No. 04-1144

IN THE SUPREME COURT OF THE UNITED STATES

KELLY A. AYOTTE, ATTORNEY GENERAL OF THE STATE OF NEW HAMPSHIRE,

Petitioner,

v.

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

Respondents.

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

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BRIEF *AMICI CURIAE* OF THE UNITED STATES CONFERENCE OF CATHOLIC BISHOPS AND ROMAN CATHOLIC BISHOP OF MANCHESTER IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

The United States Conference of Catholic Bishops ("Conference") is a nonprofit corporation organized under the laws of the District of Columbia. Its members are the Catholic bishops of the United States. The Conference is a vehicle through which the bishops can speak collegially on matters affecting the Catholic Church, its people, and society as a whole. The Conference advocates and promotes the Church's pastoral teaching in such areas as education, family life, health care, social welfare, immigrant aid, poverty assistance, and communications.

The Roman Catholic Bishop of Manchester ("Diocese"), a corporation sole, is coterminous with the State of New Hampshire, home to over 330,000 Catholics. The Diocese is led by Most Reverend John B. McCormack, Bishop of Manchester, a member of the Conference. On behalf of the Catholic faithful of New Hampshire, Bishop McCormack and the Diocese strongly supported enactment of New Hampshire's parental notification law and participated as an amicus in this case in the Court of Appeals.

This case presents an opportunity for this Court to fulfill the promise it made in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), which restored to legislatures broader power to regulate abortion than some of this Court's previous cases had recognized. Applying *Casey* and other precedent, this Court should reject the attempt to portray parental notice laws as creating a conflict between the rights of parents and the interests

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[1]Pursuant to this Court's Rule 37.6, counsel for a party did not author this Brief in whole or in part. No person or entity, other than the United States Conference of Catholic Bishops, made a monetary contribution to the preparation or submission of this Brief. The parties have consented to the filing of this Brief. Letters of consent are filed herewith.

of their children. If a family is to retain its vitality and integrity when confronted with the reality of an unexpected pregnancy, parents must, at a minimum, be permitted to reflect upon and discuss with their pregnant adolescent daughter the decision whether to carry her child to term or to undergo an abortion. A State may ensure that the family will have an opportunity for this kind of consultation. To hold otherwise is to undermine familial relationships and the health and well-being of the family's adolescent members.

SUMMARY OF ARGUMENT

Parents are the undisputed guardians of their children's health. This is part of the constitutionally protected right and responsibility parents undertake in the care and upbringing of their own children. New Hampshire sought to advance those interests by passing a law ensuring a parent's involvement in a dependent teenage daughter's decision whether to carry a child to term or to have an abortion. The First Circuit read this Court's precedents to require that the New Hampshire law include a "health exception" which would give an abortion provider the discretion to dispense with the notification requirement anytime it deems an abortion necessary for the minor's health. This holding is contrary to this Court's precedent and common sense.

New Hampshire's law is constitutional. This Court has upheld against constitutional challenge a Minnesota parental notice law despite the absence of a "health" exception. *Hodgson v. Minnesota*, 497 U.S. 417 (1990). The Minnesota statute is materially indistinguishable from New Hampshire's. *Hodgson* therefore controls here. The First Circuit's opinion requires one to assume that this Court, in *Casey*, rewrote its parental notification precedent and overruled *Hodgson* without saying so. Given *Casey*'s lengthy discussion of the need to respect

precedent, its explicit overruling of two previous cases, its favorable citation to *Hodgson*, and its insistence that states should now be freer to regulate abortion, an "implicit" overruling of *Hodgson* seems far-fetched.

By contrast, *Stenberg v. Carhart*, 530 U.S. 914 (2000), upon which the First Circuit relied, is distinguishable. *Carhart*, which purports (530 U.S., at 921, 938) only to apply *Casey*, held that a ban of a particular method of abortion requires a health exception if a significant body of medical authority claims, with evidentiary support, that the procedure is medically necessary. The New Hampshire law is not a ban.

It would be a grave mistake to divest parents of meaningful input into the health care of their own dependent children. The First Circuit's decision falsely assumes a conflict between the right and responsibility of parents to care for their children, on the one hand, and the best interests of their children, on the other. In every other context, the law assumes that parents are the natural guardians of their children's health and best interests. It should be no different here. It is folly to believe that third parties are in a better position than parents to protect the interests of their children. Such a view is inconsistent with how the law generally treats parents and children. Indeed, recognizing the fundamental and constitutionally protected role of parents in caring for their children, this Court has upheld laws requiring parental *consent* to an abortion. The New Hampshire law requires only notification. Hence, this is an easier case.

Requiring a health exception in this case is unnecessary and would undermine the whole point of the notification requirement. First, health is rarely the reason for an abortion. Most abortions are elective. Second, when health is at issue, the need for parental notice for their teenage daughter's abortion is all the more compelling in light of the demonstrated physical and

mental health risks of abortion. Third, a health exception would be subject to abuse because it would make an abortion practitioner with a financial interest in performing an abortion (typically a doctor with no prior experience treating the patient and no knowledge of her medical history) the custodian, in place of the parents, of a pregnant teen's interests. This substitution of interests cannot be squared with the paramount place that American society and institutions, including this Court, have always reserved for parents in relation to their minor, dependent children. Fourth, in any case where the minor's and parents' interests are in actual conflict, the New Hampshire statute allows minors to bypass their parents through 24-hour access to the state courts. Though this Court has never held that such a bypass is constitutionally required for a one-parent notice statute, it is certainly sufficient to protect minors in case of any divergence between the interests of parents and their children.

At bottom, the decision below is a throwback to an earlier and now-discredited era in which this Court admits it went "too far" (*Casey*, 505 U.S., at 875) in striking down reasonable abortion legislation that in no sense deprived a woman of the ultimate decision whether to have an abortion. Concerns with upholding precedent and preserving this Court's institutional integrity, values that so motivated the *Casey* plurality, counsel adherence to this Court's earlier decision in *Hodgson*. In a broader sense, this case provides the entire Court with an opportunity to reassert, as seven Justices did in *Casey*, that some policy decisions on abortion, including those now before this Court, are simply beyond the judicial ken and appropriately left to legislatures.

ARGUMENT

I. New Hampshire's Parental Notice Statute is Consistent With This Court's Precedent

From the earliest stages of its abortion jurisprudence, this Court has insisted that abortion is not an absolute right. *Roe v. Wade*, 410 U.S. 113, 159 (1973) ("The pregnant woman cannot be isolated in her privacy"); *Maher v. Roe*, 432 U.S. 464, 473 (1977) ("*Roe* did not declare an unqualified 'constitutional right to an abortion'").

In the years immediately following *Roe*, this Court issued a number of decisions that, as the Court itself would later acknowledge, failed to give appropriate deference to the states' legitimate interests in regulating abortion. In 1992, this Court issued a landmark decision that cleared away some of the jurisprudential underbrush. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Seven justices in *Casey* concluded that this Court's earlier decisions had too severely and improperly restricted the states' power to regulate abortion. *Id*. at 871-78, 882 (joint opinion of O'Connor, Kennedy, and Souter, JJ.); *id*. at 944 (Rehnquist, C.J., joined by White, Scalia, and Thomas, JJ., concurring in the judgment in part and dissenting in part). The three-justice plurality, whose opinion on this issue, combined with the four justices who wanted to overrule *Roe* outright, is controlling, elaborated:

> [D]espite the protestations contained in the original *Roe* opinion to the effect that the Court was not recognizing an absolute right, 410 U.S., at 154-155, the Court's experience applying the trimester framework has led to the striking down of some abortion regulations which in no real sense deprived women of the ultimate decision [whether to have an abortion]. *Those decisions went too*

> *far* because the right recognized by *Roe* is a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. [438], at 453 [(1972)]. *Not all governmental intrusion is of necessity unwarranted*….

Casey, 505 U.S., at 875 (emphasis added). Explicitly overruled (*id.* at 882) were *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

Casey therefore restored to the states a power to regulate abortion that, by the plurality's own acknowledgment, had been eclipsed in decisions issued after *Roe*. It is this aspect of *Casey* that the present case implicates. The lower courts' analysis of Respondents' claims are a throwback to the sort of second-guessing of legislative decisions that seven justices in *Casey* explicitly rejected.

The same concerns about precedent and institutional integrity that animated *Casey* (505 U.S., at 845-46, 854-69) require that this Court follow *Hodgson v. Minnesota*, 497 U.S. 417 (1990), upholding a Minnesota parental notice statute. *Cf. Lambert v. Wicklund*, 520 U.S. 292, 297 (1997) (reversing and sharply criticizing the Ninth Circuit for failing to uphold a Montana parental notice statute that was "indistinguishable in any relevant way" from an Ohio statute upheld in *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990)). The Minnesota statute, like New Hampshire's, included an exception to prevent the woman's death, but no general health or "medical emergency" exception. Writing for a plurality with respect to this part of the Court's judgment, Justice Kennedy concluded that the life-of-the-mother exception, along with a companion

exception for cases of parental abuse or neglect,[2] was sufficient to protect a pregnant teen's health. *Hodgson*, 497 U.S., at 492-93 (Kennedy, J., concurring in the judgment in part and dissenting in part).[3] The only material distinction between the Minnesota statute and New Hampshire's is that the former requires both parents to be notified, while the latter requires notification of only one parent. *Cf.* Minn. Rev. Stat. § 144.343, with N.H. Rev. Stat. § 132:24, VII. Hence, this is an easier case.

In the more than thirty years since *Roe*, this Court has never invalidated a parental notice statute based on the absence of a "medical emergency" exception, let alone a more general "health" exception. *Casey*, which cites *Hodgson* with approval (505 U.S., at 899-900), is not to the contrary. Eight justices in *Casey* voted to *uphold* a parental *consent* statute that had a medical emergency exception. 505 U.S., at 899-900 (opinion of O'Connor, Souter & Kennedy, JJ.); *id.* at 922 n.8 (Stevens, J.,

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[2]No contention is made in this case that the absence of a parental abuse and neglect exception renders the New Hampshire statute constitutionally suspect.

[3]Health was also considered by Justices who dissented from this portion of the Court's judgment in *Hodgson*. 497 U.S., at 465 (Marshall, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("the prospect of having to notify a parent causes many young women to delay their abortions, thereby increasing the health risks of the procedure"). The parties in *Hodgson* had also raised the health issue. Brief of Cross-Respondents (Jane Hodgson, *et al.*), 1989 WL 1127353, at *15 n.29 (claiming that the statute's life-exception "does not help minors whose health problems warrant immediate abortions but whose lives cannot be certified to be so imminently endangered"); Reply Brief of Cross-Petitioners (State of Minnesota, *et al.*), 1989 WL 1127554, at *17-18 ("Plaintiffs assert … that this exception is insufficient in that it fails to permit an immediate abortion necessitated by serious health problems which are not life threatening," and noting that the evidence was insufficient to support this assertion). The Minnesota statute has now been in effect for 15 years with no demonstrated harm to minors.

concurring in part and dissenting in part); *id*. at 970-71 (Rehnquist, C.J., joined by White, Scalia, and Thomas, JJ., concurring in the judgment in part and dissenting in part). In *Casey*, this Court did not strike down, nor was it presented with, a parental consent statute that *lacked* a medical emergency exception. *Cf. Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983) (upholding a parental consent statute that lacked a health exception). Furthermore, a notice statute like New Hampshire's, by its very nature, does not interfere with the decision whether to have an abortion. Therefore, even if *Casey* could be construed as adverse precedent on this point, which it cannot, it would be distinguishable because at issue there was a *consent* statute, not a notice requirement. *Cf. H.L. v. Matheson*, 450 U.S. 398, 411 n.17 (1981) (this Court has "expressly declined to equate notice requirements with consent requirements"), citing *Bellotti v. Baird*, 443 U.S. 622, 640, 657 (1979) ("*Bellotti II*"); *Ohio v. Akron Center for Reproductive Health*, 497 U.S., at 511; *Hodgson*, 497 U.S., at 496 (Kennedy, J., concurring in the judgment in part and dissenting in part).

Hodgson, cited favorably in both *Casey* (505 U.S., at 899-900) and *Lambert* (520 U.S., at 298 n.4), has never been overruled. Given the *Casey* plurality's extensive discussion of the need to respect precedent, its explicit overruling in part of *Thornburgh* and *Akron*, its favorable citation to *Hodgson*, and its insistence that states should now be freer to regulate abortion, an "implicit" overruling of *Hodgson* seems an unlikely reading of *Casey*.

Stenberg v. Carhart, 530 U.S. 914 (2000), does not dictate a different result. *Carhart* involved the outright ban of a particular method of abortion. This Court held that a general health exception was constitutionally required because a significant body of medical opinion had concluded that the procedure was medically necessary, a conclusion for which there was, in the

Court's view, a plausible explanation in the record. The New Hampshire statute, by contrast, does not ban a single abortion.

Carhart does not purport to rewrite previous case law, but only to apply *Casey*. *Carhart*, 530 U.S., at 921 ("we shall not revisit … [*Casey*'s] legal principles. Rather we apply them to the circumstances of this case"); *id*. at 938 (describing the holding in *Carhart* as a "straightforward application" of *Casey*). It would far exceed *Carhart*'s holding, and lead to absurd consequences besides, to require a "medical emergency" or "health" exception for all abortion regulation that does not ban abortion. What is distinctive about the "health" exception mandated in *Roe*, *Casey* and *Carhart* is that the mandated exception pertained in each instance either to a total ban of abortion (as in *Roe*, as reaffirmed by *Casey*) or a ban of a particular abortion procedure (as in *Carhart*).[4] As to abortion regulation that falls short of an outright ban, requiring a medical emergency or health exception would be incoherent because, among other things, those regulations are typically intended in

[4]Thus, the First Circuit got it wrong in this case when it read *Carhart* as creating a *per se* requirement that all abortion regulation include a health exception. *See Planned Parenthood v. Heed*, 390 F.3d 53, 58 (1st Cir. 2004) (stating that "an abortion regulation must contain an exception for the preservation of a pregnant woman's health"); *id*. at 59 & n.5 (rejecting amicus Bishop of Manchester's suggestion that health exceptions only apply to abortion bans, and concluding that "a statute regulating abortion must contain a health exception in order to survive constitutional challenge"). Other courts have likewise erred in this regard. *E.g*., *Planned Parenthood v. Owens*, 287 F.3d 910, 918 (10th Cir. 2002). This Court could not have intended such a major change in the law without announcing it, for *Casey* merely reaffirmed what it characterized as *Roe*'s central holding, and *Carhart* in turn purports to be a "straightforward application" (530 U.S., at 938) of *Casey*. Accordingly, neither *Casey* nor *Carhart* can be read as embracing the sweeping substantive requirement that each and every abortion regulation a state promulgates be accompanied by a health exception.

the first instance to advance a woman's health. As a surgical procedure, abortion falls well within the ambit of New Hampshire's regulatory authority.[5] The Constitution does not require a "health" exception to a health regulation, whether it involves abortion or any other surgical procedure, because the regulation itself represents a legislature's judgment about what will best serve the health and well being of its citizens. An exemption in this instance would give an abortion practitioner with a financial interest in performing an abortion – typically a doctor with no previous experience treating the patient and no knowledge of her medical history – unfettered and unpoliced power to decide whether a parent should be notified. *See Carhart*, 530 U.S., at 1012 (Thomas, J., dissenting) (noting the problems inherent in a "health" exception); *id*. at 953 (Scalia, J., dissenting) (same); *id*. at 964-65 (Kennedy, J., dissenting) (same). The potential for abuse is heightened by the extraordinary breadth that this Court has occasionally given to such terms as "health" in the abortion context. *Doe v. Bolton*, 410 U.S. 179, 192 (1973). In sum, a regulation that allowed doctors to exempt themselves from the regulation would be no regulation at all.

II. The New Hampshire Statute Preserves Family Integrity and Protects the Right of Parents to Care for Their Children

New Hampshire's parental notice law is built on the common sense premise that parents should know about and be involved in

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[5] *Roe v. Wade*, 410 U.S., at 154 (the state has "important interests in safeguarding health" and "maintaining medical standards"); *Whalen v. Roe*, 429 U.S. 589, 604 (1977) (a physician has no right to practice medicine according to his own unfettered judgment); *Barsky v. Board of Regents,* 347 U.S. 442, 449 (1954) (the authority to regulate the practice of medicine is a "vital part of a state's police power"); *Lambert v. Yellowley*, 272 U.S. 581, 596 (1926) ("there is no right to practice medicine which is not subordinate to the police power of the states").

life-affecting decisions by their own children. *Casey*, 505 U.S., at 895 (joint opinion of O'Connor, Kennedy & Souter, JJ.) (parental involvement laws "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"). Opponents of parental notice suggest that these legislative efforts neither aid families nor promote the legitimate exercise of rights, but only allow parents to deny their adolescent daughters unfettered access to abortion. By framing the debate in this case as a conflict between parents' and children's rights, those opponents are missing the most important point. This Court has cautioned against "intrusion by a State into family decisions," *Wisconsin v. Yoder*, 406 U.S. 205, 231 (1972), delineating instead a "private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). As with other significant subjects that might come up from time to time within a family, a teen must be given the opportunity, in consultation with her parents, to face the important decision whether to have an abortion.

Protection for parental involvement in the care of one's children is deeply rooted in the Nation's history and traditions. *Bellotti II*, 443 U.S., at 638; *see also Moore v. City of East Cleveland*, 431 U.S. 494, 503 & n.12 (1977); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).[6] The right to raise and

[6]At common law in England and the United States, the duties of parents to maintain, support, and educate their children were well established. I William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, ch. 16, 434-40 (1765-69); II James Kent, COMMENTARIES ON AMERICAN LAW, 159-60, 164 (Da Capo ed. 1971). The duties of children relative to their parents were also well established. I Blackstone at 441-42; II Kent at 172-73. The common law family relationship may be described as mutual and reciprocal. I Blackstone at 434-42; II Kent at 159. Each member was bonded to the other in what one court called a "mutual interest" in interdependence. *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977).

care for one's child has been deemed "essential to the orderly pursuit of happiness" by a free people, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and a "basic civil right[] of man." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents…." *Prince*, 321 U.S., at 166. Indeed, the integrity of the family, which includes the right of parents to direct the care and nurture of their children, is so fundamental that it has been found to draw its protection from more than one constitutional guarantee. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), citing *Meyer*, 262 U.S., at 399 (Fourteenth Amendment Due Process Clause); *Skinner*, 316 U.S., at 541 (Fourteenth Amendment Equal Protection Clause); and *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring) (Ninth Amendment).

Our common law heritage (*see* note 6, *supra*) presumes that "natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J.R.*, 442 U.S. 584, 602 (1979). Because this Court has found that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning … medical care or treatment" (*id*. at 603), it must not divest parents of meaningful input into their dependent child's abortion decision. Where evidence exists as to specific concerns, it does not serve the public interest for this Court, based on "expert" opinion in one trial court, to upset centuries of tradition.

Here, New Hampshire was on firm constitutional ground in striving to recognize and protect the right of parents to participate in health care decisions involving their own children. Even if one can posit situations in which the interests and rights of parent and child are so divergent as to render parental notice unwise, New Hampshire has created an accommodation in the form of a judicial bypass. The New Hampshire bypass, which gives minors access to the courts twenty-four hours a day, seven

days a week (*see* N.H. Rev. Stat. § 132:26), is entirely sufficient as an accommodation to minors.[7]

III. The New Hampshire Statute Advances the Health and Welfare of Pregnant Minors

Abortion is a surgical procedure which, its practitioners admit, poses a sufficient risk to maternal life and health to require a high level of skill and competence. Warren M. Hern, ABORTION PRACTICE 101 (1990). In this case, the health and welfare of pregnant minors is promoted, not undermined or compromised, by New Hampshire's parental notice statute. A parental involvement statute, among other things, provides "an opportunity for parents to supply essential medical and other information to a physician," *H.L.*, 450 U.S., at 411, including "information … of which the minor may not be aware." *Hodgson*, 497 U.S., at 428 n.11 (citing lower court findings). "Parents can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data." *H.L.*, 450 U.S., at 411. Parents can provide the "mature advice and emotional support" a teenage girl needs in deciding whether to have an abortion at all, counsel and support that she is "unlikely" to get from the attending physician at an abortion clinic. *Planned Parenthood v. Danforth*, 428 U.S. 52, 91 (1976) (Stewart, J., concurring).[8] Parental involvement statutes are an

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[7]This Court has never decided, nor need it decide here, whether a judicial bypass is constitutionally required for a one-parent notice statute like New Hampshire's. *Ohio v. Akron Center for Reproductive Health*, 497 U.S., at 510 (leaving the question open).

[8]Justice Stewart's opinion includes an excerpt from the record in *Bellotti v. Baird*, 428 U.S. 132 (1976), showing the operation of one such clinic:

> The counseling … occurs entirely on the day the abortion is to be performed…. It lasts for two hours and takes place in groups

appropriate vehicle for "giving the parents an opportunity to foster [the child's] welfare by helping [her] to make and to implement a correct decision." *Danforth*, 428 U.S., at 104 (Stevens, J., concurring in part, dissenting in part). Such statutes "maximiz[e] the probability that the decision [whether to have an abortion will] be made correctly and with full understanding of the consequences of either alternative." *Id*. at 103.

A parental notice requirement "permits the parent to … discuss the religious or moral implications of the abortion decision, and provide the daughter needed guidance and counsel in evaluating the impact of the decision…." *Hodgson*, 497 U.S., at 448-49 (opinion of Stevens, J.). Informed consent requirements "have particular force with respect to minors" and "may provide the parent or parents of a pregnant young woman the opportunity to consult with her in private, and to discuss the

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> that include both minors and adults who are strangers to one another…. The physician takes no part in this counseling process…. Counseling is typically limited to a description of abortion procedures, possible complications, and birth control techniques….
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> The abortion itself takes five to seven minutes…. The physician has no prior contact with the minor, and on the days that abortions are being performed at the [clinic], the physician … may be performing abortions on many other adults and minors…. On busy days patients are scheduled in separate groups, consisting usually of five patients…. After the abortion [the physician] spends a brief period with the minor and others in the group in the recovery room….

Danforth, 428 U.S., at 91 n.2 (Stewart, J., concurring). There is no indication this has changed. *E.g*., *Women's Medical Center v. Archer*, 159 F.Supp.2d 414, 428 (S.D. Tex. 1999) (citing abortion practitioner's testimony concerning the "cattle herd mentality" common in abortion clinics), *aff'd in part*, *rev'd in part on other grounds sub nom.*, 248 F.3d 411 (5th Cir. 2001).

consequences of her decision in the context of the values and moral or religious principles of their family." *Casey*, 505 U.S., at 899-900 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

Parental involvement is critical to ensure not only that the adolescent's choice is informed, but that it is freely made and not the result of coercion or duress. High abortion rates are generally associated not with freedom, but with "lack of control over one's life" and "lack of financial and social resources."[9] A survey by a pro-choice post-abortion support group shows, for example, that many women feel pressured by the baby's father to have an abortion.[10] These concerns are heightened for adolescents who, as this Court has recently observed, are more susceptible than adults to "outside pressure" and other "negative influences," and more likely than adults to make decisions that are "impetuous and ill-considered." *Roper v. Simmons*, 125 S.Ct. 1183, 1195 (2005); *see also Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 311-12 (2000) (noting the susceptibility of adolescents to peer pressure and coercion). Among women who have negative psychological reactions to abortion after undergoing the procedure, minors are more likely than older patients to report being misinformed at the time of the

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[9]Stanley K. Henshaw & Kathryn Kost, *Abortion Patients in 1994-1995: Characteristics and Contraceptive Use*, 28 Family Planning Perspectives, 140, 147 (July/August 1996).

[10]Survey by host of www.afterabortion.com available at www.geocities.com/Athens/Parthenon/1362/surveyresults1.html (visited July 28, 2005). Eighty-five percent of the fathers of the unborn child offered no encouragement to continue the pregnancy. *Id.*, Question 6. When the woman said she wanted to continue the pregnancy, the dominant reaction of the unborn child's father was "slightly upset" (60%), angry (38%), and/or very angry (43%) compared to "happy" (.7%). *Id.*, Question 8. Seventy-three percent of the fathers suggested an abortion. *Id.*, Question 9.

abortion, to feeling forced or pressured into having the abortion, and being dissatisfied with the decision to undergo an abortion.[11]

A parent may also be helpful in choosing a qualified and competent medical provider. *Hodgson*, 497 U.S., at 448 (opinion of Stevens, J.) (a parental involvement statute "permits the parent to inquire into the competency of the doctor performing the abortion"); Testimony of Professor Teresa Stanton Collett before the New Hampshire Senate Judiciary Committee (May 16, 2003) at 4 (testifying that a well-informed parent is more likely to inquire into the qualifications of a physician than a teenager who is panicking over an unexpected pregnancy). Adolescents "are less likely than adults to know or be able to recognize ethical, qualified physicians, or to have the means to engage such professionals." *Bellotti II*, 443 U.S., at 641 n.21. Without parental input many minors "probably will resort to an abortion clinic, without being able to distinguish the competent and ethical from those that are incompetent or unethical." *Id.*

With respect to specific *medical* risks, even competent "doctors are not omniscient; specialists in performing abortions may incorrectly conclude that the immediate advantages of the procedure outweigh the disadvantages which a parent could evaluate in better perspective." *Danforth*, 428 U.S., at 104 (Stevens, J., concurring in part, dissenting in part). No woman, especially a minor, should be isolated in her privacy in weighing

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[11]Wanda Franz & David Reardon, *Differential Impact of Abortion on Adolescents and Adults*, 27 Adolescence 161 (Spring 1992). One physician reported that of the 54 teenage patients he had seen with "significant complications" after legal abortions, "one factor common to all of them stands out. None of them felt they had been afforded any meaningful information about the potential dangers of the abortion operation." Matthew J. Bulfin, M.D., *A New Problem in Adolescent Gynecology*, 72 Southern Med. J. 967, 968 (Aug. 1979).

these risks. *Roe*, 410 U.S., at 153-54.

Significantly, maternal health is rarely the reason for an abortion.[12] In those few cases where health is at issue, parental involvement is even more important, especially in light of the demonstrated physical and mental health risks associated with abortion generally,[13] risks often exacerbated in the adolescent population.[14] Parental notice is critical in assuring evaluation of

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[12]Aida Torres & Jacqueline Forrest, *Why Do Women Have Abortions?*, 20 Family Planning Perspectives 169, 170 (July/Aug. 1988) (reporting that mental or physical health is reported as a reason for abortion in only 3% of cases). *See Planned Parenthood v. Danforth*, 428 U.S., at 103 (Stevens, J., concurring in part, dissenting in part) ("the most significant consequences of the [abortion] decision are not medical in character").

[13]Immediate complications include hemorrhage, uterine perforation, cervical lacerations, and anesthetic complications. Elizabeth Ring-Cassidy & Ian Gentles, WOMEN'S HEALTH AFTER ABORTION: THE MEDICAL AND PSYCHOLOGICAL EVIDENCE 2 (2002); Royal College of Obstetricians and Gynecologists, THE CARE OF WOMEN REQUESTING INDUCED ABORTION: EVIDENCE-BASED CLINICAL GUIDELINE NO. 7, at 29 (Sept. 2004), available at http://www.rcog.org.uk/resources/Public/pdf/induced_abortionfull.pdf (visited July 28, 2005). Long-term complications include placenta previa and pre-term delivery in a subsequent pregnancy. John M. Thorp, Jr., M.D., *et al*., *Long-term Physical and Psychological Health Consequences of Induced Abortion: Review of the Evidence*, 58 Obstetrical and Gynecological Survey 67, 70-72, 75 (2002); Elizabeth M. Shadigian, M.D., "Reviewing the Evidence, Breaking the Silence: Long-term Physical and Psychological Health Consequences of Induced Abortion," in THE COST OF "CHOICE": WOMEN EVALUATE THE IMPACT OF ABORTION (2004), at 63, 67-68.

[14]It has long been reported, for example, that aborting teenagers are at an increased risk for cervical injury because "many women early in their teens have small, immature cervices, difficult to grasp with a tenaculum and to dilate." Kenneth F. Schulz, *Measures to Prevent Cervical Injury During Suction Curettage Abortion*, The Lancet 1182, 1184 (May 28, 1983); *see* Willard Cates, Jr., M.D., *et al*., *The Risks Associated with Teenage Abortion*, 309 New Eng. J. Med. 621, 622, 624 (Sept. 15, 1983). Cervical injury is of special concern for adolescents because it may predispose them

these risks, and improves the post-operative medical care of dependent minors who decide to have an abortion by ensuring "that parents have adequate knowledge to recognize and respond to any post-abortion complication that may develop." Testimony of Professor Teresa Stanton Collett before the New Hampshire Senate Judiciary Committee (May 16, 2003) at 5.

Moreover, there are specific health issues where the patient is an adolescent. Setting aside the disputed question whether abortion is an independent risk factor for breast cancer,[15] it is widely accepted that by sacrificing the protective effect of a delivery, a woman who has an abortion increases her risk of breast cancer. The increased risk "is most pronounced in women under 20 years of age who elect to undergo abortion rather than continue their pregnancy."[16] An 18-year-old woman's decision to have an abortion nearly doubles her five-year and lifetime risk

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to adverse outcomes in future pregnancies. Cates at 624. Aborting adolescents are also reported to be at an increased risk of endometritis (inflammation of the uterine lining). Ronald T. Burkman, M.D., *Morbidity Risk Among Young Adolescents Undergoing Elective Abortion*, 30 Contraception 99, 101, 103-04 (Aug. 1984).

[15]If abortion is not an independent risk factor for breast cancer, then a woman's risk of contracting breast cancer as a result of abortion is no greater than if she had never become pregnant at all. Angela Lanfranchi, M.D., "The Abortion-Breast Cancer Link: The Studies and the Science," in THE COST OF CHOICE, *supra* note 13, at 72, 84. If, however, abortion is an independent risk factor for breast cancer, then a woman who aborts is at greater risk for breast cancer than the woman who did not become pregnant. *Id*. Of course, a pregnant teen is not faced with the choice of whether to get pregnant or not, but whether to have an abortion or carry the child to term. It is recognized within the medical community that *that* decision has implications for her risk of breast cancer whether or not abortion is an independent risk factor for breast cancer. *See* discussion *infra* at 18-19.

[16]Thorp, *supra* note 13, at 76.

of breast cancer at age 50.[17] One study of nearly 2,000 women found 12 who had a combined history of an abortion before age 18 and a positive family history of breast cancer, and *all* 12 women went on to develop breast cancer before the age of 45.[18]

The only published, quantitative meta-analysis to take up the question whether abortion is an independent factor for cancer (*see* note 15 *supra*) reports an odds ratio for breast cancer of 1.3 in women with previous induced abortion (*i.e.*, for every ten women who develop breast cancer and have not had an abortion, there are 13 who develop breast cancer and have had an abortion, representing a 30% increased risk), not an insubstantial risk for an adolescent considering an abortion.[19]

In addition, there is evidence of a link between abortion and suicidal ideation among women generally. Aborting women are 3.1 to 6.5 times more likely to commit suicide compared to delivering women.[20] Evidence of a correlation is even stronger

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[17]Shadigian, *supra* note 13, at 65; WOMEN'S HEALTH AFTER ABORTION, *supra* note 13, at 23. *See also* Janet R. Daling, *et al.*, *Risk of Breast Cancer Among Young Women: Relationship to Induced Abortion*, 86 J. of Nat'l Cancer Institute 1584, 1585 (Nov. 2, 1994) (risk of breast cancer among women who underwent their first induced abortion before the age of 18 was 250% higher than among other women).

[18]Daling, *supra* note 17, at 1588; WOMEN'S HEALTH AFTER ABORTION, *supra* note 13, at 26 (discussing the Daling study).

[19]Joel Brind, *et al.*, *Induced Abortion as an Independent Risk Factor for Breast Cancer: a Comprehensive Review and Meta-analysis*, 50 J. of Epidemiology and Community Health 481 (1996), discussed in Shadigian, *supra* note 13, at 66, and Thorp, *supra* note 13, at 71-74. Great Britain's Royal College of Obstetricians and Gynecologists concluded that Brind's meta-analysis has "no major methodological shortcomings and could not be disregarded." THE CARE OF WOMEN REQUESTING INDUCED ABORTION, *supra* note 13, at 33.

[20]David C. Reardon, *et al.*, *Deaths Associated with Abortion Compared to*

for adolescents. One study shows, within a six-month period, a *ten-fold increase* in attempted suicides among teenage girls who had an abortion.[21] A comprehensive review of existing studies concluded that "[a]ny woman contemplating an induced abortion should be cautioned about the mental health correlates of an increased risk of suicide or self-harm attempts as well as depression and a possible increased risk of death from all causes."[22] Given the reported ten-fold increase in suicide attempts among adolescents who undergo an abortion, the need for parental involvement and follow up would appear to be even stronger.[23]

Consideration of the relevant risks is plainly essential for a woman's informed consent, whether a minor or not. There is even greater justification for regulation to ensure informed consent with respect to minors because they pose "unquestionably greater risks of inability to give an informed consent." *H.L.*, 450 U.S., at 411. With respect to minors, this Court has recognized that "[t]here is no logical relationship between the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion." *Id*. at

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Childbirth – A Review of New and Old Data and the Medical and Legal Implications, 20 J. of Contemp. Health L. & Policy 279, 298 (Spring 2004).

[21]B. Garfinkel, *et al*., STRESS, DEPRESSION AND SUICIDE: A STUDY OF ADOLESCENTS IN MINNESOTA (1986), discussed in *Deaths Associated with Abortion Compared to Childbirth*, *supra* note 20, at 302.

[22]Thorp, *supra* note 13, at 76.

[23]This again underscores the need for parental involvement in supervising post-abortion care. *Hodgson*, 497 U.S., at 428 n.11. Parents can "support the minor's psychological well-being and thus mitigate adverse psychological sequelae that may attend the abortion procedure." *Id.* (quoting lower court findings).

408. Thus parental involvement is critical.[24]

IV. The Institutional Concerns at Issue in *Casey*, and a Proper Regard for the Respective Roles of this Court And Other Branches of Government, Support Reversal

Casey attempted to broker a kind of constitutional compromise. It did so by reaffirming *Roe*'s holding that the decision whether to have an abortion before viability resides with the woman, while requiring a more deferential standard of review than previously recognized (replacing strict scrutiny with the undue burden standard), thereby permitting broader regulation of abortion. *Casey* repeatedly underscores this point, emphasizing that what is protected under this Court's

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[24]It is all the more critical when an adolescent is faced with serious health issues. The First Circuit (390 F.3d at 63) relied heavily on the declaration of a single physician, a Dr. Wayne Goldner, concerning health risks that, in his opinion, necessitate an immediate "termination of pregnancy." Dr. Goldner does not claim that he has actually encountered, or intends to treat, any of the situations he describes, raising a question whether this case is justiciable at all. *Cf. Ohio v. Akron Center for Reproductive Health*, 497 U.S., at 514 (holding that the lower court should not have invalidated a parental notice statute "based upon a worst-case analysis that may never occur"). But more to our point, if there were a need for an immediate delivery, Dr. Goldner's declaration begs the question since the woman would still face the choice of whether to deliver the child or have an abortion, making parental involvement all the more critical. In other words, any danger posed by continuing the pregnancy would not require an abortion, but at most a choice between an abortion and a (potentially pre-term) delivery. In this regard, the oft-stated assumption that abortion is a "safer" choice than delivery, a claim that was critical in *Roe* (410 U.S., at 163), has come under recent challenge. *Deaths Associated with Abortion Compared to Childbirth*, *supra* note 20, at 281 (studies based on more reliable and objective data than earlier research show that pregnancy-associated deaths are "two to four times higher for aborting women compared to delivering women").

jurisprudence is a woman's *decision* whether to have an abortion, and that this Court's decisions after *Roe* had gone "too far" (505 U.S., at 875) in striking down regulations that did not unduly burden that decision.[25] As a result of *Casey*, states may not ban abortion, but they can substantively regulate it.

We disagree with the "balance" struck in *Case*y, believing, as do many others, that nothing in the Constitution forbids a legislature from prohibiting the intentional killing of any class of human beings. Indeed, it can be questioned whether failure to protect a segment of society with no political voice can be reconciled with values fundamental to the law, such as the protection of human life and the guarantee of equal justice for all, including people who are most vulnerable and socially marginalized. One earmark of *Roe*'s departure from long-standing public expectations about the role of law and government in protecting human life is that *Roe* has never enjoyed wide currency among the American public.[26] *Roe* has

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[25]505 U.S., at 874 (the Constitution is implicated "[o]nly where state regulation imposes an undue burden on a woman's ability to make this decision"; what the Constitution forbids is undue interference with a woman's "freedom to decide whether to terminate her pregnancy"); *id*. at 877 ("What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so.").

[26]A recent Harris poll reported that 72% and 86% of Americans believe abortion should be illegal in the second and third trimesters, respectively. The Harris Poll #18 (March 3, 2005). A Los Angeles Times poll in January 2005 found 53% saying abortion should be illegal in every case or with the rare exceptions of rape, incest, or to prevent the mother's death. Los Angeles Times Poll, Study #514 (Jan. 18, 2005), Question 65, available at http://www.latimesinteractive.com/pdfarchive/nationworld/la-011905poll1_pdf.pdf (visited July 28, 2005). Likewise, most women, polled separately, say abortion either should never be permitted or should be allowed only in cases of rape, incest, and to save the mother's life; only 30% of women think abortion should be "generally available." Center for Gender Equality, *Progress and Perils: How Gender Issues Unite and Divide Women, Part Two* (April 7, 2003) (conducted by Princeton Survey

even long been criticized by scholars and commentators who favor legalized abortion,[27] and is radically out of step with the laws of most other western nations. Mary Ann Glendon, ABORTION AND DIVORCE IN WESTERN LAW (1989); *cf. Roper v. Simmons*, 125 S.Ct., at 1198-1200 (considering the views of other nations in evaluating the constitutionality of executing adolescent offenders). Thus, unlike other landmark decisions of this Court,[28] *Roe* has never gained wide acceptance; indeed, opposition to the decision has only grown. *See* notes 26-27, *supra*.

For these and other reasons, on the question whether states may ban abortion, we believe *Casey* was wrongly decided. Yet, at the same time, *Casey* recognizes that policy decisions concerning abortion which do not unduly burden the ultimate decision whether to have an abortion are the proper domain of the legislative branches. For that reason, it would be radically inconsistent with *Casey* were this Court now to affirm that issues like parental involvement are left to it and lower courts rather

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Research Associates).

[27]Among the extensive literature, *see*, *e.g.*, Laurence H. Tribe, *Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1, 7 (1973) ("One of the most curious things about *Roe* is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found"); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*," 82 Yale L.J. 920, 947 (1973) ("*Roe* is a "very bad decision" because "it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be"); Benjamin Wittes, *Letting Go of Roe*, Atlantic Monthly (Jan./Feb. 2005) ("Since its inception *Roe* has had a deep legitimacy problem, stemming from its weakness as a legal opinion").

[28]*Cf.*, *Brown v. Board of Education*, 349 U.S. 294 (1955), a decision based on constitutional amendments that were adopted to overcome the problem of socially-institutionalized racial inequality that *Brown* addressed.

than legislatures.[29] Such a result in the case at bar would not only repudiate the balance struck in *Casey*, but would undermine the values *Casey* sought to protect.

Casey disclaims any intent that this Court take upon its own shoulders the burden of deciding all important questions concerning abortion, leaving legislatures with power only to decide trivial issues. This Court is not, and surely does not wish to be, the Nation's medical board on abortion. Yet that is precisely what Respondents invite. Yielding to that temptation on the sensitive question of parental involvement in adolescent decisions whether to have an abortion, a question on which there are differing views and evolving evidence, would constitute a rejection of *Casey* and, just as seriously, inject this Court even deeper into issues that are properly decided by legislatures.

CONCLUSION

Respondents have failed to demonstrate, as they must to prevail, that there is a "clear incompatibility"[30] between the challenged New Hampshire statute and the Constitution. Indeed, the statute serves the legitimate interests of children, parents, and family integrity, interests deeply imbedded in our Nation's history and traditions. There is no constitutional basis for preventing New Hampshire's legislature from determining that children's health and welfare will be advanced in all cases by facilitating parental involvement in a minor's decision whether

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[29] *See Akron v. Akron Center for Reproductive Health*, 462 U.S., at 465 (O'Connor, J., dissenting) (noting that legislatures are the appropriate forum for the resolution of sensitive issues and are "ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts"), quoting *Missouri, K. & T.R. Co. v. May*, 194 U.S. 267, 270 (1904) (Holmes, J.).

[30] *Legal Tender Cases*, 12 Wall. 457, 530-31 (1871); *Fletcher v. Peck*, 6 Cranch 87, 128 (1810) (Marshall, C.J.).

to have an abortion. Any exception beyond that already crafted by the New Hampshire legislature should be left to that body, which is in a superior position to evaluate competing claims and evolving evidence in protecting the health and welfare of its citizens.

The judgment of the Court of Appeals should be reversed.

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