No. 04-1144

In The
Supreme Court of the United States

KELLY A. AYOTTE,
Attorney General 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 OF THE HONORABLE JOHN H. LYNCH GOVERNOR OF THE STATE OF NEW HAMPSHIRE AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

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STATEMENT OF INTEREST OF AMICUS[1]

Governor John H. Lynch has served as Governor of the State of New Hampshire since January 6, 2005. As Governor, he has the responsibility to ensure that all New Hampshire citizens, particularly the most vulnerable, have access to quality health care. The Governor must strive to protect the integrity of the process by which highly trained professionals deliver health care services in New Hampshire. The Governor has an interest in assuring that physicians in New Hampshire are allowed to exercise their good faith medical judgment in preserving the life and health of their patients without being subject to criminal sanctions.

SUMMARY OF ARGUMENT

New Hampshire has a proud tradition of providing for the medical needs of its citizenry, including young women.[2] Just as the Hippocratic Oath commands physicians, "First, do no harm," the State of New Hampshire must first ensure that it does not create legal impediments that prevent physicians from continuing to provide quality

[1] Amicus Curiae file this brief by consent of the parties, and copies of the letters of consent are on file with the Clerk of the Court. Counsel for Amicus Curiae authored this brief in its entirety. No person or entity, other than the Amicus Curiae, has made a monetary contribution to the preparation or submission of this brief.

[2] New Hampshire has been cited as having one of the lowest teenage pregnancy rates in the nation, ranking 48th. *See*, The Alan Guttmacher Institute, U.S. Teenage Pregnancy Statistics: Overall Trends, Trends by Race and Ethnicity and State-by-State Information, Table 2, http://www.guttmacher.org/pubs/state_pregnancy_trends.pdf (updated Feb. 19, 2004).

health care to all citizens. The New Hampshire Parental Notification Prior To Abortion Act (the "Parental Notification Act" or the "Act")[3] creates such impediments.

The Act interferes with the long-established practice in New Hampshire that allows a physician to act without delay in an emergency situation to save the life or health of a patient. The Act imposes criminal penalties on a physician who, without prior parental notification, acts in an emergency to preserve the health of a minor. Even a physician who attempts a *life*-saving abortion is not spared from criminal liability under the Act unless the physician can attest to a medical certainty that the patient will die if the abortion is not performed within the time it takes to comply with the Act's notice requirements.[4] Imposing such a heavy personal burden on physicians will result in reduced access to health care for young women. Imposing prohibitions on and delays in emergency treatment creates the risk of permanent impairment or death to patients.

The judicial bypass procedure set forth in the Act, N.H. Rev. Stat. Ann. §132:26, II, does not serve as a substitute for the sort of health exception mandated by this Court in the context of an abortion.[5] Emergency health procedures are just that: emergencies. Often split-second decisions must be made by physicians to preserve the health of the patient.

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[3] N.H. Rev. Stat. Ann. §§132:24-28.

[4] N.H. Rev. Stat. Ann. §132:26, I(a) provides that no notice to the parent is required if: "[t]he attending abortion provider certifies in the pregnant minor's medical record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice."

[5] *See Planned Parenthood v. Casey*, 505 U.S. 833, 846, 879-80 (1992); *Stenberg v. Carhart*, 530 U.S. 914, 931 (2000).

Despite the stated intention of the Act to provide for judges to be available on an around-the-clock basis, our state's judiciary is simply not equipped to serve as an emergency medical second-opinion in abortion cases. A young woman will be hard-pressed to convene a judicial hearing to provide "immediate relief" as argued by Petitioner in her Brief.[6] As a practical matter, the court system is not able to play the role ascribed to it by the Attorney General.

ARGUMENT

I. New Hampshire's Parental Notification Act Reverses the Long-Established Presumption in New Hampshire that a Physician May Act Without Delay in an Emergency Situation to Save the Life or Health of a Patient

The Parental Notification Act prevents a minor from obtaining an abortion unless her parent has been notified at least forty-eight (48) hours in advance of the abortion; the parent certified that he or she received notice; or the young woman has been granted a waiver pursuant to a judicial bypass mechanism provided in the Act. The Act contains no emergency health exception to the parental notice requirement. The Act, therefore, defies a well-established practice in New Hampshire of permitting health care practitioners to act without delay in emergency situations (even without the consent of the patient or the patient's authorized representative) to protect the health of their patients. In fact, the Act renders criminally liable a physician who, without at least 48-hours advance notification to

[6] Petitioner's Brief, p. 21.

the patient's parent, performs an abortion that the physician believes is necessary to prevent harm (e.g., kidney failure, infertility) to the health of the patient.

Under the Act, the physician is prevented from performing even life-saving abortions unless the physician can certify to a certainty that the minor will die within the time it takes to comply with the Act's notice requirements and that the abortion is "necessary" to prevent death. In this respect the Act attempts to convert medicine from an art to a science by requiring precision and certitude that is unattainable in the medical profession. The sanction for a misstep by the physician is severe: a criminal penalty.

The general emergency implied consent doctrine in New Hampshire is derived not from legislative enactment but from common practice and common law.[7] A generally accepted practical and common sense exception to New Hampshire's informed consent laws, it allows physicians to act without express consent in order to save the life or health of the patient. Although no single New Hampshire statute or case encapsulates this general emergency doctrine, its existence has been acknowledged and embraced by the legislature. *See, e.g.*, N.H. Rev. Stat. Ann.

[7] *See*, *e.g.*, *Luka v. Lowrie*, 136 N.W. 1106 (Mich. 1912) ("To hold that a surgeon must wait until perhaps he may be able to secure the consent of the parents before giving to the injured one the benefit of his skill and learning, to the end that life may be preserved, would, we believe, result in the loss of many lives which might otherwise be saved); *Jackovach v. Yocom*, 237 N.W. 444 (Iowa 1931) ("If the surgeon, confronted by an emergency, is not to be permitted, after having fairly and carefully examined the situation, to exercise his professional judgment in his honest endeavor to save human life, then the public at large must suffer"); *Tabor v. Scobee*, 254 S.W. 2d 474 (Ky. 1951) (recognizing "emergency exception" doctrine).

§507-E:2, II(a) (articulating the elements of a cause of action for negligent failure to give informed consent and specifically excluding from its parameters those circumstances in which the physician "acted in an emergency situation"). Other New Hampshire statutes identify specific circumstances in which a physician may act without consent in an emergency to preserve the life or health of a patient.[8]

The Parental Notification Act overrides common law and common sense. The Act reverses the long-standing presumption that a physician may act without delay in an emergency to preserve the life or health of a patient. The Act's inclusion of a death exception and its glaring omission of any emergency health exception makes it impossible for state courts to infer an emergency health exception.[9] Moreover, even the emergency death exception in the Act is limited, requiring the physician to attest with certainty that if an abortion is not performed within the 48-hour notification period, death to the patient will result. The combination of the high burden of proof and the high stakes to a physician places at risk the very health and life of the young patient.

In an effort to save the Act from constitutional infirmity, the Attorney General argued in the lower court that

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[8] *See*, *e.g.*, N.H. Rev. Stat. Ann. §153-A (addressing the delivery of emergency medical and trauma services initiated at the scene of an incident); N.H. Rev. Stat. Ann. §627:6, VII(b) (allowing a health care practitioner to use force in certain circumstances when administering treatment during a medical emergency).

[9] "The expression of one thing in a statute implies the exclusion of another." *St. Joseph Hosp. of Nashua v. Rizzo*, 141 N.H. 9, 11-12, 676 A.2d 98, 100 (1996).

this Court can, if necessary, read an emergency health exception into the Act. The Attorney General posited that certain other New Hampshire statutes, when read with the Act, authorize a physician to provide medical treatment to a pregnant minor in the case of a medical emergency.[10] Unfortunately, none of the three statutes cited by the Attorney General applies to the situation addressed by the Act: (1) N.H. Rev. Stat. Ann. §153-A addresses the rendering of "emergency medical services" by EMTs or "any other health professional" in the *pre-hospital* setting, *e.g.*, treatment at the scene of an accident or a curbside setting; (2) N.H. Rev. Stat. Ann. §627:6, VII(b) allows a health care practitioner to use force in certain circumstances when administering treatment during a medical emergency; and (3) N.H. Rev. Stat. Ann. §627:3, I is a general criminal statute addressing "competing harms" that does not purport to address emergency health exceptions, or health care at all.

The Attorney General's reliance on the two criminal statutes cited above highlights one of the most insidious ramifications of the Act: the application of the heavy hand of criminal law to the good faith exercise of professional medical judgment. This radical new approach to our health care delivery system threatens to interfere with the competent and safe delivery of health care services in New Hampshire.

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[10] *See Planned Parenthood v. Heed*, 390 F.3d 53, 61 (1st Cir. 2004). Note that the Attorney General has abandoned this line of argument in this Court.

II. The Act Subjects Well-Intentioned Physicians to Criminal Penalties, Thereby Undermining the Sanctity of the Physician-Patient Relationship in New Hampshire and Creating a Chilling Effect on Access to Health Care in New Hampshire

New Hampshire has a long tradition of respecting the sanctity of the physician-patient relationship.[11] By criminalizing the behavior of physicians who exercise their professional judgment in attempting to protect the health of their patients, the Act will have the effect of changing the health care landscape in New Hampshire.

The Parental Notification Act has the potential to reduce access to health care services for patients in New Hampshire and to change the nature of the services rendered. At present, only a small number of physicians are willing to perform abortions on minors. Faced with criminal sanctions for even good faith decisions regarding emergency procedures, it is likely that even fewer physicians will be willing to continue to provide these services. Those who continue to accept young patients seeking abortions will inevitably approach their decision making in a different manner. Given the high stakes of criminal liability, they will no longer be concerned about just the risks to their patients, but will understandably be concerned about their own careers and their own personal liberties. In a small state, the already small percentage of providers could be dramatically reduced.

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[11] *State v. Elwell*, 132 N.H. 599, 567 A.2d 1002 (1989); *Nelson v. Lewis*, 130 N.H. 106, 534 A.2d 720 (1987).

III. The Judicial Bypass Procedure Provided in the Act Does Not Serve as a Substitute for a Health Exception

The Parental Notification Act provides that in lieu of the 48-hour parental notice provision, a minor woman may seek a waiver from a judge pursuant to a "judicial bypass provision." Under the Act, access to the lower and appellate courts must be available "24 hours a day, 7 days a week,"[12] and according to the Attorney General, "access to a judge can be almost immediate"[13] for the granting of a judicial waiver.

New Hampshire boasts a judiciary which is both competent and responsive. But as a practical matter, neither our courts – nor indeed the courts of any state – have the resources to provide a thoughtful second opinion in a medical emergency on a moment's notice. The way in which this Act will be administered in the real world is at the heart of this constitutional issue. As this Court held in the case of *Planned Parenthood v. Casey*, the government may not "interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health."[14]

In her Brief to the Court, the Attorney General analogizes the Act's judicial bypass procedure to a search warrant procedure. This is a revealingly inapt analogy. A petition to a court seeking a judicial bypass waiver due to a health exception calls for a far more complicated and time consuming review than an application for the issuance of a

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[12] N.H. Rev. Stat. Ann. §132:26, II(c).

[13] Petitioner's Brief at p. 22.

[14] *Planned Parenthood v. Casey*, 505 U.S. 833, 879-80 (1992).

search warrant. Given the number and frequency of applications for search warrants, New Hampshire law enforcement has established a relatively seamless procedure for gaining swift access to judges. The application for a search warrant requires only a showing of probable cause, which lies in the hands of the police. The police have an established relationship with the prosecutors, who in turn, have an established relationship with the judges. In fact, the police and prosecutors typically have the home telephone number of the judge.

A young woman facing a medical emergency and seeking to invoke the Act's judicial bypass procedure hardly has a judge's home telephone number at her fingertips. Nor is it likely that she even has an attorney's telephone number. And, if she is in the throes of a health emergency, she will be hard-pressed to marshal the physical energy and focus to gain access to a judge on an "almost immediate" basis.

Even if the young woman has a health care provider willing to press her case, it is unlikely, for the reasons set forth below, that she could gain "almost immediate" access to a judge. Just as importantly, it is unreasonable to assume that the judge could render an immediate decision on whether the abortion is in the "best interests" of the young woman.[15] The following list includes only the most basic steps to comply with the required procedural safeguards of the Parental Notification Act.

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[15] It is telling that the Act itself calls for a maximum time limit of seven days – not minutes or hours – for a decision by the lower court, together with another seven days for a decision by the appellate court. N.H. Rev. Stat. Ann. §§132:26, II(b)-(c).

1. Under the Act, the young woman has a right to court-appointed counsel.[16] Even during business hours, it takes time to locate an attorney who is immediately available to meet with the client and to commence the court filings;

2. Under the Act, the judge determines whether the young woman is "mature and capable of giving informed consent,"[17] which would appear to require an assessment by the judge of the young woman's demeanor;

3. The Act provides that the judge "may choose to appoint a guardian ad litem for the young woman."[18] Even assuming that the emergency occurs during business hours, it takes time to locate guardians ad litem who can make themselves immediately available to meet with the patient and her health care professionals, review the patient's medical record, and prepare a report to the judge regarding the "best interests" of the young woman;

4. The judge will likely require testimony or affidavits from physicians treating the young woman regarding the health issues involved, given that the precipitating reason for the judicial bypass hearing is the patient's emergency medical condition;

5. The judge will likely want to examine a certified copy of the medical record at issue. During business hours, a physician or hospital can promptly produce a certified medical record from the keeper of the medical records but

[16] N.H. Rev. Stat. Ann. §132:26, II(a).

[17] N.H. Rev. Stat. Ann. §132:26, II.

[18] *Id.*

outside of business hours this document will be much more difficult to obtain;

6. The Act calls for "an appropriate hearing" to be held.[19] The court will likely schedule an expedited hearing, either in the courtroom or at the patient's bedside, at which the judge may wish to elicit testimony from the young patient (if capacitated), her physician, and others who can offer pertinent information for the court to make a determination as to whether the abortion is in the "best interests"[20] of the young woman; and

7. The judge who hears this non-routine medical case will rightfully expect to familiarize himself or herself with the facts and law before rendering a decision in the case.

In sum, it is unlikely that a young, pregnant woman with an emergency health condition – with or without assistance from her health care provider – could navigate the medical and legal terrain in a manner that would allow her to obtain "almost immediate" access to a judge. This is especially so if her medical emergency arises after business hours and in the middle of the night. Once a judge is found, it seems reasonable to expect that the judge will need to take the time to gather pertinent evidence to ascertain whether it is indeed in the "best interests" of the young woman to proceed with an abortion.

[19] *Id.*

[20] N.H. Rev. Stat. Ann. §132:26, II(a).

CONCLUSION

This case is not a referendum on whether parents should usually be involved in decisions related to medical care for their minor children. There are few who would dispute that in the best of worlds parental guidance is desirable. Rather, this case involves that small percentage of situations in which, for one reason or another, parental involvement is not available and in which the treating physician has determined that continuation of the pregnancy creates serious health risks or even the risk of death to the young woman. These are precisely the conditions under which this Court has ruled that states must exercise caution. These are also the circumstances under which leaders of a state must take steps to safeguard the life and health of its citizens.

For the foregoing reasons, Amicus Curiae, the Governor of the State of New Hampshire, respectfully requests this Honorable Court to affirm the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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