No. 04-1144

In The

Supreme Court of the United States

KELLY A. AYOTTE,
ATTORNEY GENERAL OF THE STATE OF NEW HAMPSHIRE, IN HER OFFICIAL CAPACITY,
Petitioner,

v.

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, *ET AL.*
Respondents.

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

BRIEF OF *AMICI CURIAE* JAMES P. WEIERS, SPEAKER OF THE HOUSE OF REPRESENTATIVES, KEN BENNETT, PRESIDENT OF THE SENATE, REPRESENTATIVE MARK ANDERSON, REPRESENTATIVE LAURA KNAPEREK, SENATOR LINDA GRAY, AND THE CENTER FOR ARIZONA POLICY IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

James P. Weiers is the Speaker of the Arizona House of Representatives. Ken Bennett is the President of the Arizona Senate. Representative Mark Anderson, Representative Laura Knaperek, and Senator Linda Gray are members of the Arizona Legislature. In 2000, *amici* legislators were the sponsors of SB 1238, Arizona's parental consent law (codified as Ariz. Rev. Stat. § 36-2152 (2005)).

The Center for Arizona Policy ("Center") is a non-profit tax-exempt research, education, and advocacy organization. The Center promotes public policy that strengthens Arizona's families. In 1996, the Center's General Counsel helped draft and testified in support of a prior version of Arizona's parental consent law. After that law was eventually enjoined, the Center supported a revised parental consent bill in 2000 with further legislative testimony and by circulating and delivering petitions with over 12,000 signatures in support of the bill to the Arizona legislature.

Amici recognize the importance of this case and urge this Court to reverse the ruling of the United States Court of Appeals for the First Circuit. *Amici*

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. None of the counsel for the parties authored this brief in whole or in part. Counsel for *amici* have applied to the Alliance Defense Fund ("ADF") for a grant for the preparation of this brief. ADF is a non-profit, 501(c)(3) organization that funds legal work in the public interest. Counsel for *amici* certify that they are the exclusive authors of this brief.

write to highlight their concern with the impact this case will have on the ability of state policymakers to promote the interests of pregnant minors and their parents through parental involvement laws.

SUMMARY OF THE ARGUMENT

New Hampshire's parental notification law is a modest and appropriate response to the critical issue of underage pregnancy. State governments enact parental notification and consent laws (hereinafter collectively referred to as "parental involvement laws") to promote the rights, well-being, and safety of young women, the rights of parents, as well as to promote their own valid governmental interests. Parents occupy a unique and essential place in the lives of their children. Pregnant minors can benefit tremendously from the involvement and support of their parents. The state helps young women when it encourages their parents to stand with them in their time of need. This Court recognizes that parents have a fundamental interest in the freedom to control the care and upbringing of their children, as well as in the ability of parents to develop and enjoy close relationships with their children. It is appropriate for states to use parental involvement laws to recognize and promote the rights of parents and encourage the parent-child bond. Parental involvement laws also serve important state interests. States have a clear interest in ensuring that pregnant minors are protected at all times in the exercise of their rights. States also have a clear interest in promoting live childbirth.

This Court has said that parental involvement laws occupy an important place within the nation's legal framework. Increasingly, however, lower

courts employ an exacting standard to review these laws, often resulting in their invalidation. This Court should continue its practice of using the traditional standard for facial challenges to the constitutionality of parental involvement laws. Because facial challenges allege that laws have no constitutional application, it is appropriate to require that there is no set of circumstances under which the challenged law would be constitutional. The standard that was used by the First Circuit Court of Appeals in this case—and the standards that have been employed by many of the lower courts—essentially require that states enact perfect laws of general applicability. This severely restricts the ability of policymakers to enact meaningful parental involvement legislation.

Finally, New Hampshire's parental notification law does not preclude a pregnant minor from receiving a medically necessary abortion. The decision of the First Circuit erroneously presumes that New Hampshire's judges, who are statutorily tasked with safeguarding the "best interests" of pregnant minors, will unreasonably delay awaited decisions on judicial bypass requests. In actuality, New Hampshire's courts are open to pregnant minors 24 hours a day, 7 days a week. There is no evidence that the New Hampshire judiciary will not make every accommodation for minors seeking a judicial bypass. Further, in striking New Hampsire's parental notification law, the District Court and the First Circuit gave short shrift to *Hodges v. Minnesota*, in which this Court confirmed the constitutionality of a similar parental notification law. The legal framework that this Court shapes is very important to state policy-

makers. By ignoring *Hodges*, the courts below have undermined part of that legal framework. The time is right for the Court to reassert its guidance so that state legislatures can continue to promote parental involvement without being hampered by ambiguity or unreasonable interference.

ARGUMENT

I. PARENTAL INVOLVEMENT LAWS PROMOTE SIGNIFICANT RIGHTS AND INTERESTS

Parental involvement laws are the best way for states to harmonize the rights of minors to have access to abortion, the rights of parents to serve as the primary caregivers and protectors of their children, and the interests of state governments to safeguard the welfare and safety of pregnant minors as well as to promote live childbirth. These rights and interests are compelling. Consequently, parental involvement legislation is overwhelmingly popular across the country.[2]

States further "a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision of whether or not to bear

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[2] One recent poll finds that 78% of Americans support legally required parental notification and 72% support parental consent. *See Fox News/Opinion Dynamics Poll*, (April 27, 2005) *at* http://www.foxnews.com/projects/pdf/poll_042705.pdf. At present 34 states have parental involvement laws. *See generally*, Guttmacher Institute, *State Policies in Brief: Parental Involvement in Minors' Abortions*, (July, 2005) *at* http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf.

a child." *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 91 (1976) (Stewart, J. concurring). While the state cannot impose a third party veto on a minor's decision to seek an abortion, *id. at* 74-5, it can and should pass legislation that permits and encourages others to come along side and support minors as they face a very difficult and important decision. As this Court observed in *Ohio v. Akron Center for Reproductive Health* ("*Akron II*"), "[i]t is both rational and fair for the State to conclude that, in most instances, the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature." 497 U.S. 502, 520 (1990).

Clearly most pregnant minors benefit when the law promotes parental involvement. Parents can facilitate full and effective communication between their daughters and abortion providers. *See Akron II*, 497 U.S. at 518-19; *and H.L. v. Matheson*, 450 U.S. 398, 411 (1981). Typically, parents are also in the best position to support and assist their daughters in the days following an abortion. Young women may need someone close to help them deal with the emotional side of the abortion decision. *See Hodgson v. Minnesota*, 497 U.S. 417, 484 (1990) (Kennedy, J., concurring in the judgment). Parents can also help their daughters be alert to any post-abortive health complications. *See generally* Teresa Stanton Collett, *Protecting Our Daughters: The Need For The Vermont Parental Notification Law*, 26 Vt. L. Rev. 101, 113-17 (2001) (noting that teens are less likely to return for post-operative exams and outlining possible post-abortive health complications). Additionally, parental involvement laws serve as a safeguard in detecting whether a minor has been the

victim of sexual assault. *Id.* at 118. Pregnant minors often find themselves in a very vulnerable position. States act in the best interests of pregnant minors when they encourage parental involvement.

Parental involvement laws also safeguard the "fundamental interest" of parents to control the care and upbringing of their children. *See Troxel v. Granville*, 530 U.S. 57, 65-6 (2000). "It is cardinal with us," this Court has explained, "that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) ("*Bellotti II*") (citation omitted) (emphasis in original). Moreover, parents "have a liberty interest, protected by the Constitution, in having a reasonable opportunity to develop close relations with their children." *Hodgson*, 497 U.S. at 484 (citations omitted) (Kennedy, J. concurring in the judgment). Parental consent laws help ensure that the bond between parents and children stays strong at the time when it is most needed.[3]

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[3] To this end, the Arizona Court of Appeals has held that a judicial bypass of parental consent is only appropriate upon a showing by "clear and convincing evidence." The court reasoned, in part, that such an evidentiary standard is warranted because judicial bypass "impacts a parent's opportunity to participate in making a significant decision involving his or her minor daughter." *In re B.S.*, 74 P.3d 285, 290 (Ariz. App. Ct. 2003) (citing *Akron II*, 497 U.S. at 517-18); *see also* Note, *Arizona Court of Appeals Holds That a Minor Must Show Fitness by Clear and Convincing Evidence To Bypass the State's Parental Consent Requirement*, 117 Harv. L. Rev. 2785 (2004) (sum-

footnote continued

Finally, the State itself has several interests that are served by promoting parental involvement. The State shares a pregnant minor's interest in seeing that her health is protected at all times. The State shares parents' interest in ensuring that their daughters are protected from sexual predators. States also have an undeniable interest in promoting live childbirth. *See Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833, 886 (1992) ("[A] state is permitted to enact persuasive measures which favor childbirth over abortion. . . .") *accord Simat v. Ariz. Health Care Cost Containment Sys.*, 56 P.3d 28, 33 (Ariz. 2002) (recognizing that the state has a "compelling interest . . . in preserving and protecting potential life and promoting childbirth."). The welfare of pregnant minors, their legal rights, the legal rights of parents, and the interests of state governments can be harmonized. This is the balance that states such as New Hampshire seek to strike by enacting parental involvement legislation. Unfortunately, New Hampshire's salutary and modest attempt to enact parental notification has been met in the courts below with a rigid and unforgiving review. *Compare Casey*, 505 U.S. at 872 ("A framework of this rigidity was unnecessary and in its later interpretation sometimes contradicted the State's permissible exerciser of its powers").

II. THIS COURT SHOULD CONTINUE TO ANALYZE FACIAL ATTACKS ON PARENTAL INVOLVEMENT LAWS WITH THE

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marizing *In re B.S.* and Arizona's use of the "clear and convincing" standard for judicial bypasses).

TRADITIONAL FACIAL CHALLENGE STANDARD OF REVIEW

Generally, facial challenges to laws must fail unless they "establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). This rule is firmly grounded in the role of the courts and the role of legislatures in our constitutional system. *See*, *e.g.*, *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). Below, the District Court and the First Circuit determined that that this Court has abrogated *Salerno*'s "no set of circumstances" standard in abortion cases and decided this case using the "undue burden" standard from *Casey*. *See Planned Parenthood of N. New England v. Heed*, 390 F.3d 53, 57-8 (1st Cir. 2004); *Planned Parenthood of N. New England v. Heed*, 296 F. Supp. 2d 59, 63 (D. N.H. 2003). This was error because this Court has not abandoned the *Salerno* standard in the abortion context. Further, the "no set of circumstances" standard is the appropriate framework for parental involvement cases because it complements the important individual rights and interests that surround underage pregnancy and society's proper response.

Laws are typically challenged, "as applied," meaning "on the facts of a particular case or in its application to a particular party." Blacks Law Dictionary (8th Ed. 2004). Successful "as applied" challenges result in specific applications of laws being enjoined. Conversely, to subject a law to a "facial challenge" is to say, "it always operates unconstitutionally." *Id*. Absent a limiting construction, laws challenged successfully on their face must be struck down, which is "manifestly, strong medicine."

Broadrick, 413 U.S. at 613. As this Court explained in *Salerno*, "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." 481 U.S. at 745 (emphasis added).

Because facial challenges to parental involvement laws allege that they "always operate[] unconstitutionally," this Court has applied the "no set of circumstances" standard to test allegations that they are unconstitutional. *See Akron II*, 497 U.S. at 514 (citing *Webster v. Reproductive Health Services*, 492 U.S. 490, 524 (1989) (O'Connor, J. concurring)). By contrast, in this case the First Circuit ruled that *Salerno* no longer applies to laws regulating abortion.[4] Often a statute's very constitutionality depends on whether the reviewing court applies the *Salerno* standard.[5]

This Court's landmark decision in *Planned Parenthood v. Casey* did not abandon the *Salerno* standard. This Court rejected the argument that Penn-

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[4] This has been the approach of the majority of circuits. *See Planned Parenthood of N. New Eng. v. Heed*, 390 F.3d 53, 57-8 (1st Cir. 2004) (surveying the positions of the circuits); *and Richmond Medical Center for Women v. Hicks*, 409 F.3d 619, 626-27 (4th Cir. 2005) (concluding that the *Salerno* standard does not apply to abortion regulation laws); *but see Barnes v. Moore*, 970 F.2d 12, 14 n.2 (5th Cir. 1992) (applying *Salerno*).

[5] *See*, *e.g.*, *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1179-80 (1996) (Scalia, J. dissenting from denial of *certiorari*) (noting that facial challenge to parental notification law would have failed if the appellate court had applied *Salerno*).

sylvania's definition of "medical emergency" foreclosed "the possibility of an immediate abortion despite some significant health risks." *Casey*, 505 U.S. at 880. The statute's language could have been "interpreted in an unconstitutional manner," but this Court preferred the interpretation of the appellate court. *Id*. For its part, the Third Circuit—acting without the benefit of state case law interpreting the provision—construed the statute as constitutional, noting that its interpretation was consistent with this Court's admonition that in the context of a facial challenge "a court is not to strike down a law as unconstitutional on the basis of 'a worst-case analysis that may never occur.'" *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F.2d 682,700-01 (3d Cir. 1991) (quoting *Akron II*, 497 U.S. at 514).

The "medical emergency" portion of the *Casey* decision has proven extremely influential. As the Ninth Circuit has recently observed, "[e]ssentially this same definition [for "medical emergency"] is used in the statutes of 26 states." *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 926 (9th Cir. 2004); *and see id*. n.15 (listing the statutes). If indeed *Salerno* no longer applies to abortion laws, the law has been changed significantly—with widespread consequences. *Salerno's* abrogation could mean, for example, that the Third Circuit's definition of "medical emergency," language that is now widely considered the paragon of constitutionality, may in fact be constitutionally infirm.

As Justice Kennedy recognized in *Hodgson*, "laws of general application . . . cannot produce perfect results in every situation to which [they] appl[y];

but the State is under no obligation to enact perfect laws." *Hodgson*, 497 U.S. at 496-97 (Kennedy, J. concurring in the judgment). *Salerno*'s continued validity in the parental involvement law context continues the tradition of granting deference to state policymakers by avoiding the onerous requirement that they "enact perfect laws."[6] Parental involvement laws involve "extremely sensitive issues." *Id*. State policymakers should be empowered to address these delicate issues. This Court's legal framework should reflect the fact that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Id. at* 491 (quoting *Missouri, K. & T. Ry. Co. of Texas v. May*, 194 U.S. 267, 270 (1904)).

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[6] Arizona's experience demonstrates the ease with which parental involvement laws can be blocked by litigation. Arizona first passed a parental consent in 1989. A federal district judge enjoined the law before it could go into effect. Over the next 13 years Arizona made several attempts to enact a parental consent law, all of which were enjoined. *See Planned Parenthood of Southern Arizona v. Neely*, 130 F.3d 400, 401-2 (9th Cir. 1997) (summarizing these attempts and the litigation up to that time). Parental consent in Arizona finally went into effect in 2003. *See generally Planned Parenthood of Southern Arizona v. Lawall*, 307 F.3d 783 (9th Cir. 2002) (parental consent law given final approval); *and* Robbie Sherwood, *Parental Consent For Minors To Get Abortion Takes Effect*, Ariz. Republic, March 5, 2003, at B1.

III. NEW HAMPSHIRE'S PARENTAL NOTIFICATION LAW ADEQUATELY SAFEGUARDS THE HEALTH OF PREGNANT MINORS

The First Circuit ruled that parental notification was unconstitutional, saying it lacked an exception to preserve the health of the mother. *Heed*, 390 F.3d at 62. The First Circuit erred because there is no requirement that states couch protections for the health of the mother in terms of an "explicit" health exception and because New Hampshire's parental notification law does not "interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." *Casey*, 505 U.S. at 880.

The First Circuit rejected New Hampshire's argument that its judicial bypass mechanism is sufficient to satisfy the health exception requirement, reasoning that "delay of up to 14 days could occur. . . ." 390 F.3d 53, 62. But New Hampshire's judicial bypass provision fully protects the health of pregnant minors. The Act requires a judge to authorize a minor's abortion when "the pregnant minor's best interests would be served thereby." N.H. Rev. Stat. Ann. § 132:26(II) (2005). It mandates that bypass proceedings "shall be given precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interest of the pregnant minor." § 132:26(II)(b). Finally, the act requires that all courts are accessible to pregnant minors "24 hours a day, 7 days a week." § 132:26(II)(c).

The First Circuit used a worst-case scenario analysis to focus on the maximum number of days a

judicial bypass determination could take—14. This approach ignores the law's flexibility and the fact that it requires judges to make their determination based on what is in the "best interests" of a pregnant minor. The Act does not impose a specific waiting period for a judicial determination, but it does limit the length of time judges can take to make a decision. Nothing in the act prevents New Hampshire trial or appellate judges from acting faster than the 7 days allotted to them by statute. Indeed, in the cases where a pregnant minor's health is at risk, there is no reason to believe that a judge would hesitate to render an immediate decision.

As this Court stated in *Casey*, "we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure." 505 U.S. at 899 (emphasis added). The First Circuit, reviewing simple parental notification, has not taken this reaffirmation to heart. In *Hodgson v. Minnesota*, this Court approved of a parental notification law very similar to the one at issue in this case. 497 U.S. 417, 497 (1990) (upholding two-parent notification with a judicial bypass). The First Circuit attempted to distinguish *Hodgson* by saying that a specific challenge for lack of a health exception was not before this Court. *See Heed*, 390 F.3d at 60 & n.6. The suggestion that *Hodgson* has been supplanted is erroneous. Far from abrogating *Hodgson*, the *Casey* decision relies on its reasoning.[7]

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[7] *See Casey*, 505 U.S. at 874 (citing *Hodgson* for the proposition that "Only where state regulation imposes an un-

footnote continued

This Court also cited *Hodgson* in its most recent decision dealing with a parental involvement statute. *See Lambert v. Wicklund*, 520 U.S. 292, 298 n.4 (1997) (upholding Montana's parental notification statute).

The First Circuit's conjecture that *Hodgson* has become a dead letter should be rejected. Other courts have also deemed *Hodgson* to have been displaced *sub silentio*. *See* 390 F.3d at 61 (citing *Planned Parenthood of the Rocky Mountains Services, Corp. v. Owens*, 287 F.3d 910 (10th Cir. 2002); *and Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908 (9th Cir. 2004)). These decisions are not based on what this Court has actually said. State legislatures depend on this Court's guidance as they fulfill their essential lawmaking function. *See Casey*, 505 U.S. at 845 (recognizing that "legislatures throughout the Union must have guidance as they seek to address this subject in conformance with the Constitution."). Indeed, in this case, the New Hampshire legislature has clearly attempted "to fit its legislation into the framework that [this Court] has supplied in [] previous cases." *Hodgson*, 497 U.S. at 497 (Kennedy, J. concurring in the judgment). Lower courts seriously impair the ability of state legislatures to divine and abide by constitutional

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due burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause."); *and id.* at 899 (citing *Hodgson* for the proposition that "a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure.").

tional boundaries when they rule based upon supposed unstated implications drawn from this Court's decisions.

CONCLUSION

The approach of the courts below unreasonably limits the ability of state policymakers to promote parental involvement with pregnant minors. Absent correction from this Court, the lower courts will continue to apply a rigid and unyielding framework to state parental involvement laws. The decision of the First Circuit should be reversed.

Respectfully Submitted,

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