).

When this Court invalidated a spousal notification provision under an "undue burden" test in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 895 (1992), it recognized that its conclusion

> is in no way inconsistent with our decisions upholding parental notification or consent requirements.[citations] Those enactments, and our judgment that they are constitutional, 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.

As Justice Scalia has stated, the *Casey* decision did not

overrule *Salerno* nor abrogate its role as the established test for facial challenges. *Janklow v. Planned Parenthood, Sioux Falls Clinic,* 517 U.S. 1174, 1178-1179 (1996) (Mem.) (Scalia, J., dissenting). In fact the *Casey* decision does not even mention the *Salerno* standard.

Nevertheless, the First Circuit determined that New Hampshire's parental notification statute should not be judged by the *Salerno* standard, but by the less strict "undue burden" test announced in *Casey.* Although the differences between parental notification statutes and other abortion regulations justify findings that the parental notification statutes are constitutional despite the holding in *Casey*, the First Circuit determined that New Hampshire's Act is unconstitutional under *Casey.* The First Circuit's failure to apply *Salerno* reflects a misapplication of relevant precedent from this Court. In addition, the First Circuit misapplied the *Casey* standard when it found that New Hampshire's parental notification law placed an "undue burden" on minors' rights to abortion.

ARGUMENT

I. THE "NO SET OF CIRCUMSTANCES" TEST OF *UNITED STATES V. SALERNO* PRESERVES THE BALANCE OF RIGHTS AND RESPONSIBILITIES BETWEEN THE COURT AND LEGISLATURES.

Far from being a "draconian" standard lacking in authority,[4] the "no set of circumstances" test described in

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[4] Michael Dorf, *Facial Challenges to State and Federal Statutes,* 46 STAN. L.REV. 235, 239 (1994).

United States v. Salerno, 481 U.S. 739, 745 (1987)[5] is, in fact, the culmination of years of precedents that balance the relative constitutional duties of the judiciary and legislature with the right of litigants to be judged by a valid rule of law. Maintaining the proper balance between these competing rights and responsibilities requires continued application of the *Salerno* test to facial constitutional challenges.

Despite one commentator's claim that *Salerno* is inaccurate and inconsistent with this Court's facial challenge cases,[6] the history of facial constitutional challenges both before and after *Salerno* demonstrates that it is "only the most famous of a line of cases applying virtually the same test" based upon institutional and federalism concerns.[7] *Salerno's* "no set of circumstances" test and similar standards address the institutional concern that Article III courts can decide only concrete cases.[8] *Salerno*'s concept of strictly limiting facial challenges also addresses the federalism concern that if a statute is capable of constitutional application, then courts should hold off constitutional judgments until it is known whether a construction adopted by state courts will protect

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[5] "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [an act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment." *Salerno*, 481 U.S. at 745.

[6] Dorf, *Facial Challenges,* 46 STAN. L.REV. at 238

[7] Note, *Stranger in a Strange Land: The Use of Overbreadth in Abortion Jurisprudence,* 99 COLUM. L. REV. 173, 195 (1999).

[8] *Id.*

constitutional rights.[9]

By utilizing *Salerno* and similar standards over the years, this Court has made it clear that facial challenges are appropriate, if at all, only in exceptional circumstances.[10] Mirroring Chief Justice Rehnquist's statements in *Salerno,* the Court in *National Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) said, "Respondents raise a facial constitutional challenge to § 954(d)(1), and consequently they confront 'a heavy burden' in advancing their claim." Facial invalidation "is, manifestly, strong medicine" that 'has been employed by the Court sparingly and only as a last resort." *Id.*

The reasoning behind the continuing validity of the *Salerno* test was best explained in *Younger v. Harris*, 401 U.S. 37, 52-53 (1971):

> The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision; a statute apparently governing a dispute cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). But this vital responsibility, broad as it is, does not amount

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[9] *Id.*

[10] Marc Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement,* 48 AM. U.L. REV. 359, 361 (1998).

> to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them. Ever since the Constitutional Convention rejected a proposal for having members of the Supreme Court render advice concerning pending legislation it has been clear that, even when suits of this kind involve a 'case or controversy' sufficient to satisfy the requirements of Article III of the Constitution, the task of analyzing a proposed statute, pinpointing its deficiencies, and requiring correction of these deficiencies before the statute is put into effect, is rarely if ever an appropriate task for the judiciary. The combination of the relative remoteness of the controversy, the impact on the legislative process of the relief sought, and above all the speculative and amorphous nature of the required line-by-line analysis of detailed statutes, [citations] ordinarily results in a kind of case that is wholly unsatisfactory for deciding constitutional questions, whichever way they might be decided. In light of this fundamental conception of the Framers as to the proper place of the federal courts in the governmental processes of passing and enforcing laws, it can seldom be appropriate for these courts to exercise any such power of prior approval or veto over the legislative process.

Justice Scalia explained the dangers of discarding *Salerno*'s strict standard for one that would be more inviting

to facial challenges:

> Facial invalidation based on overbreadth impermissibly interferes with the state process of refining and limiting–through judicial decision–statutes that cannot be constitutionally applied in all cases covered by their language. And it prevents the State (or territory) from punishing people who violate a prohibition that is, in the context in which it is applied, entirely constitutional.

Ada v. Guam Society of Obstetricians and Gynecologists, 506 U.S. 1011 (1992) (Scalia, J., dissenting).

Viewed in historical context, *Salerno* and other cases imposing strict limits on facial challenges "reflect a conception of a federal judiciary limited to interfering with legislatures, particularly state legislatures, only when necessary to judge the constitutional rights of the parties to a particular case."[11] "The Salerno test...is based not on a simplistic policy of applying a statute as often as possible, but upon preservation of a proper balance between courts and legislatures."[12]

II. *SALERNO*'S "NO SET OF CIRCUMSTANCES" TEST IS THE PROPER STANDARD OF REVIEW FOR RESPONDENTS' FACIAL CHALLENGE OF NEW HAMPSHIRE'S PARENTAL NOTIFICATION LAW.

The *Salerno* test illustrates that in order to maintain a proper balance between competing individual rights and the

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[11] Note, *Stranger in A Strange Land,* 99 COLUM. L. REV. at 195.

[12] *Id.* at 197.

relative roles of the judiciary and legislature, statutes cannot be subjected to microscopic cleansing of all conceivable impermissible applications. Instead, a statute must be judged according to its terms and overturned on its face only when those terms contain an inherent infirmity regardless of particular applications. Such analysis is particularly apropos for abortion statutes which by their nature involve a conflict between personal and states' rights, and is absolutely critical for evaluating parental notification statutes which affect fundamental rights that predate the right to abortion.

A. The *Salerno* Standard Must Be Applied To Protect The Parents' Fundamental Right To Direct The Upbringing Of Their Children Inherent In The New Hampshire Law.

As the *Casey* court said:

> Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted.

Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 852 (1992). In addition, when the woman seeking an abortion is an unmarried unemancipated minor, there are consequences to her parents and to her continuing journey toward maturity.

Therefore, when a statute such as New Hampshire's addresses a minor seeking an abortion, it must necessarily balance the competing privacy interests of the pregnant woman described in *Roe v. Wade*, 410 U.S. 113 (1973), and the woman's parents, as established in *Meyer v. Nebraska*, 262 U.S. 390 (1923). Indeed, both before and after *Roe*, this Court has recognized "the fundamental liberty interest of natural parents in the care custody and management of their children." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). As Justice Scalia stated: "[A] right of parents to direct the upbringing of their children is among the 'unalienable Rights' with which the Declaration of Independence proclaims 'all men ... are endowed by their Creator.'" *Troxel v. Granville,* 530 U.S. 57, 91 (2000) (Scalia, J., dissenting). New Hampshire's parental notification statute protects these fundamental rights by requiring that a minor notify a parent before obtaining an abortion, while at the same time preserving the right of the minor to have an abortion.

Such a balancing of interests means that certain limitations which might otherwise be viewed as an impermissible restriction on abortion (such as the notification requirement) would be seen as reasonable in light of the competing parental interest. "[T]he holding in *Roe v. Wade* that the abortion decision is entitled to constitutional protection merely emphasizes the importance of the decision; it does not lead to the conclusion that the state legislature has no power to enact legislation for the purpose of protecting a young pregnant woman from the consequences of an incorrect decision." *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 102 (1976) (Stevens, J., concurring in part and dissenting in part). Therefore, a facial challenge to a law that protects both the right to abortion and the unique needs of a pregnant minor must be subjected to the exacting

scrutiny of the *Salerno* standard so as to avoid the kind of impermissible interference with state legislative process that this Court has been concerned about through the years. *See, e.g., Younger v. Harris*, 401 U.S. 37, 52-53 (1971).

B. This Court Has Used *Salerno's* "No Set of Circumstances" Test To Protect State Interests Against Facial Challenges to Abortion Regulations.

While *Salerno* dealt with a facial constitutional challenge to a bail reform act, its "no set of circumstances" test has not been limited to criminal laws. In fact, this Court has used the test described in *Salerno* to protect state interests against facial challenges to abortion laws.

Concurring in the Court's upholding of various provisions of Missouri's abortion law, Justice O'Connor said:

> Appellee's facial challenge to the constitutionality of Missouri's ban on public funding cannot succeed. There may be conceivable applications of the ban on the use of public facilities that would be unconstitutional, but some quite straightforward applications of the Missouri ban would be constitutional and that is enough to defeat appellees' assertion that the ban is facially unconstitutional. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the [relevant statute] might operate unconstitutionally under

> some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment."

Webster v. Reproductive Health Services, 492 U.S. 490 522-524 (1989) (O'Connor, J., concurring).

Similarly, in *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court explicitly relied upon *Salerno* to reject a facial challenge to Title X funding restrictions against abortion counseling:

> Petitioners are challenging the facial validity of the regulations. Thus, we are concerned only with the question whether, on their face, the regulations are both authorized by the Act and can be construed in such a manner that they can be applied to a set of individuals without infringing upon constitutionally protected rights. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid." *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987) .

Rust, 500 U.S. at 183. Application of the *Salerno* standard in these cases was appropriate in light of the maxim that "[a]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." *Id.* at 190. "Under this canon of statutory

construction, '[t]he elementary rule is that every reasonable construction must be resorted to, in order to *save a statute* from unconstitutionality'."*Id.* "As between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act." *Id*. *Salerno*'s strict standard of review permits the Court to carry out that duty by ensuring that only laws which are inherently unconstitutional are declared facially invalid.

C. *Salerno*'s Strict Standard Of Review Best Represents This Court's Zealous Protection Of Parental Rights Against Facial Challenges To Parental Notification Laws.

As this Court recognized in *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990), *Salerno*'s "no set of circumstances" test preserves the elementary rule described in *Rust* by ensuring that only those statutes that are truly invalid on their face are found to be unconstitutional. After repeating the adage that where fairly possible, courts should construe a statute to avoid a danger of unconstitutionality, the *Akron* court used the *Salerno* standard to reject a facial challenge to Ohio's parental notification law. *Id.* at 514.

"Because appellees are making a facial challenge to a statute, they must show that 'no set of circumstances exists under which the Act would be valid.'"*Id.* "The Court of Appeals should not have invalidated the Ohio statute on a facial challenge based upon a worst-case analysis that may never occur." *Id.*.

While not explicitly referencing *Salerno*, this Court's other rulings rejecting facial challenges to parental notification statutes have utilized similarly strict standards of review aimed

at preserving the balance between the courts and legislatures. This Court's rejection of facial challenges to parental notification statutes also reflects the Court's zealous protection of the fundamental liberty interest of parents in the care, custody and management of their children.

"Three separate but related interests – the interest in the welfare of the pregnant minor, the interests of the parents, and the interest of the family unit – are relevant to our consideration of the constitutionality of [Minnesota's] 48-hour waiting period and the two-parent notification requirement." *Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990). "The State has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely." *Id.* "That interest, which justifies state-imposed requirements that a minor obtain his or her parent's consent before undergoing an operation, marrying, or entering military service, . . extends also to the minor's decision to terminate her pregnancy." *Id.* at 445. "Although the Court has held that parents may not exercise 'an absolute, and possibly arbitrary, veto' over the decision, [citations] it has never challenged a State's reasonable judgment that the decision should be made after notification to and consultation with a parent." *Id*.

> The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition. We have long held that there exists a "private realm of family life which the state cannot enter." Thus, when the government intrudes on choices concerning the arrangement of the household, this Court has carefully examined the governmental interests advanced and the

> extent to which they are served by the challenged regulation.

Id. at 446-447. "We think it clear that a requirement that a minor wait 48 hours after notifying a single parent of her intention to get an abortion would reasonably further the legitimate state interest in ensuring that the minor's decision is knowing and intelligent." *Id.* at. 448.

Similarly, in *H.L. v. Matheson,* 450 U.S. 398, 409 (1981), this Court rejected a facial challenge to Utah's parental notification statute, stating that, parental notice and consent are qualifications that typically may be imposed by the State on a minor's right to make important decisions. In addition, "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Id*. at 410. "We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected." *Id.* "Parents have an important guiding role to play in the upbringing of their children, which presumptively includes counseling them on important decisions," including the decision of whether to have an abortion. *Id.*.

As Justice Stewart said in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 91 (1976),

> There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where

abortions for pregnant minors frequently take place. Justice Stevens added that:

> The State's interest in the welfare of its young citizens justifies a variety of protective measures. Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. Persons below a certain age may not marry without parental consent. Indeed, such consent is essential even when the young woman is already pregnant. The State's interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible.

Id. at 102 (Stevens, J., concurring in part and dissenting in part). In his dissent, Justice White made an even stronger case for protecting the interests of the parents when a minor is considering an abortion.

> The abortion decision is unquestionably important and has irrevocable consequences whichever way it is made. Missouri is entitled to protect the minor unmarried woman from making the decision in a way which is not in her own best interests, and it seeks to achieve this goal by requiring parental consultation and consent. This is the traditional way by which States have sought to protect children from their own immature and improvident decisions; and there is absolutely no reason expressed by the majority why the State may not utilize that method here.

Id. at 95 (White, J., dissenting).

Therefore, when confronted with a conflict between a woman's privacy right as described in *Roe* and the parents' fundamental right to direct the upbringing of their children, this Court has consistently acted to preserve the state's interest in protecting parental rights. With few exceptions, the Court has acted to preserve the balance between the legislature and the courts by rejecting facial challenges to parental notification statutes.[13] This is consistent with *Salerno*'s strict limitation of facial challenges to those laws that are inherently unconstitutional.

D. This Court Has Acknowledged That *Casey* Does Not Affect Rulings Upholding Parental Notification Statutes Under The *Salerno* Standard.

The *Casey* decision did not mention, let alone overrule *Salerno*. More importantly, as the Court implicitly stated in *Casey*, nothing in that ruling diminishes the applicability of *Salerno* to parental notification statutes.

In invalidating Pennsylvania's spousal notification requirement, the *Casey* plurality specifically stated:

> This conclusion is in no way inconsistent with our decisions upholding parental notification or consent requirements. *Akron II,* 497 U.S. at 510-19; *Bellotti v. Baird,* 443 U.S. 622 (1979), (Bellotti II) and *Planned Parenthood*

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[13] Most recently, this Court upheld Montana's parental notification statute against a facial challenge based upon the fact that the statute used as a criteria for judicial by-pass whether notification was in the minor's best interest instead of whether the abortion was in the minor's best interest. *Lambert v. Wicklund*, 520 U.S. 292 (1997) (per curiam).

> *of Central Mo. v. Danforth,* 428 U.S. at 74. Those enactments, and our judgment that they are constitutional, 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.

Casey, 505 U.S. at 895. As Justice Stevens said in *Casey*, "Thus, we have upheld regulations of abortion that are not efforts to sway or direct a woman's choice, but rather are efforts to enhance the deliberative quality of that decision or are neutral regulations on the health aspects of her decision. *Id*. at 916 (Stevens, J., concurring in part and dissenting in part). Citing *Hodgson v. Minnesota*, Justice Stevens noted that, "While there are well-established and consistently maintained reasons for the Commonwealth to view with skepticism the ability of minors to make decisions...none of those reasons applies to an adult woman's decisionmaking ability." *Id.* at 918-919 (Stevens, J., concurring in part and dissenting in part). The state has a "legitimate interest in protecting minor women from their own immaturity." *Id.*

That legitimate state interest meant that the parental consent portion of the Pennsylvania law was constitutional, even though the spousal notification and other provisions were not. *Id.* at 899."Our cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure." *Id*.

The Court's recognition of the continuing validity of parental consent/notification statutes even after the *Casey* ruling demonstrates that, contrary to the First Circuit's

conclusion in this case, *Casey* and *Salerno* are not mutually exclusive. In fact, the Fourth and Fifth Circuits have recognized that the *Salerno* test could easily accommodate the *Casey* "undue burden" test. *See Manning v. Hunt*, 119 F.3d 254, 269 (4th Cir. 1997) and *Barnes v. Moore*, 970 F.2d 12, 14 (5th Cir. 1992).

The Fifth Circuit upheld Mississippi's parental consent statute, noting that it was substantially similar to the Pennsylvania provision found constitutional in *Casey*. "Because the plaintiffs are challenging the facial validity of the Mississippi Act, they must 'establish that no set of circumstances exists under which the Act would be valid'." *Barnes*, 970 F.2d at 14. "In light of *Casey*'s holding substantially identical provisions of the Pennsylvania Act facially constitutional, the plaintiffs cannot satisfy this 'heavy burden'." *Id.* The *Barnes* court noted that "[t]he *Casey* joint opinion may have applied a somewhat different standard in striking down the spousal notification provision of the Pennsylvania Act, not in issue here. Nevertheless, we do not interpret Casey as having overruled, sub silentio, longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes." *Id.* at n.2.[14]

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[14] As the First Circuit noted, numerous circuit courts have chosen to use *Casey* instead of *Salerno* as the applicable test for facial challenges to abortion statutes. I, *Planned Parenthood of Central N.J. v. Farmer*, 220 F.3d 127, 142-43 (3rd Cir. 2000) (invalidating New Jersey's ban on partial birth abortions), *Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187, 194-97 (6th Cir.1997) (invalidating bans on certain procedures and a requirement of viability testing), *cert. denied,* 523 U.S. 1036 (1998); *Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir.1996) (invalidating regulations on abortions before 20 weeks gestation and essentially banning abortions after 20 weeks gestation) cert. denied, 520 U.S. 1274 (1997); *Planned Parenthood, Sioux Falls Clinic*

Justices Rehnquist, Scalia, and Thomas agree that *Casey* did not overrule *Salerno.*

> "Our traditional rule has been, however, that a facial challenge must be rejected unless there exists *no set of circumstances* in which the statute can constitutionally be applied. The only exception to the rule recognized in our jurisprudence is the facial challenge based upon First Amendment free-speech grounds. We have applied to statutes restricting speech a so-called 'overbreadth' doctrine, rendering such a statute invalid in all its applications (*i.e.,* facially invalid) if it is invalid in any of them. While the *Roe* court seemed to apply an overbreadth approach, later abortion decisions

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v. Miller, 63 F.3d 1452, 1456-58 (8th Cir.1995)(invalidating several provisions of the South Dakota statute). All of these decisions recognize that this Court has not overruled *Salerno* and has not held that *Casey* displaced *Salerno*. Nevertheless, the appellate courts applied *Casey* instead of *Salerno* based upon preference or their belief that this Court "intended" to overrule *Salerno* but neglected to do so. In all but one case, the courts used the *Casey* standard to invalidate provisions similar to those struck down by the *Casey* court and therefore unlike the parental notification statute here or the parental consent provision found valid in *Casey*. In one case, *Miller*, the court looked at provisions that included a parental notification statute without a judicial by-pass provision. The *Miller* court did not recognize the critical differences between a parental notification/consent statute and a statute regulating adults' abortion decisions, as this Court did in *Casey*, and therefore failed to follow *Casey* in that respect. By contrast, the *Manning* and *Barnes* courts correctly noted the continuing deference given to parental consent/notification statutes even after *Casey*, and held that in those instances *Casey* has not overruled *Salerno*. *See Manning*, 119 F.3d at 268-269; *Barnes*, 970 F.2d at 14.

> have explicitly rejected application of an "overbreadth" doctrine. (*Ohio v. Akron Center, Webster, Rust v. Sullivan*). The Court did not purport to change this well-established rule last Term in *Casey.*

Ada 506 U.S. at 1011(Scalia, J., dissenting).

Similarly, in *Janklow v. Planned Parenthood, Sioux Falls Clinic,* 517 U.S. 1174, 1178 (1996) (Scalia, J.. dissenting), Justice Scalia said, "It has become questionable whether, for some reason, this clear principle [*Salerno*] does not apply in abortion cases." Since *Casey* did not so much as allude to the facial-challenge rule in *Salerno*, let alone overrule it, there is no basis to believe that the Court has purported to reject the *Salerno* standard, particularly in parental notification/consent cases. *Id.* at 1179.

Even in adopting the "undue burden" standard in *Casey* this Court recognized that the legitimate state interests in protecting parental rights and protecting minors from their own immaturity justify continued heightened review of parental notification/consent standards. Therefore, contrary to the First Circuit's conclusion, *Salerno*'s "no set of circumstances" standard continues to be the proper standard for judging facial constitutional challenges of parental notification laws.

III. NEW HAMPSHIRE'S ACT IS CONSTITUTIONAL EVEN IF IT IS ANALYZED UNDER THE "UNDUE BURDEN" STANDARD IN *PLANNED PARENTHOOD V. CASEY*.

When a plurality of this Court used an "undue burden" standard to invalidate certain provisions in Pennsylvania's abortion statute, it was also careful to explain that the

standard was not meant to have universal application. *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 876-77 (1992). In particular, when an abortion regulation is not an effort "to sway or direct a woman's choice," but is "an effort to enhance the deliberative quality of the decision," then it is not facially invalid under *Casey*. *Id.* at 916 (Stevens, J., concurring in part and dissenting in part). The First Circuit erred when it failed to recognize this distinction which would have rendered the New Hampshire statute constitutional even under the *Casey* standard.

The *Casey* court found that the parental consent provision in Pennsylvania's statute was aimed at enhancing deliberations for pregnant minors rather than swaying their decision, and therefore was constitutional. *Id.* at 899. "Our cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure." *Id.* The "right to choose" does not mean that the state is prohibited from taking steps to ensure that the choice is thoughtful and informed. *Id.* at 872. Justice Stevens agreed that the state may take steps to ensure that a woman's choice is thoughtful and informed, and that the states are free to enact laws to provide a reasonable framework for a woman to make "a decision that has such profound and lasting meaning." *Id.* at 916 (Stevens, J., concurring in part and dissenting in part). This is particularly true when the woman making the decision is a minor, since "there are well-established and consistently maintained reasons for the Commonwealth to view with skepticism the ability of minors to make decisions." *Id.* at 918. Justice Blackmun agreed that the state has an interest in encouraging parental involvement in the minor's abortion decision. *Id.* at 938 (Blackmun, J., concurring in part and dissenting in part).

As the plurality noted, "Not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right." *Id.* at 873.

> The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.

Id. at 874 (citing, *inter alia*, *Hodgson v. Minnesota*, 497 U.S. 417, 458-459 (1990), *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 519-520 (1990) and *Webster v. Reproductive Health Services,* 492 U.S. 490, 530 (1989), cases upholding parental consent/notification statutes).

> A finding of an undue burden is a shorthand for the conclusion 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. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it.

Id. at 877. As Justice Stevens said, "A state-imposed burden on the exercise of a constitutional right is measured both by its effects and by its character: A burden may be 'undue' either because the burden is too severe or because it lacks a legitimate, rational justification." *Id.* at 920 (Stevens, J., concurring in part and dissenting in part).

Therefore, "challengers of abortion statutes must prove in the first instance that either 'the legislature's purpose was to interfere substantially with a woman's abortion choice, or that a challenged regulation would impose a 'substantial obstacle' to the exercise of that choice.'"[15] "The existence of a substantial obstacle is calculated not by determining how the statute would affect all women seeking to obtain an abortion, but by evaluating its effect on the group for whom the law is a restriction."[16] "The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it."[17]

Under *Casey*, therefore, "[A] regulation which is solely intended to be an obstacle to choice, or which has the direct effect of burdening choice, imposes an unconstitutional burden for that reason alone. If the regulation lacks such intent and has only an incidental or insignificant effect on choice, it is constitutional."[18]

Measuring New Hampshire's statute against the "undue burden" standard as enumerated in *Casey* and in the context of its status as a parental notification law leads to the inescapable conclusion that Respondents' facial challenge must fail. As was true with the parental consent statute upheld

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[15] Note, *Casey "Versus" Salerno: Determining an Appropriate Standard for Evaluating The Facial Constitutionality of Abortion Statutes*, 19 CARDOZO L.REV. 1825, 1835 (1998).

[16] *Id.* at 1836.

[17] *Note, Stranger in a Strange Land*, 99 COLUM. L. REV at pp. 176-177.

[18] *Id.* at 177.

in *Casey*, New Hampshire's statute seeks to enhance the minor's deliberative process. New Hampshire's Legislature, like Pennsylvania's, has taken steps to ensure that a minor woman's choice is thoughtful and informed, and is seeking to provide a reasonable framework for a woman to make "a decision that has such profound and lasting meaning." Since the women affected by New Hampshire's statute are minors, the state has "well-established and consistently maintained reasons" to view with skepticism the ability of minors to make decisions" and therefore an interest in encouraging parental involvement in the minor's abortion decision. *See, Casey*, 505 U.S. at 918, 938. The state has built in exceptions to the parental notification requirement, including a judicial by-pass provision, which illustrates that the state's interest is not in posing an obstacle to obtaining an abortion, but in ensuring that the abortion right is properly balanced with the parents' rights.

The ruling in *Casey* makes clear that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure. *Id.* at 899.[19] New Hampshire's statute, therefore, permissibly addresses the state's interests in the well-being of pregnant minors and their families. The fact that the parental notification statute might incidentally make it more difficult or more expensive for a minor to obtain an abortion (a fact which Respondents did not prove) does not invalidate the statute under *Casey*.

The First Circuit failed to engage in the analysis required under *Casey* for a parental notification law. In so

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[19] Amicus does not address whether New Hampshire's by-pass procedure is constitutionally adequate, which is beyond the scope of this brief.

doing, it ignored the state's long-standing interest in protecting parental rights and the well-being of minors facing a life-changing decision. As *Casey* made clear, the "undue burden" test did not jettison years of precedent which established that a woman's "right to choose" must be balanced, in the case of minors, with the parents' right to control the care and upbringing of their children. New Hampshire's law respects that precedent while also respecting the right to abortion described in *Roe,* and therefore is not facially invalid under either *Casey* or *Salerno.*

CONCLUSION

This Court's ruling in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992) did not affect long-standing precedent. The standard described in *United States v. Salerno*, 481 U.S. 739 (1987) remains the proper standard of review for facial constitutional challenges to parental notification statutes.

Respectfully Submitted,

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