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**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 *AMICI CURIAE* NARAL PRO-CHOICE AMERICA FOUNDATION, ET AL., IN SUPPORT OF RESPONDENTS

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## INTERESTS OF AMICUS CURIAE[1]

The NARAL Pro-Choice America Foundation, NARAL Pro-Choice America and the 27 state-based affiliates, chapters and projects of NARAL Pro-Choice America (collectively, "NARAL Pro-Choice America") are organizations that work through the legislative process, in Congress and in the states, to secure policies that reduce unintended pregnancy and the need for abortion, while ensuring access to the full range of reproductive health services and safeguarding the constitutional right to privacy.[2] NARAL Pro-Choice America tracks state and federal legislation, writes reports and amicus briefs, educates the public, serves as a legislative consulting service, and organizes citizens and legislators to protect the freedom to choose. Our work nationally and in the states and our annual publication *Who Decides? The Status of Women's Reproductive Rights in the United States* (formerly, *A State-by-State Review of Abortion and Reproductive Rights)*, inform this brief. As *amicus curiae*, NARAL Pro-Choice America seeks to highlight the Court's and the legislature's respective spheres of authority: declaring this legislation unconstitutional is consistent with the judicial function, whereas reenacting the law with necessary exceptions properly belongs within the purview of the New Hampshire legislature.

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[1] This brief was not authored, in whole or in part, by counsel for either party. No person or entity other than the *amici curiae*, their members, and their counsel contributed monetarily to the preparation or submission of the brief. The parties consented to the filing of the brief and copies of their letters of consent have been lodged with the Clerk of the Court.

[2] For a complete list of the NARAL Pro-Choice America affiliates, chapters and projects that have signed on to this brief, *see* Additional *Amici*, *infra*.

## SUMMARY OF ARGUMENT

The New Hampshire statute at issue in this case, N.H. Rev. Stat. Ann. §§ 132:24-28, contains fatal constitutional flaws, including its obvious lack of a health emergency exception. Courts cannot and should not graft provisions onto this statute to render it constitutional.

The reasons for this are many: first, it would re-negotiate the compromise embodied in the New Hampshire legislation and likely trample upon the wishes of New Hampshire's legislators. In enacting this law, the New Hampshire legislature chose not to include an exception for those emergencies that endanger a minor's health but do not immediately threaten her life. Given the clarity of the law requiring health emergency exceptions and the vigorous advocacy surrounding health exceptions in abortion jurisprudence, the legislature's failure to make provisions to protect young women's health in the event of an emergency can only be called intentional. The "deal" embodied in the legislation should not be rewritten, but rather invalidated.

Second, the Court would be engaging in sheer guesswork if it tried to craft a health emergency exception. Although the Court since *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S 833 (1992), has clearly demanded a medical emergency exception protecting health, it has yet to specify the constitutional minima for such an exception. Thirty-six legislatures around the country have enacted at least twelve formulations protecting women's health in an emergency, with varying specifications as to five separate issues, such as the severity of the health problem, its duration and what types of problems might constitute a health emergency. Thus, if the Court were to write a health emergency exception to save the law from being struck as unconstitutional, its guess would in all likelihood diverge from anything that could have gained consensus among the New Hampshire legislators.

Third, if the Court were to try to cure the law's obvious constitutional defects, it would encourage legislators across the country to act irresponsibly, or even lawlessly. Lawmakers have a duty to uphold the Constitution, including interpretations of the Constitution with which they disagree. The Court should not countenance legislators' intentional disregard for constitutional precepts by drafting obviously necessary provisions for them. Legislators would be free to dodge tough issues and cater to insistent interest groups that favor no health exceptions during the legislative process and thereafter be rewarded by having their laws go into effect as amended by the Court. Instead, the Court should encourage responsible lawmaking by effectively saying "Enact a constitutional bill, and we will uphold it. Flout established law, and we will strike the enactment down."

This has often been the Court's approach, and legislators have by and large responded with a strong measure of fidelity to clear holdings of facial invalidity. Adhering to this approach would encourage conscientious lawmaking, or at least not reward irresponsible lawmaking.

Fourth and relatedly, with respect to protecting women's health, the battle among advocates and key political constituencies is well-articulated, and it carries well-understood political consequences. Although the actual number of women who might be affected by a health emergency exception may not be large, the issue commands the highest level of attention on both sides of the abortion debate. Pro-choice advocates have long defended the pillar of *Roe v. Wade*, 410 U.S. 113 (1973), that protects women's health against relentless criticism and legal attack. By contrast and notwithstanding constitutional law demanding protection for women's health, anti-abortion advocacy groups and legislators typically oppose all abortions other than those necessary to save women's lives, even when the continuation of the pregnancy poses a serious health threat. Given this political landscape, were the Court to craft a

health emergency exception to save the statute, it would become a new political actor in New Hampshire's legislative negotiations.

In sum, declining to rewrite New Hampshire's law to make it constitutional coheres with the Court's expertise, role and function: to say what the law is and to maintain precedent. Rewriting New Hampshire's law would involve the Court in the legislative function, without the democratic procedures of having the legislation considered and voted on by elected officials who hear public testimony and who may be called to account for their actions by the people.

## ARGUMENT

### I. THE NEW HAMPSHIRE LEGISLATURE CHOSE NOT TO INCLUDE THE CONSTITUTIONALLY REQUIRED HEALTH EXCEPTION, AND THE LAW CANNOT BE SAVED BY CRAFTING A HEALTH EMERGENCY EXCEPTION FOR IT.

It is obvious that New Hampshire's statute does not contain a health emergency exception. Likewise, the remedy is apparent: this Court cannot save the statute for the legislature, when its collective determination – not to have a health exception at all – is manifest.

#### A. New Hampshire Legislators Were on Notice that the Supreme Court Has Required that Abortion Regulations Must Provide Protection for Women's Health.

For more than 30 years, this Court's abortion jurisprudence has required protections for women's health, and this doctrine has recently been clarified and reaffirmed. Even when the state's interest in fetal life is at its apex late in pregnancy, *Roe v. Wade* forbids a state to interfere with a

woman's choice to have an abortion if continuing the pregnancy would threaten her health. 410 U.S. at 164.

An unbroken line of cases has carried this doctrine to the present. In *Colautti v. Franklin,* the Court disapproved of any "trade off" between the woman's health and an increased likelihood of fetal survival. 439 U.S 379, 400 (1979). In *Thornburgh v. American College of Obstetricians & Gynecologists,* Pennsylvania's second physician requirement failed to provide an exception for situations where waiting for a second physician would endanger a woman's health. Accordingly, the statute was invalidated. 476 U.S. 747, 771 (1986). Though much of *Thornburgh* has been overruled by *Casey*, its holding regarding the necessity for a health emergency exception is undisturbed.

In *Casey,* the Court reiterated *Roe's* prohibition on requirements that burden women's health. Indeed, in assessing the Pennsylvania statute at issue under the Court's new "undue burden" analysis, the Court began by assessing the adequacy of the health emergency definition and referenced *Roe*: that is, the health exception is an independent doctrinal necessity, and its adequacy was the very first point of inquiry for the Court in determining the provisions' constitutionality. The Court noted that the "essential holding of *Roe* forbids a State to 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. In upholding Pennsylvania's law providing for parental consent, the Court found that the "medical emergency" exception of Section 3202 was sufficiently broad to protect women's health. *Id.* This section of the opinion, Part V-A, was joined by two concurring justices and, thus, was the opinion of the Court. It was a ringing reaffirmation that regulations must explicitly protect women facing health emergencies.

The continued vitality of the health exception was underscored in another context eight years later in *Stenberg v. Carhart,* where the Court struck down Nebraska's ban on abortion procedures for at least "two independent reasons," one being that it failed to include the required health exception. 530 U.S. 914, 930 (2000).

Given these well-publicized and unambiguous rulings, the New Hampshire legislators were on notice about the constitutional necessity to include a health emergency exception. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97 (1979). Other states certainly understand these requirements: as we discuss in Part II below, 42 states have enacted a parental involvement law; of these, 36 states explicitly protect minors facing a medical emergency. Ten of the 42 state laws are enjoined or otherwise not in force; some of the litigation in these states and others concerned the laws' failure to protect minors' health in an emergency.[3] New Hampshire legislators' failure to follow unbroken Supreme Court law, their sister states' lead, and the lower court cases striking down statutes for failure to protect women's health, demonstrates defiance towards the law's requirements, defiance that should not be rewarded by fixing the statute for them.

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[3] *See Planned Parenthood of the Rocky Mountains Services, Corp. v. Owens*, 287 F.3d 910 (10th Cir. 2002) (striking down parental involvement law for lack of a health emergency exception); *Planned Parenthood of S. Arizona v. Neely*, 804 F. Supp. 1210 (D. Ariz. 1992) (same); *see also Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908 (9th Cir. 2004) (striking down parental involvement law for lack of an adequate health emergency exception).

### B. New Hampshire Legislators Did Not Want a Health Emergency Exception.

The most salient fact in construing the statute is what the statute itself says. This statute says *nothing* about minors' health; the only exemption concerns threats to minors' lives. The New Hampshire statute simply leaves the Court nothing to construe.[4] The New Hampshire statute is crystal clear: doctors may waive the parental notice requirement to protect a minor who may die, but not one who may suffer serious threats to her health.[5]

The failure to include a health exception was not a mere drafting error or legislative oversight that might arguably warrant a judicial remedy to implement the legislature's overall intent. On the contrary, key sponsors of the legislation trumpeted their pride in not including a health exception. Former State Representative Phyllis Woods, a co-sponsor of the bill, declared that the lawmakers intentionally left out a health exception, which she denounced as necessarily too broadly defined.[6] Her comments were echoed by her colleague Fran Wendleboe, who told the Associated Press, "We didn't mistakenly forget to put in a health exception. We purposely crafted the bill without an

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[4] *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (citing *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 240 (1989)) (statute is clear; no interpretation necessary).

[5] The New Hampshire legislature's failure to enact an exception protecting minors' health is significant. *See Tanner v. United States*, 483 U.S. 107, 122-25 (1987); *I.N.S. v. Cardozo-Fonseca*, 480 U.S. 421, 441- 43 (1987); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985); *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 663 n.3 (1985).

[6] Dan Gorenstein, Parental Notification Law Faces Challenge, New Hampshire Public Radio (Nov. 17, 2003) http://www.nhpr.org/node/5396.

exception."[7] Woods wanted the Supreme Court to take the case so that the law requiring health exceptions could be challenged:

> It's what we were hoping for [that the Court would grant certiorari]. It's one of the reasons we wrote the law the way we did. Because we thought it would go through all the courts and it would be challenged.[8]

She said that it does not include a health exception because, "[i]f we had written that into the bill[,] it would have made it useless,"[9] ignoring the fact that 36 states have enacted explicit, limited health exceptions in their parental involvement laws. Likewise, Roger Stenson, director of New Hampshire Citizens for Life, who testified in favor of the bill, derided all health exceptions when the law was enjoined for want of a health exception.[10]

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[7] *Abortion Law Was Dangerous*, PORTSMOUTH HERALD, Dec. 31, 2003, *available at* http://www.seacoastonline.com/2003news/12312003/opinion/68065.htm.

[8] Dan Gorenstein, Court Takes Up State's Parental Notification Law, New Hampshire Public Radio (May 23, 2005) http://www.nhpr.org/node/8861.

[9] Kaiser Daily Reports, In the Courts: Planned Parenthood Affiliate, ACLU, Health Providers to File Suit To Block New Hampshire Parental Notification Abortion Law, (Nov. 19, 2003) http://www.kaisernetwork.org/daily_reports/rep_index.cfm?DR_ID=20932 (quoting FOSTER'S DAILY DEMOCRAT, (Nov. 18, 2003)).

[10] Samuel E. Kastensmidt, *Federal Judge Strikes N.H. Parental Notification Law*, Center on Reclaiming America, http://www.reclaimamerica.org/pages/NEWS/newspage.asp?story=1500.

### C. The New Hampshire Law Is Consistent with a Strategy to Eliminate Constitutional Protection for Women's Health.

These statements by the protagonists of this law are consistent with efforts by national anti-abortion organizations that deplore the health exception and their nationwide legislative, litigation and public relations strategy to tear down that tenet of constitutional law respecting women's health. Judie Brown, the head of the American Life League, and Douglas Johnson, the Federal Legislative Director of the National Right to Life Committee ("NRLC"), have each attacked the health exception, Johnson urging NRLC affiliates to resist amendments providing for very limited health exceptions in the context of legislation to ban abortion procedures.[11] NRLC, with chapters in all 50 states and the District of Columbia, is the principal legislative arm of the pro-life movement, so it was particularly significant that it denounced as inadequate any exceptions that would protect women from "serious and permanent impairment of a major bodily function."[12] Many of the *amici curiae* supporting petitioners are clearly hopeful that this case will overturn the constitutional requirement to protect women's health in abortion regulations. A book entitled *Abortion and the Constitution: Reversing Roe v. Wade Through the Courts* features strategy papers, one of which declares: "Reversal strategy, which begins by weakening 'viability' and 'health' abortion arguments, is calculated to attack the framework of

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[11] *See* Judie Brown, *The Exception,* All About Issues, Mar.-Apr. 1992, *available at* http://www.prolife.org.au/articles/abt015.htm (opposing all exceptions to abortion bans); Memorandum from Douglas Johnson, National Right to Life Committee Federal Legislative Director and Mary Spaulding Balch, NRLC State Legislative Director to NRLC State Affiliates and Other Interested Parties (Nov. 22, 1996).

[12] Johnson, *supra* note 11, at 2.

the abortion privacy doctrine at its most vulnerable."[13] Against this strategic backdrop, it would be contrary to the intent of the New Hampshire legislature to fix its statute by imputing any intent to protect minors facing health crises.

The filings of the *amici curiae* legislators in this case confirm that their 2003 legislative gamble was intentional. The *amicus* brief of the New Hampshire legislators attacks the health exception as formulated in *Roe* and *Doe v. Bolton*, 410 U.S. 179, 192 (1973), generally, claiming erroneously that including a health exception would render "the statutory duty of parental notification nugatory."[14] The legislators further argue that even under the narrower medical emergency exception standard of *Casey*, on balance, the alleged health benefits of involving parents outweigh the health risks to minors facing emergencies of delaying the procedure[15] – a risk/benefit analysis not found in the Court's jurisprudence and unavailable under New Hampshire's statutory scheme involving a waiting period in any event. Another brief filed on behalf of various legislators defends the narrowness of the life exception as enacted.[16]

Likewise, the Attorney General herself does not urge the Court to save the statute by appending to it the necessary

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[13] Victor Rosenblum & Thomas J. Marzen, *Strategies for Reversing Roe v. Wade through the Courts*, in ABORTION AND THE CONSTITUTION: REVERSING ROE V. WADE THROUGH THE COURTS, 200 (Dennis J. Horan et al., eds., (1987)).

[14] Brief of New Hampshire Legislators as Amicus Curiae in Support of Petitioner at 26, *Ayotte v. Planned Parenthood of Northern New England* (Aug. 8, 2005).

[15] *Id.* at 26-28.

[16] Brief of Amici Curiae New Hampshire Representative and HB 763 Sponsor Kathleen Souza et al. at 13, *Ayotte v. Planned Parenthood of N. New England* (Aug. 8, 2005).

health exception. She has abandoned the argument advanced in the District Court and Court of Appeals that other New Hampshire laws can be cobbled together to protect women's health in an emergency. *Planned Parenthood of N. New England v. Heed*, 296 F. Supp. 2d 59, 65-6 (D.N.H. 2003), *aff'd*, 390 F.3d 53, 61 (1st Cir. 2004).

### D. The Prudent Remedy Is To Declare the Law Unconstitutional and Let New Hampshire Decide Whether To Try To Reenact the Law with a Health Emergency Exception.

The modest, most prudent course is to strike New Hampshire's parental notice law and allow New Hampshire to enact the medical emergency/waiting period/notification process it favors, if it can muster the votes for any particular formulation. Such was the course followed in Colorado.[17] In *Planned Parenthood of the Rocky Mountain Services Corp. v. Owens,* 287 F.3d 910 (10th Cir. 2002), the Tenth Circuit struck down Colorado's parental involvement law that had been enacted through a ballot initiative. In response, the legislature enacted supplemental language that provides a medical emergency exception, expands the list of adults to whom the notification may be given, and establishes a judicial bypass procedure. The law is now in effect.[18]

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[17] *See* Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 95 (1995) ("Judicial invalidation gives Congress the opportunity to decide what it wants to do next, in light of the enforced constitutional constraint. And of course one of those options is to reenact the statute in constitutionally acceptable form.").

[18] Colo. Rev. Stat. Ann. §§ 12-37.5-101, 102 (enacted by initiative 1998), §§ 12-37.5-103 to -107 (enacted by initiative 1998; amended 2003); H.B. 03-1376, 64th Gen. Assembly, Gen. Sess. (Colo. 2003) (enacted 2003).

The Colorado example does not prove that the "second choice" of all legislative bodies is a law with a health emergency exception; it says nothing about New Hampshire's second choice – whether to reenact its bill with a health emergency exception or have no bill at all. It simply speaks to which branch of government should make that decision: clearly, the legislature.

The Court cannot presume that New Hampshire would rather have some of its law go into force after the Court carves out a health emergency exemption on behalf of the legislature. States sometimes decline to fix their parental involvement laws that have been struck down. Their second choice is no law at all, not a law with constitutionally required protections. For instance, Nevada's law was struck down in 1991 because the bypass was insufficient.[19] New Mexico's Attorney General opined in 1990 that its parental involvement law was unenforceable because it lacked a bypass procedure.[20] In both states, the legislatures have not enacted a conforming law in the many years since.

As the Court said in *Seminole Tribe of Florida v. Florida,* "[n]or are we free to rewrite the statutory scheme in order to approximate what we think Congress might have wanted had it known that § 2710(d)(7) was beyond its authority. If that effort is to be made, it should be made by Congress, and not by the federal courts." 517 U.S. 44, 76 (1996). When confronted with legislative inaction, the courts should decline to insert provisions the legislature should have enacted. As Justice Kennedy wrote in *Salinas v. United*

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[19] *Glick v. McKay*, 937 F.2d 434 (9th Cir. 1991) (preliminary injunction upheld); *Glick v. McKay*, No. CV-N-85-331-ECR (D. Nev. Oct. 10, 1991) (permanent injunction issued).

[20] N.M. Att'y Gen. Op. No. 90-19 (Oct. 3, 1990) *available at* 1990 WL 509590.

*States,* 522 U.S. 52, 59-60 (1997) (quoting *United States v. Albertini*, 472 U.S. 675, 680 (1985)):

> Statutes should be construed to avoid constitutional questions, but this interpretive canon is not a license for the judiciary to rewrite language enacted by the legislature. *Heckler v. Matthews*, 465 U.S. 728, 741-42 (1984). Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Article I, § 1 of the Constitution. *United States v. Locke*, 471 U.S. 84, 95-96 (1985).

This is emphatically the view of the New Hampshire Supreme Court. *In re Jerome*, 843 A.2d 325, 328 (N.H. 2004) (courts cannot limit definition of "gross income" by adding language to statute) (citing *Progressive N. Ins. Co. v. Enterprise Rent-A-Car*, 821 A.2d 991 (N.H. 2003)); *State v. Kidder,* 843 A.2d 312, 316 (N.H. 2004) (refusing to impute exemptions for innocent contact to New Hampshire domestic violence statute); *In re CNA Ins. Cos.*, 722 A.2d 496, 497 (N.H. 1998) ("[W]e 'cannot read words into it which the legislature did not see fit to insert.' *Gregory v. State*, 369 A.2d 181, 181-82 (N.H. 1977).").

## II. THE COURT WOULD BE ENGAGING IN SHEER GUESSWORK IF IT WERE TO TRY TO SAVE THE LAW BY DRAFTING A HEALTH EMERGENCY EXCEPTION.

The Court would diminish its own credibility if it appended a medical emergency exception to New Hampshire's law, as such drafting is a quintessentially legislative function. It is impossible for the Court to discern any legislative intent to include a medical emergency exception at all, much less correctly ascertain the scope and

terms of any medical exception that the legislators would have wanted.

### A. States Have Enacted at Least Twelve Different Health Emergency Exceptions.

Crafting a medical emergency exception is clearly within the competence of the New Hampshire state legislature, as state legislatures have almost uniformly understood the necessity to protect minors' health in emergency situations. Forty-two states have enacted a parental involvement law.[21] Thirty-six states have explicitly provided some protection for a minor's health in enacting parental involvement/bypass laws.[22] Only four states have

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[21] Ten of the 42 state laws have been enjoined or are otherwise not enforceable: AK, CA, FL, ID, IL, MT, NV, NH, NJ, and NM. NARAL Pro-Choice America and NARAL Pro-Choice America Foundation, *Who Decides? The Status of Women's Reproductive Rights in the United States* 17 (14th ed. 2005) ("*Who Decides?*"). The laws in force are: Ala. Code § 26-21-3; Ariz. Rev. Stat. § 36-2152; Ark. Code Ann. §§ 20-16-801 *et seq.*; Colo. Rev. Stat. § 12-37.5-104; Fla. Stat. Ann. § 390.01114; Ga. Code Ann. § 15-11-112; Ind. Code Ann. § 16-34-2-4; Iowa Code Ann. § 135L.3; Kan. Stat. Ann. § 65-6705; Ky. Rev. Stat. Ann. § 311.732; La. Rev. Stat. Ann. § 40:1299.35.5; Mass. Gen. Laws Ann. ch. 112, § 12S; Mich. Comp. Laws Ann. § 722.903; Minn. Stat. Ann. § 144.343; Miss. Code Ann. § 41-41-53; Mo. Ann. Stat. § 188.028; Neb. Rev. Stat. § 71-6902; N.C. Gen. Stat. Ann. § 90-21.7; N.D. Cent. Code § 14-02.1-03; Ohio Rev. Code Ann. § 2919.121; Okla. Stat. Ann. tit. 63, § 1-740.2; 18 Pa. Cons. Stat. Ann. § 3206; R.I. Gen. Laws § 23-4.7-6; S.C. Code Ann. § 44-41-31; S.D. Codified Laws § 34-23A-7; Tenn. Code Ann. § 37-10-303; Tex. Occ. Code Ann. § 164.052; Utah Code Ann. § 76-7-304; Va. Code Ann. § 16.1-241; W. Va. Code Ann. § 16-2F-3; Wis. Stat. Ann. § 48.375; and Wyo. Stat. Ann. § 35-6-118.

[22] *See infra* notes 24-35. Three other states give the physician sufficient discretion to provide the abortion to protect a minor's health generally or in an emergency. Del. Code Ann. tit. 24

Footnote continued on next page

parental involvement laws in effect that make no provision for minors' health in an emergency.[23]

No state statute's language is identical to any other state, but there are at least twelve formulations of emergency health exceptions. The twelve types are:

1. "serious risk of substantial and irreversible impairment of major bodily function";[24]

2. "risk of serious impairment of major bodily function";[25]

3. "grave peril of immediate and irreversible loss of major bodily function";[26]

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Footnote continued from previous page
§ 1783; Md. Code Ann. § 20-103; Me. Rev. Stat. Ann. tit. 22 § 1597-A.

[23] The four states are MN, MO, ND, WY.

[24] Ariz. Rev. Stat. § 36-2152(G)(2); Ark. Code Ann. §§ 20-16-802, 805 (amended Mar. 4, 2005); Colo. Rev. Stat. §§ 12-37.5-103(5), 105; Del. Code Ann. tit. 24 §§ 1782(d), 1787; Fla. Stat. Ann. § 390.01114; Idaho Code § 18-604 (enjoined); 750 Ill. Comp. Stat. § 70/10 (enjoined); Ky. Rev. Stat. §§ 311.720(12), 732(8); Mich. Comp. Laws §§ 722.902(b), 905; Mont. Code Ann. §§ 50-20-203(5), 50-20-208; N.J. Stat. Ann. §§ 9:17A-1.3, 1.6; Okla. Stat. tit. 63, § 1-740.2; 18 Pa. Cons. Stat. Ann. §§ 3203, 3206; S.D. S.B. 193, 80th Leg. Sess., Reg. Sess. (S.D. 2005) (Enacted 2005); Tex. Fam. Code Ann. §§ 33.001, 004; Tex. Occ. Code Ann. §§ 164/052 (a)(19); S.B. 419 79th Leg. (Tex. 2005) (Enacted 2005); Utah Code Ann. §§ 76-7-301, 305; Va. Code Ann. § 18.2-76.

[25] Iowa Code Ann. §§ 135L.1, *et seq.*

[26] N.D. Cent. Code §§ 14-02.1-03(1), (12).

4. "immediate threat and grave risk to . . . health";[27]

5. "immediate threat and grave risk to . . . permanent physical health";[28]

6. "grave impairment of the physical or mental health of the woman";[29]

7. "grave physical injury";[30]

8. "immediately necessary to preserve the patient's life or health";[31]

9. "medical emergency [that so] complicates the pregnancy [as] to require an immediate abortion";[32]

10. "emergency exists that so compromises the health, safety or well-being of the mother as to require an immediate abortion";[33]

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[27] Ind. Code § 16-34-2-4(i); Neb. Rev. Stat. § 71-6906; W. Va. Code Ann. § 16-2F-5.

[28] La. Rev. Stat. § 40:1299.35.12.

[29] N.M. Stat. Ann. § 30-5-1(C) (enjoined).

[30] S.C. Code Ann. § 44-41-30(C).

[31] Nev. Rev. Stat. § 442.255.

[32] Miss. Code § 41-41-57; N.C. Gen. Stat. § 90-21.9; Tenn. Code Ann. § 37-10-305; Wis. Stat. § 48.375(4)(b). Georgia substitutes "condition of the minor" for "pregnancy." Ga. Code Ann. § 15-11-116;

[33] Ala. Code § 26-21-5; Kan. Stat. Ann. § 65-6705(j)(1)(B) (minor difference in language from Alabama's).

11. "medical emergency requiring immediate medical action";[34]

12. "emergency requiring immediate action."[35]

These twelve types of laws spotlight the sheer guesswork that would be involved in trying to create an exception on New Hampshire's behalf.

### B. The Court Would Have To Make at Least Five Legislative Choices To Save the Statute.

If the Court were to write a medical emergency exception to avoid its facial invalidation, it would have to make decisions along at least five axes: severity, time, what is at risk, the likely duration of the health problem, and who decides whether the minor faced a health threat. Legislatures have made divergent choices as to:

1. **The severity of the risk:** compare "serious threat" (18 states), with "emergency exists" (AL, AR, CA, GA, KS, MS, NC, ND, RI, SC), "risk" (IA), "likely" (NM), and "grave risks" (IN, LA, NE, WV).

2. **The immediacy of the threat:** compare necessitates/requires immediate (medical) action/abortion (AL, CA, GA, IA, KY, LA, MI, MS, NJ, NC, OH, PA, RI, TN, UT, VA, WI), with delay will create serious risk (AZ, AR, CO, DE, FL, ID, IL, IA, KY, MI, MT, NJ, OK, PA, UT, VT), insufficient time to obtain consent (AR, CO, FL, NE, SD, TX), emergency need for a medical procedure to be performed (IN, WV), continuation of pregnancy provides immediate threat (NE), no immediacy/emergency

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[34] Cal. Health & Safety Code § 123450(a) (enjoined).

[35] Mass. Gen. Laws ch. 112 § 125; R.I. Gen. Laws § 23-4.7-4.

requirement (NM), "emergency exists" (SC), and "to avoid serious risk" (TX). (Note that many states demand compliance with more than one criterion.)

3. **What is threatened:** compare "grave physical injury" (SC) with "physical health" (OH), "grave impairment of physical or mental health" (NM), "impairment of major bodily function" (AZ, AR, CO, DE, FL, ID, IL, KY, MI, MT, NJ, OK, PA, SD, TX, UT, VA), "threaten the health, safety or well-being of the mother" (AL, KS), "the pregnancy" (MS, NC, TN, WI), "the condition of the minor" (GA), unspecified medical emergency (CA, MA, RI), "loss of major bodily function" (ND), "potential suicide" (WI), and preservation of health (NV).

4. **The duration of the health risk:** "irreversible" (18 states) or silent as to duration (19 states).

5. **Physician's judgment:** Compare "best" judgment (KS, MS, MT, NE, NC, TN, WI) with "good faith" (AZ, CO, DE, FL, IL, MI, MT, NJ, ND, PA, SD, TX, UT), "judgment of the physician" (NV), and "physician determines" (SC). Some states require a certification, (possibly triggering other charges for false statements or certifications) either immediately or within 24 hours (GA, IN, IA, LA, OH, RI, SD, TX, VA, WA). One state just requires the physician to record the reasons in writing (MS). Others are silent as to whether a jury could revisit the question of whether the minor's medical emergency fit the exception.

With at least five variables, some of which contain multiple options, it is clear that the Court would be throwing darts if it tried to craft an emergency exception on behalf of the New Hampshire state legislature. The statute is simply not "readily susceptible" to limitations; it cannot be rewritten. *Virginia v. Am. Booksellers Ass'n,* 484 U.S. 383, 397 (1988). Carving out a medical health exception would

clearly necessitate "tamper[ing] with the text of the statute," a practice the Court "strive[s] to avoid." *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 478 (1995). *See also Tafflin v. Levitt*, 493 U.S. 455, 462 (1990) ("[E]ven if we could reliably discern what Congress' intent might have been had it considered the question, we are not at liberty to so speculate.").

### C. Public Choice Theory Confirms That New Hampshire's Second-Choice Wishes Cannot Be Ascertained.

One method the Court could *not* credibly employ would be to guess what New Hampshire's legislature would have done if it were referred the question of what type of emergency medical health exception it would want. The legislature's intent, beyond the intent not to have an emergency medical exception at all, is completely inscrutable. The New Hampshire House of Representatives has between 375 and 400 members, and the Senate has 24 members.[36] Each legislator has a distinct constituent base, self-interest in re-election, and particular policy convictions. *See* Kenneth A. Shepsle, *Congress is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 248 (1992). The entire legislature, and indeed each chamber, does not speak with a collective voice, other than when it enacts legislation, nor does it have a single collective intent. *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y, 61, 68 (1994). The absence of a collective intent, other than as actually expressed in its legislation, precludes this Court from guessing whether the New Hampshire legislature would have preferred a parental notification statute with a constitutionally required medical health

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[36] N.H. Const. p.2 Arts. 9, 25.

emergency exception, or no legislation at all, much less which of the various formulations it might have chosen.

Moreover, even in the face of clear evidence (and *no evidence* has been adduced here) that the New Hampshire legislature would have preferred a statute with a health exception to no statute at all, it is not certain such a statute would have been enacted.[37]

Arrow's Theorem shows the difficulty in predicting legislative action.[38] If presented with three choices, A, B, and C, Option A may defeat Option B; Option B may defeat Option C; but Option A will not necessarily defeat Option C. The New Hampshire legislature was presented with at least three options: no bill, a bill with a health emergency exception, or a bill without a health emergency exception. If the Court finds the law constitutionally defective for want of a health emergency exception, it would not necessarily be implementing the collective will of the legislature to graft health emergency provisions onto the law to save it, according to Arrow's Theorem. The calculus is proportionately more indeterminate once we add the twelve existing types of emergency health exception, or the five dimensions of decision-making with respect to health exemptions.

The process of voting on successive amendments, "logrolling" (when a legislator votes against a bill she favors in order to gain support for a bill she favors more or vice

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[37] *See* Lauren Gilbert, *Fields of Hope, Fields of Despair: Legisprudential and Historic Perspectives on the AgJobs Bill of 2003*, 42 HARV. J. ON LEGIS. 417 (2005).

[38] *See* Shepsle, *Congress is a "They," Not an "It"*, 12 INT'L REV. L. & ECON. at 241-42 (citing Kenneth J. Arrow, SOCIAL CHOICE AND INDIVIDUAL VALUES (1963)) (describing Arrow's Theorem).

versa), and the role of interest groups and self-interest, all create uncertainty in the legislative process. As Judge Easterbrook has written:

> [T]he order of decisions and logrolling are . . . so integral to the legislative process that judicial predictions of how the legislature would have decided issues it did not in fact decide are bound to be little more than wild guesses, and thus to lack the legitimacy that might be accorded to astute guesses.

Frank Easterbrook, *Statutes' Domain*, 50 U. CHI. L. REV. 533, 547-48 (1983). The bill as enacted by the legislature was its compromise, summing all the political forces and interests and ideologies at work at that particular time.[39] Thus, the Court cannot later attempt to recreate the voting patterns of New Hampshire and insert provisions it believes New Hampshire would have adopted, in an attempt to save otherwise unconstitutional legislation. The legislation is a deal, one the Court cannot and should not renegotiate.

## III. THE CONSEQUENCES OF REWRITING THE LAW TO SAVE IT WOULD BE UNFORTUNATE FOR COURTS AND LEGISLATURES ALIKE.

Regarding abortion, legislators often press the law as far as it can be pressed. They usually legislate in gray areas, but if the demand to craft legislation within constitutional limits were lifted, we could expect to see far more legislation in areas that the Court has previously foreclosed. Debate on the toughest issues, such as the scope of exceptions, would

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[39] *See* Jerry Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 134 (1989).

often be cut off by committee chairs or majority leaders, who would insist on broad restrictions without any exemptions. Lawmakers would ignore the Constitution and punt the toughest negotiations to the courts for resolution.

### A. Knowing that Flagrantly Unconstitutional Laws Will Be Struck Down, Legislators Tend To Legislate in Gray Areas.

In tracking state laws, NARAL Pro-Choice America has found that, state legislators sometimes legislate in an effort to change constitutional law to which they object. Yet for the most part, they abide by clear constitutional rulings. Anti-choice efforts have typically focused on taking full advantage of any room for state regulation allowed by the Court, finding new and untested areas to regulate, and pressing constitutional change where a doctrine is especially important to a woman's right to choose or when they believe a doctrine is vulnerable.

Examples abound. Abortion bans, review of abortion requests by hospital committees, and bans on out-of-state women obtaining abortions nearly halted after *Roe v. Wade* and *Doe v. Bolton.* After *Roe,* the focus of anti-abortion advocacy shifted to efforts to bar public funding and public involvement in any way, to restrict minors' access, and to enact bans on abortion procedures, such as the use of saline instillation.[40] After *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), however, states by

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[40] The Hyde Amendment, Pub. L. 96-86 § 109, 93 Stat. 926 (1979), was upheld in *Harris v. McRae*, 448 U.S. 297 (1980), the example of which has been followed by 33 states. *Who Decides?* at 14. In *Bellotti v. Baird*, 443 U.S. 622 (1979), the Court established constitutional requirements for valid judicial bypass laws, and 42 states have enacted parental involvement laws. *Who Decides?* at 17.

and large stopped trying to ban saline abortions. Following the decision in *Webster v. Reproductive Health Services*, 429 U.S. 490 (1989), which cast doubt on the continued vitality of *Roe*, abortion bans were enacted in Guam,[41] Louisiana,[42] and Utah.[43] But after *Casey* upheld the core right articulated in *Roe*, to have a legal abortion, such wholesale, frontal bans on abortion once again stopped, at least for the most part.[44] The *Danforth* case also struck husband consent laws, but in the wake of *Webster,* Pennsylvania again attempted to enact another husband involvement law.[45] Pennsylvania's husband notice law was held unconstitutional in *Casey*, and no similar legislation has been enacted in the 13 years since then. Bans on broad, vaguely defined abortion procedures lacking health exceptions were held unconstitutional in *Stenberg v. Carhart.* Although 30 states had enacted such bans, since the Court's clear ruling in *Stenberg*, few legislatures have revisited this

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[41] 9 Guam Code Ann. §§ 31.20-23 (enacted 1990, declared unconstitutional in *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366 (9th Cir. 1991)).

[42] La. Rev. Stat. Ann. §14:87 (enacted 1942; amended and reenacted 1991, held unconstitutional in *Sojourner T. v. Edwards,* 974 F.2d 27 (5th Cir. 1992)).

[43] Utah Code Ann. § 76-7-314 (enacted 1991, held unconstitutional in *Jane L. v. Bangerter,* 809 F. Supp. 865 (D. Utah 1992) (portions of this ruling related to abortion regulations after the 20th week of pregnancy were appealed, however provisions related to the entire abortion ban were not)).

[44] *But see* Mich. Comp. Laws Ann. § 33.1081-1085 (redefining abortion so as effectively to ban most abortions), *enjoined, Northland Family Planning Clinic v. Cox*, No. 2:05-cv-70779 (E.D. Mich. Sept. 12, 2005).

[45] 18 Pa. Cons. Stat. Ann. § 3209 (amended 1989). Only three other states had legislated in this area in the sixteen years between *Danforth* and *Casey*: Illinois, 735 Ill. Comp. Stat. Ann. 5/11-107.1 (1985); Kentucky, Ky. Rev. Stat. Ann. § 311.735 (1982); and Rhode Island, R.I. Gen. Laws Ann. §§ 23-4.8-1 to 4.8-5.

issue. The exceptions of Utah and Virginia[46] (and the U.S. Congress[47]) prove the rule.

Every year, NARAL Pro-Choice America analyzes the top areas of state legislative activity, based upon regular legislative tracking documents and meticulous counts of bills introduced and enacted. A summary of the analysis contained in *Who Decides?* for each of the past five years shows that legislators tend to enact legislation where they are not squarely prohibited by existing precedent from doing so.[48]

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[46] Utah Code Ann. §§ 76-7-301(3), 310.5, 314, 326-330 (enacted 2004) contains exclusions on the procedures covered, in contrast to the Nebraska ban, but no health exception. *Utah Women's Clinic v. Walker*, No. 2:04CV00408 (D. Utah May 5, 2004) (enjoined by stipulation and order). Virginia ignored *Stenberg*'s holding regarding health exceptions in enacting Va. Code Ann. §18.2-71.1, which was enjoined in *Richmond Medical Center for Women v. Hicks*, 409 F.3d 619 (4th Cir. 2005). Ohio enacted a law before the decision in *Stenberg* that differed from the pattern bills most states enacted. Ohio Rev. Code Ann. § 2919.151.

[47] The federal ban, 18 U.S.C. § 1531, has no health exception and was enjoined in *Carhart v.Ashcroft,* 331 F. Supp. 2d 805 (D. Neb. 2004), *aff'd*, *Carhart v. Gonzales*, 413 F.2d 791 (8th Cir. 2005), *petition for cert. filed* (Sept. 23, 2005) (No. 05-380), as well as in two other district court cases, *Planned Parenthood Federation of America v. Ashcroft,* 320 F. Supp. 2d 957 (N.D. Cal. 2004), *appeal pending*, No. 04-16621 (9th Cir. filed Aug. 20, 2004); and *National Abortion Federation v. Ashcroft,* 330 F. Supp. 2d 436 (S.D.N.Y. 2004), *appeal pending*, No. 04-5201 (2d Cir. filed Sept. 29, 2004).

[48] NARAL Pro-Choice America and NARAL Pro-Choice America Foundation, *Who Decides? The Status of Women's Reproductive Rights in the United States* (10th-14th eds. 2000-2005) (before 2005, *Who Decides? A State-by-State Review of Abortion and Reproductive Rights*). Note that the terms used to

Footnote continued on next page

2004: Mandatory counseling and waiting periods; refusal clauses;[49] restrictions on young women's access to reproductive health services; targeted regulation of abortion providers (TRAP) (regulations not applied to medical practices other than ones providing abortion services); and promoting or requiring abstinence-only legislation.

2003: Restrictions on minors' access; mandatory counseling and waiting periods; measures giving legal status to embryos and fetuses; refusal clauses; and TRAP laws.

2002: Mandatory counseling and waiting periods; restrictions on minors' access; recognition of embryos and fetuses; TRAP laws; gag rules, censorship; and refusal clauses.

2001: Promoting crisis pregnancy centers and otherwise repositioning the anti-choice position as "protecting women;" linking abortion to breast-cancer; TRAP laws; elevating the legal status of the fetus; and chipping away at choice through waiting periods, biased counseling, and minors' access laws.

2000: Minors' access and information; funding for crisis pregnancy centers; elevating the status of the fetus; TRAP legislation; funding limits and limits on public facilities; "informed" consent/waiting period legislation; medical abortion legislation; pharmacist conscience clause (refusal clause) legislation; bans on abortion procedures; and prohibitions on insurance coverage for abortion.

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describe similar types of legislation sometimes differed from year-to-year.

[49] Refusal clauses allow individual providers or institutions and insurers to refuse to dispense contraceptives, provide sterilizations or offer abortions.

Of the hundreds of bills considered each year regarding abortion, only a handful of enacted statutes clearly contravene well-established constitutional requirements. When they do, it may be because legislators wish to test the continued validity of the law or be seen as taking a stand against the Supreme Court's holdings, whether or not their laws ever go into effect. In that case, they gamble: they know that if they fail to overturn existing law, their enactments will be null and void.

### B. If the Court Were To Rewrite New Hampshire's Law Rather Than To Find It Facially Unconstitutional, Legislatures Would Impose upon the Courts Ever More Demands To Graft Provisions onto Abortion Laws To Render Them Constitutional.

This trend to respect black letter law could be drastically altered if the Court were to embark on judicially writing exceptions into abortion laws to save them from invalidation. Interest group pressures could be such that legislatures would frequently omit all health exceptions, placing that burden upon the courts. Legislatures would avoid the ethical debates over whether parents' interest in knowing about their daughters' health issues trumps the minor's health itself in an emergency. Legislatures would not face competing considerations between enacting valid restrictions up to the law's limits, or enacting grandstanding legislation that defies the law and is certain to be struck down. They would be empowered to enact patently unconstitutional legislation – and many would – with the understanding that courts would amend the laws to make them constitutional. Judicial review would become the final third of the legislative enactment process, with no end in sight to the courts' legislative drafting responsibilities. Legislative process would then be described as:

1. bicameral enactment;
2. presentment;
3. judicial amendment.

State parental involvement laws might be drafted without bypass provisions, leaving the Court to craft them state-by-state. Worst of all, several states' legislatures might enact a ban on all abortions and let the courts figure out the necessary exceptions.[50]

The Court has declined such a role in other areas of the law. In *Reno v. American Civil Liberties Union*, this Court decided not to graft provisions onto a severable part of the Communications Decency Act to save its constitutionality, as it refused to allow Congress to cast an unconstitutionally wide net, only to have the Courts narrow it. 521 U.S. 844, 882-85 (1997). The Court recognized that this would "substitute the judicial for the legislative department of the government." *Id.* at 884 n.49 (quoting *United States v. Reese*, 92 U.S. 214, 221 (1875)). It also recognized that rewriting statutes would remove legislatures' incentive to narrowly tailor legislation. 521 U.S. at 885, n.50 (citing *Osborne v. Ohio*, 495 U.S. 103, 121 (1990)).

### C. If the Court Were To Craft an Emergency Medical Exception or a Broader Health Exception, It Would Short-Circuit the Litigation Process over Its Adequacy.

Crafting an emergency medical exception on behalf of the legislature would not only create legislative results where none existed, it could also foreshorten the advocacy process, through which the adequacy of any health

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[50] NARAL Pro-Choice America estimates that as many as 19 states would ban abortion, given their current political composition, if *Roe* were overturned. *Who Decides?* at 3.

emergency exception should be tested. The Court would also be acting without the benefit of the hearings, testimony, and public involvement that inform the legislative process.

### D. Politically Responsive Actors Should Determine the Details of the Health Emergency Exception.

Legislation in this area is hyper-political, conducted against a backdrop of intense lobbying, grassroots mobilization, constitutional litigation, and electoral support or opposition. Because every detail of parental involvement legislation is subject to negotiation, compromise, and electoral repercussions, the Court should not choose which formulation of a heath emergency exception the legislature would have or should have adopted. The Court's role is to enforce constitutional doctrine respecting women's health; and otherwise, to let the political players, well-informed as they are about the Constitution's demands, sort out whatever compromises they can reach.

Many pro-choice advocates and legislators insist upon maintaining broad protection for women's health, especially in emergency circumstances. The Court's insistence that women's health must always be protected has been a milestone of women's advancing equality. Protecting women's health serves as a point of remembrance of the toll abortion prohibitions took on women's health prior to *Roe v. Wade*[51] and as a warning that women's health will suffer if

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[51] In 1965, illegal abortion accounted for an estimated 17 percent of all deaths due to pregnancy and childbirth. *See Vital Statistics of the United States, 1965: Vol. II Mortality*, Part A (U.S. Gov't Printing Office 1967). One report published in 1968 estimated that "as many as 5,000 American women die each year as a direct result of criminal abortion. The figure of 5,000 may be a minimum estimate, inasmuch as many such deaths are mislabeled or unreported." Richard H. Schwarz, SEPTIC

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the right to choose is narrowed further or taken away entirely.

By contrast, hard-line opponents of a woman's right to choose do not recognize that women's health takes priority over the state's interest in fetal life. Their rhetoric characterizes protections for women's health – even protections limited to emergencies that pose a serious, immediate and permanent threat to major bodily functions – as protecting frivolous concerns or adhering to an overall body of law that they consider illegitimate and an anathema.

Political benefits and consequences flow to legislators who adhere to or diverge from the demands of advocacy groups regarding abortion and women's health. Both pro-choice supporters and anti-abortion activists constitute an informed, active citizenry. This citizenry monitors legislation, advises legislators, compiles voting records, vets candidates, summons activists, and turns out the vote for legislators who support their causes. In this area, especially, the Court should not do the work of legislators and re-cut the deal New Hampshire struck in enacting Section 132:24-28. It should strike it down. Let the legislators hear evidence on medical emergencies, consider constituent views, decide whether to enact a constitutional provision, and then face their constituents.

## CONCLUSION

Consistent with the Court's role and function, to say what the law is and to enforce precedent, the Court must strike down New Hampshire's law as unconstitutional, allowing New Hampshire's legislators to make the quintessentially legislative decisions as to how they wish to

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ABORTION 7 (1968).

protect minors' health in emergency situations, if they still want a parental notice law.

Respectfully submitted,

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October 12, 2005

## ADDITIONAL *AMICI*

NARAL Pro-Choice Arizona
NARAL Pro-Choice California
NARAL Pro-Choice Colorado
NARAL Pro-Choice Connecticut
NARAL Pro-Choice Georgia
NARAL Pro-Choice Iowa
NARAL Pro-Choice Maryland
NARAL Pro-Choice Massachusetts
MARAL Pro-Choice Michigan
NARAL Pro-Choice Minnesota
NARAL Pro-Choice Missouri
NARAL Pro-Choice Montana
NARAL Pro-Choice New Hampshire
NARAL Pro-Choice New Jersey
NARAL Pro-Choice New Mexico
NARAL Pro-Choice New York
NARAL Pro-Choice North Carolina
NARAL Pro-Choice Ohio
NARAL Pro-Choice Oregon
NARAL Pro-Choice South Dakota
NARAL Pro-Choice Texas
NARAL Pro-Choice Virginia
NARAL Pro-Choice Washington
NARAL Pro-Choice Wisconsin
NARAL Pro-Choice Wyoming