No. _____

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, CONCORD FEMINIST
HEALTH CENTER, FEMINIST HEALTH CENTER
OF PORTSMOUTH, AND WAYNE GOLDNER, M.D.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

KELLY A. AYOTTE
Attorney General

DANIEL J. MULLEN*
Associate Attorney General

SUZANNE M. GORMAN
Senior Assistant Attorney General
N.H. DEPARTMENT OF JUSTICE
33 Capitol Street
Concord, NH 03301
603-271-3658
Attorneys for Petitioner

**Attorney of Record*

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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Did the United States First Circuit Court of Appeals apply the correct standard in a facial challenge to a statute regulating abortion when it ruled that the *undue burden standard* cited in *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 876-77 (1992) and *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) applied rather than the "no set of circumstances" standard set forth in *United States v. Salerno*, 481 U.S. 739 (1987)?

2. Whether the New Hampshire Parental Notification Prior to Abortion Act, N.H. Rev. Stat. Ann. § 132:24-28 (2003) preserves the health and life of the minor through the Act's judicial bypass mechanism and/or other state statutes?

PARTIES TO THE PROCEEDING IN THE COURT BELOW

Petitioner is Kelly A. Ayotte[1], Attorney General of the State of New Hampshire, who was sued in her official capacity.

Respondents are Planned Parenthood of Northern New England, Concord Feminist Health Center, Feminist Health Center of Portsmouth, and Wayne Goldner, M.D.

[1] Respondents initially sued Peter Heed, Attorney General of the State of New Hampshire, in the United States District Court for the District of New Hampshire in November, 2003. Kelly Ayotte became Attorney General in July, 2004.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a Writ of *Certiorari* issue to the United States Court of Appeals for the First Circuit to review the judgment in this case filed on November 24, 2004.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 390 F.3d 53 (1st Cir. 2004). It is set forth in the Appendix at App. 1-App. 23. The order of the United States District Court for the District of New Hampshire holding New Hampshire's Parental Notification Prior to Abortion Act unconstitutional and enjoining its enforcement is reported at 296 F.Supp. 2d 59, and is set forth in the Appendix at App. 24-App. 40.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on November 24, 2004.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1) (2002) to review a civil judgment.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Parental Notification Prior to Abortion

[*RSA 132:24 effective December 31, 2003.*]

132:24 Definitions In this subdivision:

I. "Abortion" means the use or prescription of any instrument, medicine, drug or any other substance or device intentionally to terminate the pregnancy of a female known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove an ectopic pregnancy or the products from a spontaneous miscarriage.

II. "Commissioner" means the commissioner of the department of health and human services.

III. "Department" means the department of health and human services.

IV. "Emancipated minor" means any minor female who is or has been married or has by court order otherwise been freed from the care, custody and control of her parents.

V. "Guardian" means the guardian or conservator appointed under RSA 464-A, for pregnant females.

VI. "Minor" means any person under the age of 18 years.

VII. "Parent" means one parent of the pregnant girl if one is living or the guardian or conservator if the pregnant girl has one.

HISTORY

Source: 2003, 173:2, eff. Dec. 31, 2003

[*RSA 132:25 effective December 31, 2003.*]

132:25 Notification Required

I. No abortion shall be performed upon an unemancipated minor or upon a female for whom a guardian or conservator has been appointed pursuant to RSA 464-A because of a finding of incompetency, until at least 48 hours after written notice of the pending abortion has been delivered in the manner specified in paragraphs II and III.

II. The written notice shall be addressed to the parent at the usual place of abode of the parent and delivered personally to the parent by the physician or an agent.

III. In lieu of the delivery required by paragraph II, notice shall be made by certified mail addressed to the parent at the usual place of abode of the parent with return receipt requested and with restricted delivery to the addressee, which means the postal employee shall only deliver the mail to the authorized addressee. Time of delivery shall be deemed to occur at 12 o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing.

HISTORY

Source: 2003, 173:2, eff. Dec. 31, 2003

[*RSA 132:26 effective December 31, 2003.*]

132:26 Waiver of Notice

I. No notice shall be required under RSA 132:25 if:

(a) The attending abortion provider certifies in the pregnant minor's medical record that the abortion is

necessary to prevent the minor's death and there is insufficient time to provide the required notice; or

(b) The person or persons who are entitled to notice certify in writing that they have been notified.

II. If such a pregnant minor elects not to allow the notification of her parent or guardian or conservator, any judge of a court of competent jurisdiction shall, upon petition, or motion, and after an appropriate hearing, authorize an abortion provider to perform the abortion if said judge determines that the pregnant minor is mature and capable of giving informed consent to the proposed abortion. If said judge determines that the pregnant minor is not mature, or if the pregnant minor does not claim to be mature, the judge shall determine whether the performance of an abortion upon her without notification of her parent, guardian, or conservator would be in her best interests and shall authorize an abortion provider to perform the abortion without such notification if said judge concludes that the pregnant minor's best interests would be served thereby.

(a) Such a pregnant minor may participate in proceedings in the court on her own behalf, and the court may appoint a guardian ad litem for her. The court shall, however, advise her that she has a right to court-appointed counsel, and shall, upon her request, provide her with such counsel.

(b) Proceedings in the court under this section shall be confidential and shall be given such 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. In no case shall the court fail to rule within 7 calendar days from the time the

petition is filed. A judge of the court who conducts proceedings under this section shall make in writing specific factual findings and legal conclusions supporting the decision and shall order a record of the evidence to be maintained including the judge's own findings and conclusions.

(c) An expedited confidential appeal shall be available to any such pregnant minor for whom the court denies an order authorizing an abortion without notification. The court shall make a ruling within 7 calendar days from the time of the docketing of the appeal. An order authorizing an abortion without notification shall not be subject to appeal. No filing fees shall be required of any such pregnant minor at either the trial or the appellate level. Access to the trial court for the purposes of such a petition or motion, and access to the appellate courts for purposes of making an appeal from denial of the same, shall be afforded such a pregnant minor 24 hours a day, 7 days a week.

HISTORY

Source: 2003, 173:2, eff. Dec. 31, 2003

[*RSA 132:27 effective December 31, 2003.*]

132:27 Penalty. Performance of an abortion in violation of this subdivision shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied notification. A person shall not be held liable under this section if the person establishes by written evidence that the person relied upon evidence sufficient to convince a careful and prudent person that the representations of the pregnant minor regarding information necessary to comply with this section are bona fide and true, or if the

person has attempted with reasonable diligence to deliver notice, but has been unable to do so.

HISTORY

Source: 2003, 173:2, eff. Dec. 31, 2003

[*RSA 132:28 effective December 31, 2003.*]

132:28 Severability. If any provision of this subdivision or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect the provisions or applications of this subdivision which can be given effect without the invalid provisions or applications, and to this end, the provisions of this subdivision are severable.

HISTORY

Source: 2003, 173:2, eff. Dec. 31, 2003

STATEMENT OF THE CASE

In June, 2003, the New Hampshire Legislature passed the Parental Notification Prior to Abortion Act (Act) with an effective date of December 31, 2003. N.H. Rev. Stat. Ann. (RSA) 132:24-28. The Act defines abortion to mean:

> The use or prescription of any instrument, medicine, drug, or any other substance or device intentionally to terminate the pregnancy of a female known to be pregnant with the intention other than to increase the probability of a live birth, to preserve the life or health of a child after live birth, or to remove an ectopic pregnancy or the products from a spontaneous miscarriage.

N.H. RSA 132:24, I

The Act also provides that no abortion shall be performed upon an unemancipated minor or upon a female for whom a guardian or conservator has been appointed until at least 48 hours after written notice has been delivered to the parent at the usual place of abode of the parent by the physician or an agent or notice is made by certified mail to the parent at the usual place of abode of the parent with return receipt requested and with restricted delivery to the addressee. N.H. RSA 132:25.

No notice is required if the attending abortion provider certifies in the pregnant minor's medical record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice or the persons who are entitled to notice certify in writing that they have been notified. N.H. RSA 132:26, I, II. If the minor chooses not to notify her parent or guardian, a judicial bypass procedure is available where a judge may authorize an abortion provider to perform an abortion if the judge concludes that the pregnant minor's best interests would be served. If the judicial bypass procedure is used, the pregnant minor may participate in the court on her own behalf and the court may appoint a guardian ad litem for her. The court must advise her that she has the right to court-appointed counsel and must provide her one upon her request. Proceedings in court shall be confidential and shall be given such 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 minor. An expedited confidential appeal is available to any pregnant minor for whom the court denies an order authorizing an abortion without notification. Access to the courts is afforded 24 hours a day, 7 days a week. N.H. RSA 132:26, II.

Performance of an abortion in violation of the statute is a misdemeanor and is grounds for a civil action by a person wrongfully denied notification. A person is not liable "if the person establishes by written evidence that the person relied upon evidence sufficient to convince a careful and prudent person that the representations of the pregnant minor regarding information necessary to comply with this section are bona fide and true or if the person has attempted with reasonable diligence to deliver notice, but has been unable to do so." N.H. RSA 132:27.

On November 17, 2003, plaintiffs-appellees Planned Parenthood of Northern New England, Concord Feminist Health Center, Feminist Health Center of Portsmouth, and Wayne Goldner, M.D. filed a complaint pursuant to 42 U.S.C. § 1983 seeking a declaratory judgment that the Act is unconstitutional and a preliminary injunction to prevent its enforcement once it became effective.

In an order dated December 29, 2003, the United States District Court for the District of New Hampshire (DiClerico, J.), declared the Act unconstitutional and enjoined the Attorney General, and those acting pursuant to and under his direction and authority from enforcing the Act.

The District Court found unconstitutional both the lack of an explicit health exception to protect the health of the pregnant minor, and the narrowness of the Act's exception for abortions necessary to prevent the minor's death. The district court declined to rule on the constitutionality of the confidentiality provisions contained in the Act.

The Attorney General appealed the District Court's decision to the United States Court of Appeals for the First Circuit.

The First Circuit affirmed the district court, finding that in deciding whether the Act regulating abortion such as the Parental Notification Prior to Abortion Act is facially invalid, the undue burden standard set forth in *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 876-77 (1992) should apply as opposed to the "no set of circumstances" standard set forth in *United States v. Salerno*, 481 U.S. 739 (1987).

In applying the undue burden standard, the First Circuit determined that because the Act contains no explicit health exception, and because no health exception is implied by other provisions of New Hampshire law or by the Act's judicial bypass procedure, the Act is facially unconstitutional.

The First Circuit also determined that because the death exception contained in the Act was drawn too narrowly and because the Act fails to safeguard a physician's good-faith medical judgment that a minor's life is at risk against criminal and civil liability, the Act was unconstitutional.

Because the First Circuit found the Act in its entirety unconstitutional on the aforementioned grounds, it declined to address whether the confidentiality provisions contained in the Act are constitutional.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' Ruling Conflicts With Decisions In Other Circuits

The United States Supreme Court has never explicitly addressed what standard should be applied to determine the facial validity of a statute regulating abortion. A plurality of justices in *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 876-77 (1992) stated that a law which "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" places an unconstitutional "undue burden" on the exercise of her right to choose abortion. Prior to *Casey*, the Supreme Court applied the *Salerno* standard in the abortion context. *See Ohio v. Akron Ctr. For Reproductive Health*, 497 U.S. 502, 514 (1990). After *Casey*, the Fifth Circuit, in *Barnes v. Moore*, 970 F.2d 12, 14 n.2 (5th Cir. 1992), held that Carey did not displace *Salerno*'s "no set of circumstances" test for facial challenges to abortion regulation. *See also Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1102-03 (5th Cir. 1997) (declining to reverse *Barnes*). The Fourth Circuit has also indicated that it would apply *Salerno*. *See Manning v. Hunt*, 119 F.3d 254, 268 n.4 (4th Cir. 1997) ("not[ing] in passing" that a court is bound to apply *Salerno* in abortion context unless the Supreme Court explicitly overrules it); *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 164-65 (4th Cir. 2000) (observation in *Manning* was not dicta and that *Salerno* must be applied to show deference to legislators).

Six other circuits have disagreed with the Fourth and Fifth Circuits. *See Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 142-43 (3d Cir. 2000) (holding undue burden standard, instead of *Salerno* standard, applies in abortion context after *Casey*); *Planned Parenthood of*

S. Ariz. v. Lawall, 180 F.3d 1022, 1025-26 (9th Cir. 1999) (same), *amended on denial of reh'g*, 193 F.3d 1042 (9th Cir. 1999); *Women's Med. Prof. Corp. v. Voinovich*, 130 F.3d 187, 193-96 (6th Cir. 1997) (same), *cert. denied*, 523 U.S. 1036 (1998); *Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir. 1996) (same), *cert. denied sub nom.*; *Leavitt v. Jane L.*, 520 U.S. 1274 (1999); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1456-58 (8th Cir. 1995) (same), *cert. denied sub nom.*; *Janklow v. Planned Parenthood*, 517 U.S. 1174 (1996); *A Woman's Choice – E. Side Women's Clinic v. Newman*, 305 F.3d 684, 687 (7th Cir. 2002) (same), *cert. denied*, 537 U.S. 1192 (2003).

The question of what is the standard for a challenge to the facial constitutionality of an abortion law is squarely presented. The procedural posture and facts of this case make it an excellent vehicle for this Court to settle the important question of law which has to date evaded review, and which will continue to divide the lower courts until such time as the Supreme Court decides the matter.

This Case Presents Important Issues of Constitutional Law Which Should Be Settled By This Court

The question of whether a statute regulating abortion must contain an explicit health exception has not been addressed by this Court. The New Hampshire Act does not preclude a woman from receiving a medically necessary abortion. While the Act itself does not contain an explicit health exception, other provisions of New Hampshire law provide a functional equivalent.

Moreover, the judicial bypass provision contained in the Act allows a court to act in the best interests of the

minor. This certainly encompasses situations where the health of the minor is at issue. The judicial bypass procedure would allow a minor to seek an abortion needed for health reasons without notifying her parents or guardians.

For similar reasons, the death exception contained in the Act is constitutional. Certainly, if an abortion is necessary to prevent the death of a minor, the minor's health is affected. Thus, for the same reasons that an explicit health exception is not required, the death exception in the Act is constitutional.

The statute at issue here is very similar to the one at issue in *Hodgson v. Minnesota*, 497 U.S. 417 (1990). The statute in that case did not contain an explicit health exception and this Court upheld it. The issue of what impact the parental notification statute had on the health of minors in need of an abortion was discussed in the briefs of that case. This Court did not address the issue that a judicial bypass would be constitutionally necessary in the absence of a health exception. This Court upheld a parental notification statute in *Hodgson* that contained no health exception.

The question posed in this case is an important issue of constitutional concern which has escaped Supreme Court review, and which is presented in a procedural setting which invites appellate review. For this reason, this Court should grant the petition.

CONCLUSION

For all the foregoing reasons, this case warrants the exercise of this Court's *certiorari* jurisdiction. The petition for Writ of *Certiorari* should therefore be granted by this Court.

Respectfully submitted,

KELLY A. AYOTTE
Attorney General

By her attorneys,

DANIEL J. MULLEN
Associate Attorney General

SUZANNE M. GORMAN
Senior Assistant Attorney General
NEW HAMPSHIRE DEPT. OF JUSTICE
33 Capitol Street
Concord, NH 03301
603-271-3658

390 F.3d 53

United States Court of Appeals,
First Circuit.
PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, et al., Concord Feminist Health Center, Feminist Health Center of Portsmouth, and Wayne Goldner, M.D.,
Plaintiffs, Appellees,

v.

Peter HEED, Attorney General of the State of New Hampshire, in his Official Capacity, Defendant, Appellant.
No. 04-1161.

Heard Aug. 6, 2004.
Decided Nov. 24, 2004.

Daniel J. Mullen, Associate Attorney General, with whom Suzanne M. Gorman, Senior Assistant Attorney General, and Andrew B. Livernois, Assistant Attorney General, were on brief, for appellant.

Teresa Stanton Collett, Professor of Law University of St. Thomas School of Law, Minneapolis, MN, was on brief, for amici curia New Hampshire Legislators in support of appellant.

Dara Klassel, with whom Martin P. Honigberg, Sulloway & Hollis, PLLC, Jennifer Dalven, Corinne Schiff, Lawrence A. Vogelman, and Shuchman, Krause & Vogelman, PLLC, were on brief, for appellees.

Before BOUDIN, Chief Judge, TORRUELLA, Circuit Judge, and SARIS,* District Judge.

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* Of the District of Massachusetts, sitting by designation.

TORRUELLA, Circuit Judge.

Defendant-appellant Attorney General of the State of New Hampshire, Peter Heed, acting in his official capacity ("Attorney General"), appeals the district court's order declaring unconstitutional and enjoining the enforcement of the Parental Notification Prior to Abortion Act (the "Act"), 2003 N.H. Laws 173, codified at N.H.Rev.Stat. Ann. ("RSA") § 132:24-28 (2003).

I. *Background*

In June 2003, the New Hampshire legislature passed "AN ACT requiring parental notification before abortions may be performed on unemancipated minors," which states that:

> No abortion shall be performed upon an unemancipated minor or upon a female for whom a guardian or conservator has been appointed pursuant to RSA 464-A because of a finding of incompetency, until at least 48 hours after written notice of the pending abortion has been delivered in the manner specified in paragraphs II and III.

RSA 132:25, I.[1] Paragraph II specifies that "written notice shall be addressed to the parent at the usual place of abode of the parent and delivered personally to the

[1] The Act defines an abortion as:

> the use or prescription of any instrument, medicine, drug, or any other substance or device intentionally to terminate the pregnancy of a female known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove an ectopic pregnancy or the products from a spontaneous miscarriage. RSA 132:24, I.

parent by the physician or an agent." RSA 132:25, II. Paragraph III allows for notification by certified mail with return receipt requested and with restricted delivery to the addressee. RSA 132:25, III.

> The notice requirement is waived if
>
> (a) The attending abortion provider certifies in the pregnant minor's medical record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide required notice; or
>
> (b) The person or persons who are entitled to notice certify in writing that they have been notified.

RSA 132:26, I.

If a minor does not want her parent or guardian notified, she may request a state judge, after a hearing, to "authorize an abortion provider to perform the abortion if said judge determines that the pregnant minor is mature and capable of giving informed consent to the proposed abortion," or if the judge determines that "the performance of an abortion upon her without notification of her parent, guardian, or conservator would be in her best interests." RSA 132:26, II. In these proceedings, the pregnant minor may act on her own behalf or be appointed a guardian ad litem, and she must also be advised that she has a right to request court-appointed counsel. RSA 132:26, II(a). The court proceedings "shall be confidential and shall be given such 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." RSA 132:26, II(b). Specifically, "[i]n no case shall the court fail to rule within 7 calendar days from the time the petition is

filed." RSA 132:26, II(b). The judge must also "make in writing specific factual findings and legal conclusions," and order a record of the evidence to be maintained. RSA 132:26, II(b).

If the minor's petition is denied, an "expedited confidential appeal shall be available," and the appellate court must rule within seven calendar days of the docketing of the appeal. Access to the trial and appellate courts for the purposes of these petitions "shall be afforded such a pregnant minor 24 hours a day, 7 days a week." RSA 132:26, II(c).

Violation of the Act can result in criminal penalties and civil liability:

> Performance of an abortion in violation of this subdivision shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied notification. A person shall not be held liable under this section if the person establishes by written evidence that the person relied upon evidence sufficient to convince a careful and prudent person that the representations of the pregnant minor regarding information necessary to comply with this section are bona fide and true, or if the person has attempted by reasonable diligence to deliver notice, but has been unable to do so.

RSA 132:27. The Act was to take effect on December 31, 2003. 2003 N.H. Laws 173.

On November 17, 2003, plaintiffs-appellees Planned Parenthood of Northern New England, Concord Feminist Health Center of Portsmouth, Feminist Health Center of Portsmouth, and Wayne Goldner, M.D. ("plaintiffs") filed a

complaint under 42 U.S.C. § 1983, seeking a declaratory judgment that the Act is unconstitutional and a preliminary injunction to prevent its enforcement once it became effective.[2] The district court merged the preliminary and permanent injunction proceedings and, on December 29,

[2] Citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), amici New Hampshire Legislators argue that appellee abortion providers lack standing to challenge the Act because the injury giving rise to standing is speculative. The injury in question, according to amici, is the one suffered by pregnant minors who require an abortion for health reasons. Amici argue that it is "not sufficient to merely show that some unknown medical conditions exist that may at some unknown future date be suffered by some unknown minors." Brief of Amici New Hampshire Legislators at 8. In fact, Dr. Wayne Goldner listed in his unopposed declaration five specific conditions that could require abortion to protect a minor's health: preeclampsia, eclampsia, premature rupture of the membranes surrounding the fetus, spontaneous chorioamnionitis, and heavy bleeding during pregnancy. Declaration of Wayne Goldner, M.D., ¶¶ 8-15. Moreover, appellee abortion providers themselves face an imminent injury – civil or criminal prosecution for performing an abortion in violation of the Act – sufficient to confer on them Article III standing. *See Planned Parenthood of Cent. Mo. v. Danforth,* 428 U.S. 52, 62, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976) (holding that physician abortion providers asserting their own rights and those of their patients had standing to challenge abortion regulation and "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief"). Because of their close relationship to the abortion decision, and the rights involved, providers routinely have *jus tertii* standing to assert the rights of women whose access to abortion is restricted. *See Singleton v. Wulff,* 428 U.S. 106, 117, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) ("[I]t generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decisions. . . . "). Indeed, as the Ninth Circuit has noted, "physicians and clinics performing abortions are routinely recognized as having standing to bring broad facial challenges to abortion statutes." *Planned Parenthood of Idaho, Inc. v. Wasden,* 376 F.3d 908, 916-18 (9th Cir.2004) (discussing abortion providers' third-party standing and citing cases).

2003, issued an order holding the Act unconstitutional and permanently enjoining its enforcement.

The district court found unconstitutional both (1) the lack of an explicit exception to protect the health of the pregnant minor, and (2) the narrowness of the Act's exception for abortions necessary to prevent the minor's death. Having found the Act fatally flawed in these respects, the district court declined to rule on the constitutionality of the Act's failure to provide specific protections for the confidentiality of a minor seeking a judicial waiver.

The Attorney General, acting in his official capacity, appeals.

II. *Analysis*

We review the district court's decision regarding the constitutionality of a statute *de novo. United States v. Lewko,* 269 F.3d 64, 67 (1st Cir.2001).

The Attorney General argues that in deciding whether the Act is facially invalid we should apply the "no set of circumstances" standard set forth in *United States v. Salerno,* 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).[3] This standard requires plaintiffs challenging a state law as facially invalid to show that "no set of circumstances exists under which the Act would be valid." *Id.* at 745, 107 S.Ct. 2095. The Attorney General's argument

[3] In *Salerno,* the Court considered a facial challenge to the Bail Reform Act, 18 U.S.C. § 3142(e), which permits pretrial detention on the ground of dangerousness. The Court held that the provision in question, which was accompanied by strict procedural safeguards, did not constitute a facial violation of the Due Process or Excessive Bail clauses of the Constitution. *Salerno,* 481 U.S. at 755, 107 S.Ct. 2095.

rests on the premise that the *Salerno* standard is applicable to the Act despite the agreement of a plurality of Justices in *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 876-77, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), that a law which "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" places an unconstitutional "undue burden" on the exercise of her right to choose abortion. A majority of the *Casey* Court applied that standard to determine that an abortion regulation is facially invalid if "in a large fraction of cases in which [the regulation] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion," thus imposing an "undue burden." *Id.* at 895, 112 S.Ct. 2791 (per Justices O'Connor, Kennedy, and Souter, joined by Justices Stevens and Blackmun). The Court has since confirmed that "'a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability' is unconstitutional." *Stenberg v. Carhart,* 530 U.S. 914, 921, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000) (quoting *Casey,* 505 U.S. at 877, 112 S.Ct. 2791); *see also id.* at 945-46, 112 S.Ct. 2791 (declaring Nebraska ban on so-called "partial birth abortion" unconstitutional under undue burden standard).

Despite the Supreme Court's clear application of the undue burden standard in *Casey* and *Stenberg,* it has never explicitly addressed the standard's tension with *Salerno.* In the instant case, while recognizing that this court has yet to address the issue, the district court followed the majority of circuits that apply the *Casey* and *Stenberg* standard to legislation regulating abortion. The Attorney General notes that the Supreme Court applied the *Salerno* standard in the abortion context prior to

Casey, see, e.g., Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 514, 110 S.Ct. 2972, 111 L.Ed.2d 405 (1990), and urges us to follow the Fifth Circuit's decision in *Barnes v. Moore,* 970 F.2d 12, 14 n. 2 (5th Cir.1992), that *Casey* does not displace *Salerno's* "no set of circumstances" test for facial challenges to abortion regulation. *See also Causeway Med. Suite v. Ieyoub,* 109 F.3d 1096, 1102-03 (5th Cir.1997) (declining to reverse *Barnes*). The overwhelming majority of circuits to address this issue, however, have disagreed with the Fifth Circuit.[4] *See, e.g., Planned Parenthood of Cent. N.J. v. Farmer,* 220 F.3d 127, 142-43 (3d Cir.2000) (holding undue burden standard, instead of *Salerno* standard, applies in abortion context after *Casey*); *Planned Parenthood of S. Ariz. v. Lawall,* 180 F.3d 1022, 1025-26 (9th Cir.1999) (noting inconsistency between *Casey* and *Salerno,* and following "great weight of circuit authority holding that *Casey* has overruled *Salerno* in the context of facial challenges to abortion statutes"), *amended on denial of reh'g,* 193 F.3d 1042 (9th Cir.1999); *Women's Med. Prof. Corp. v. Voinovich,* 130 F.3d 187, 193-96 (6th Cir.1997) (holding that *Casey* effectively overruled *Salerno*), *cert. denied,* 523 U.S. 1036, 118 S.Ct. 1347, 140 L.Ed.2d 496 (1998); *Jane L. v. Bangerter,* 102 F.3d 1112, 1116 (10th

[4] Only the Fourth Circuit has been sympathetic to the *Barnes* approach, indicating that it might continue to apply *Salerno. See Manning v. Hunt,* 119 F.3d 254, 268 n. 4 (4th Cir.1997) ("not[ing] in passing" that a court is bound to apply *Salerno* in abortion context unless the Supreme Court explicitly overrules it); *Greenville Women's Clinic v. Bryant,* 222 F.3d 157, 164-65 (4th Cir.2000) (noting that observation in *Manning* was not dicta and that *Salerno* must be applied to show deference to legislatures). *But see, Greenville Women's Clinic v. Comm'r, S.C. Dept. of Health,* 317 F.3d 357, 359 (4th Cir.2002) (on subsequent appeal, characterizing *Bryant* as holding, in part, that regulation in question "did not place an *undue burden* on a woman's decision whether to seek an abortion") (emphasis added).

Cir.1996) (observing that Supreme Court applied undue burden test instead of *Salerno* test in *Casey,* rendering undue burden "the proper test after *Casey*"), *cert. denied sub nom., Leavitt v. Jane L.,* 520 U.S. 1274, 117 S.Ct. 2453, 138 L.Ed.2d 211 (1997); *Planned Parenthood, Sioux Falls Clinic v. Miller,* 63 F.3d 1452, 1456-58 (8th Cir.1995) (opting to "follow what the Supreme Court actually did – rather than what it failed to say – and apply the undue-burden test."), *cert. denied sub nom., Janklow v. Planned Parenthood,* 517 U.S. 1174, 116 S.Ct. 1582, 134 L.Ed.2d 679 (1996); *cf. A Woman's Choice-E. Side Women's Clinic v. Newman,* 305 F.3d 684, 687 (7th Cir.2002) (reconciling conflict between *Salerno,* and *Stenberg/Casey,* by construing "no set of circumstances" language as a "suggestion" that gives way to *Stenberg's* holding that undue burden test applies), *cert. denied,* 537 U.S. 1192, 123 S.Ct. 1273, 154 L.Ed.2d 1026 (2003). We agree with these six circuit courts that the undue burden standard – proposed as a standard "of general application" by the *Casey* plurality, *Casey,* 505 U.S. at 876, 112 S.Ct. 2791, and twice applied to abortion regulations by a majority of the Court, *id.* at 895, 112 S.Ct. 2791; *Stenberg,* 530 U.S. at 920, 120 S.Ct. 2597 – supersedes *Salerno* in the context of abortion regulation.

Complementing the general undue burden standard, the Supreme Court has also identified a specific and independent constitutional requirement that an abortion regulation must contain an exception for the preservation of a pregnant woman's health. *See Stenberg,* 530 U.S. at 929-30, 120 S.Ct. 2597 (identifying "two independent reasons" for striking down a Nebraska regulation: first, that it lacks a health exception, and second, that it imposes an undue burden on a woman's ability to choose

abortion). The origin of the health requirement can be traced to *Roe,* which held that "the State, in promoting its interest in the potentiality of human life, may . . . regulate . . . abortion [after fetal viability] *except* where necessary, in appropriate medical judgment, for the preservation of the life *or health* of the mother." *Roe v. Wade,* 410 U.S. 113, 164-65, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (emphasis added), *reaff'd Casey,* 505 U.S. at 879, 112 S.Ct. 2791 (plurality opinion). Later, the majority in *Casey* observed that, had the medical emergency exception to Pennsylvania's abortion restrictions – among them a parental consent requirement – precluded "immediate abortion despite some significant health risks," it would have been unconstitutional since "the essential holding of *Roe* forbids a State to interfere with a woman's choice to undergo an abortion . . . if continuing her pregnancy would constitute a threat to her health." *Casey,* 505 U.S. at 880, 112 S.Ct. 2791. Finally, in *Stenberg,* 530 U.S. at 930, 120 S.Ct. 2597, the Supreme Court clarified that "the law requires a health exception in order to validate even a post viability abortion regulation, [and] it at a minimum requires the same in respect to previability regulations," 530 U.S. at 930, 120 S.Ct. 2597. Thus, a statute regulating abortion must contain a health exception in order to survive constitutional challenge. Similarly, *Roe* requires that abortion regulations contain an adequate death exception to permit abortion when it is necessary to save the life of a pregnant woman. *Roe,* 410 U.S. at 164-65, 93 S.Ct. 705.

The instant case thus presents three questions: whether New Hampshire's Act contains an adequate health exception, whether it contains an adequate death exception, and whether it places an undue burden on unemancipated minors who wish to obtain an abortion. A

state's decision to require parental notification for minors seeking an abortion is not constitutionally infirm *per se*. *See Lambert v. Wicklund,* 520 U.S. 292, 117 S.Ct. 1169, 137 L.Ed.2d 464 (1997) (upholding parental notification statute against constitutional challenge to judicial bypass procedure). The district court determined, however, that the New Hampshire Act's lack of a health exception and overly narrow death exception render it unconstitutional. Appellees argue that the Act also creates an undue burden by failing to adequately ensure the confidentiality of judicial bypass procedures.

A. *Health exception*

The Attorney General and amici suggest that parental notification laws are shielded from the health exception requirement reiterated in *Stenberg* on account of the interests they aim to protect.[5] Parental notification laws are enacted not only in furtherance of the state's "interest in the potentiality of human life," *Roe,* 410 U.S. at 164, 93

[5] Amicus Bishop of Manchester argues that *Stenberg* should be limited to cases in which a particular method of abortion is banned outright. This argument misreads the Court's discussion of the regulation at issue in that case. The majority did emphasize its prior caselaw "invalidat[ing] statutes that in the process of regulating the *methods* of abortion, impose[ ] significant health risks," 530 U.S. at 931, 120 S.Ct. 2597 (emphasis in original), but this language was meant to rebut Justice Thomas's dissent that a health exception was only applicable "where the pregnancy *itself* creates a threat to health." *Id.* (emphasis in original). To the contrary, the Court held, "a risk to a woman's health is the same whether it happens to arise from regulating a particular method of abortion, or from barring abortion entirely." *Id.* The risk is also the same when it arises from a minor's inability or unwillingness to notify her parents. The need for a health exception arises from the potential for risk to a woman's health, not from the source of that risk.

S.Ct. 705, but also in the interest of protecting minors from undertaking the risks of abortion without the advice and support of a parent. In considering an abortion regulation based on interests other than the one identified in *Roe,* however, the Supreme Court has determined that it "cannot see how the interest-related differences could make any difference to the . . . application of the 'health' requirement." *Stenberg,* 530 U.S. at 931, 120 S.Ct. 2597; *see also Casey,* 505 U.S. at 877, 112 S.Ct. 2791 ("[A] statute which, while furthering the interest in potential life *or some other valid state interest,* has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." (emphasis added)) (plurality opinion). The Constitution requires a health exception even when the State's interest in regulation is "compelling." *See Roe,* 410 U.S. at 163, 93 S.Ct. 705; *see also Stenberg,* 530 U.S. at 931, 120 S.Ct. 2597 ("[A] State may promote but not endanger a woman's health when it regulates the methods of abortion."). Thus, regardless of the interests served by New Hampshire's parental notice statute, it does not escape the Constitution's requirement of a health exception.

The Attorney General and amici also argue that our decision should be controlled by *Hodgson v. Minnesota,* 497 U.S. 417, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990), in which the Supreme Court upheld a parental notification statute that contained no health exception. However, as noted by the district court, the *Hodgson* Court did not consider a challenge to that statute's lack of a health

exception,[6] and even if it had, the subsequent decisions in *Casey* and *Stenberg* would nevertheless require a health exception in the instant case. The additional cases cited by the Attorney General and amici as examples of parental notification or consent statutes upheld without a health exception are all similarly distinguishable. Only three times since *Roe* has the Supreme Court addressed a clear challenge to an abortion regulation's lack of a health exception. In all three, the Court has indicated that an exception must be provided when the restriction would place a woman's health at risk. *See Stenberg,* 530 U.S. at 930-38, 120 S.Ct. 2597 (requiring health exception for "partial-birth abortion" ban); *Casey,* 505 U.S. at 879-80,

[6] A review of the *Hodgson* briefs indicates only one instance in which the impact of the parental notification statute on minors in need of an abortion for health reasons is discussed. In response to Minnesota's cross-petition to appeal the Eighth Circuit's determination that a two-parent notice requirement was unconstitutional in the absence of a judicial bypass, Cross-Respondents discussed the lengths to which some minors would go to avoid having to notify a parent. This might include delaying or foregoing abortion even when "serious health problems . . . necessitate an immediate abortion." Brief for Cross-Respondents at 15, *Minnesota v. Hodgson,* 497 U.S. 417, 110 S.Ct. 2926, 111 L.Ed.2d 344 (No. 88-1309). Such health problems, Cross-Respondents explained, were not covered by the statute's death exception. *Id.* at 15 n. 29. There was no argument that the notice requirement was unconstitutional because it lacked a health exception for such circumstances; rather, Cross-Respondents argued that a judicial bypass provision was constitutionally required, in part so that a minor would not feel compelled to forego an abortion needed for health reasons in order to avoid notifying her parents. Cross-Petitioners responded that no evidence had been provided of circumstances in which health problems short of a threat to a minor's life would necessitate abortion. Reply Brief of Cross-Petitioners at 17-18, *Minnesota v. Hodgson,* 497 U.S. 417, 110 S.Ct. 2926, 111 L.Ed.2d 344 (No. 88-1309). The Supreme Court addressed neither argument, although a majority did find the two-parent notice requirement unconstitutional in the absence of judicial bypass. *Hodgson,* 497 U.S. at 455, 110 S.Ct. 2926.

112 S.Ct. 2791 (reading medical emergency exception to include threat to health); *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists,* 476 U.S. 747, 768-71, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986) (finding statute requiring presence of second physician for post-viability abortion facially invalid for lack of medical emergency exception), *overruled* on other grounds, *Casey,* 505 U.S. at 882, 112 S.Ct. 2791.

Since *Stenberg,* at least two circuit courts have applied the health exception requirement to parental notice or consent laws. In *Planned Parenthood of the Rocky Mountains Services, Corp. v. Owens,* 287 F.3d 910, 915-16 (10th Cir.2002), the Tenth Circuit held that, because circumstances existed in which a pregnancy complication could seriously threaten a pregnant minor's health, a Colorado parental notification law similar to the New Hampshire Act was facially invalid for lack of a health exception. Similarly, the Ninth Circuit recently struck down an Idaho parental consent statute, finding that "[a] health exception is as requisite in statutory or regulatory provisions affecting only minors' access to abortion as it is in regulations concerning adult women." *Planned Parenthood of Idaho, Inc. v. Wasden,* 376 F.3d 908, 922-24 (9th Cir.2004) (finding Idaho statute's health exception overly narrow). We agree, and therefore affirm the district court's holding that the New Hampshire Act is constitutionally invalid in the absence of a health exception.

Acknowledging that the Act contains no explicit health exception, the Attorney General argues that other provisions of New Hampshire law provide a functional equivalent. None of the proffered statutes, however, is adequate. RSA 153-A:18 precludes civil liability for health professionals who render emergency medical care without

consent, but it does not preclude criminal liability. RSA 676:6, VII(b) permits physicians and their assistants to use force in providing emergency medical care when no one competent to consent to such care is available. While RSA 676:6, VII(b) may preclude criminal liability for assault, it would not insulate a physician from criminal liability for violating the Act's notification provisions. *See* RSA 132:27 (providing that violation of the Act's notice requirement is a misdemeanor). Moreover, the proffered statutes insulate medical personnel from civil liability or assault charges that arise from giving treatment without *consent;* they do not provide such protection when the legal action arises from giving treatment to a consenting minor without first providing forty-eight hours' notice to her parent.

For the first time, in this appeal, the Attorney General also cites RSA 627:3, I, which codifies the "competing harms" defense to criminal liability for those who violate the law in order to avoid harm that "outweigh[s], according to ordinary standards of reasonableness, the harm sought to be prevented" by the criminal provision. Although this provision has the potential to protect against criminal liability under the Act, it cannot preclude civil liability. Moreover, the provision would leave providers uncertain whether, in any given circumstance, providing an abortion in violation of the Act would meet the "ordinary standards of reasonableness."

Even if these statutes could be cobbled together to preclude all civil and criminal liability for medical personnel who violate the Act's notice requirements in order to preserve a minor's health, we would not view them as equivalent to the constitutionally required health exception. The basic canons of statutory construction in New

Hampshire require us to look first to a statute's plain meaning, and when it is clear and unambiguous, to apply the statute as written. *See, e.g., Appeal of Astro Spectacular, Inc.,* 138 N.H. 298, 639 A.2d 249, 250 (N.H.1996). The Act clearly states that "[n]o abortion shall be performed upon an unemancipated minor . . . until at least 48 hours after written notice" to a parent. RSA 132:25. Three explicit exceptions to this rule are provided: (1) when abortion is necessary to prevent the minor's death; (2) when a parent certifies in writing that he or she has been notified; and (3) when a court grants a judicial bypass. RSA 132:26, I, II. The New Hampshire legislature's intent that abortions not in compliance with the Act's notification provisions be prohibited in all but these three circumstances is clear. *See St. Joseph Hosp. of Nashua v. Rizzo,* 141 N.H. 9, 676 A.2d 98, 100 (1996) (espousing *expressio unius* standard of statutory construction). The earlier-enacted statutory provisions cited by the Attorney General cannot be read to supercede this intent. *See Petition of Dunlap,* 134 N.H. 533, 604 A.2d 945, 955 (1992) ("'When a conflict exists between two statutes, the later statute will control, especially when the later statute deals with a subject in a specific way and the earlier enactment treats the subject in a general fashion.'") (quoting *Bd. of Selectmen v. Planning Bd.,* 118 N.H. 150, 383 A.2d 1122, 1124 (1978)).

Finally, the Attorney General argues that the Act's judicial bypass mechanism allows prompt authorization of a health-related abortion without notice. The Act provides that such proceedings "shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay," provides minors 24-hour, 7-day access to the courts, and provides for expedited

appeal. RSA 132:26, II(b)-(c). However, the Act allows courts seven calendar days in which to rule on minors' petitions, and another seven calendar days on appeal. Delays of up to two weeks can therefore occur, during which time a minor's health may be adversely affected. Even when the courts act as expeditiously as possible, those minors who need an immediate abortion to protect their health are at risk. Due to this delay, the Act's bypass provision does not stand in for the constitutionally required health exception. *See Thornburgh,* 476 U.S. at 768-71, 106 S.Ct. 2169 (finding statute facially invalid for failing to provide health exception to delay caused by awaiting presence of second physician).

The New Hampshire Act contains no explicit health exception, and no health exception is implied by other provisions of New Hampshire law or by the Act's judicial bypass procedure. Thus, the Act is facially unconstitutional.

B. *Death exception*

Just as it requires a health exception, the Constitution also requires an exception to abortion restrictions when the life of a pregnant woman is in danger. *Stenberg,* 530 U.S. at 931, 120 S.Ct. 2597 ("[T]he governing standard requires an exception 'where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother.'" (quoting *Casey,* 505 U.S. at 879, 112 S.Ct. 2791)). Accordingly, the New Hampshire Act waives its parental notice requirement when a physician can certify that abortion is "necessary to prevent the minor's death and there is insufficient time to provide the required notice." RSA 132:26, I(a). Appellees argue that this death

exception is unconstitutionally narrow because (1) it is not possible for a physician to determine with any certainty whether death will occur before the notice provisions could be complied with; (2) it does not allow for circumstances in which abortion is the best, but not the only, option for saving a minor's life;[7] and (3) it does not permit abortion providers to rely on their own good faith judgment about whether an abortion is necessary. The Attorney General does not refute these charges, but responds that the Act is sufficiently specific to give notice of prohibited conduct, and that a scienter requirement can be read into the Act from New Hampshire law.

A minimum of forty-eight hours is necessary for compliance with the Act's notification requirement. RSA 132:25, I. Dr. Wayne Goldner, a named plaintiff in this case, provided unopposed testimony that physicians cannot predict with adequate precision what course medical complications will take, and thus cannot always determine whether death will occur within this time window. Consequently, the time component of the Act's death exception forces physicians either to gamble with their patients' lives in hopes of complying with the notice

[7] The plaintiffs correctly identify that the Act, as currently formulated, would require a physician to use procedures that pose more risk to her patient's health in order to comply with the necessity provision of the death exception. *See Colautti v. Franklin,* 439 U.S. 379, 400, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979) ("[T]he word 'necessary' suggests that a particular technique must be indispensable to the woman's life or health – not merely desirable – before it may be adopted."). Because we have already found unconstitutional the Act's failure to provide a health exception – which would remedy this problem by permitting abortion even in cases where a minor's death could be avoided by other, riskier means – we do not address this flaw as a separate ground for constitutional challenge.

requirement before a minor's death becomes inevitable, or to risk criminal and civil liability by providing an abortion without parental notice. *See* Declaration of Wayne Goldner, M.D., at ¶ 17 ("[T]he Act will force me to choose between following the law and letting my patient's condition deteriorate, possibly past the point of being able to save her life at all, and alternatively providing appropriate medical care to my patient and risking criminal prosecution and being sued by her parents."). The threat of such sanctions will have a "profound chilling effect on the willingness of physicians to perform abortions" when a minor's life is at risk. *Colautti,* 439 U.S. at 396, 99 S.Ct. 675. Thus, the Act's death exception is drawn too narrowly to protect minors in need of a life-saving abortion.

The Attorney General apparently concedes that an abortion provider must be able to rely on his or her good faith medical judgment in determining whether her patient's life is in danger. *See Colautti,* 439 U.S. at 395, 99 S.Ct. 675 ("We need not now decide whether, under a properly drafted statute, a finding of bad faith or some other type of scienter would be required before a physician could be held criminally responsible for an erroneous determination of viability. We reaffirm, however, that 'the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician.' "). The Attorney General argues that RSA 626:2, I, which states that "[a] person is guilty of a . . . misdemeanor only if he acts purposely, knowingly, recklessly or negligently, as the law may require, with respect to each element of the offense," can be read together with the Act to provide the necessary scienter requirement. According to the Supreme Court of New Hampshire, "[w]here a specific mental state is not provided for the

offense," RSA 626:2, I(a) requires "proof of a culpable mental state which is appropriate in light of the nature of the offense and the policy considerations for punishing the conduct in question." *State v. Bergen,* 141 N.H. 61, 677 A.2d 145, 146 (1996) (determining requisite mental state for indecent exposure). It is not clear, however, which of the four scienter requirements would be imposed in this circumstance. The definition of negligence imposes an objective reasonableness standard, *see* RSA 626:2, II(d), thus, a physician who acts on a good faith belief that abortion is necessary to save a patient's life could nonetheless face criminal or civil liability if a judge or jury later found that the physician's assessment was unreasonable. *See Voinovich,* 130 F.3d at 205 ("In this area [of medical necessity] where there is such disagreement, it is unlikely that the prosecution could not find a physician willing to testify that the physician did not act reasonably.").

As the district court held, we cannot construe the Act to preclude liability for good faith judgments "unless such a construction is reasonable and readily apparent." *Heed,* 296 F.Supp.2d at 66-67 (quoting *Stenberg,* 530 U.S. at 944, 120 S.Ct. 2597). The Act gives no indication that the negligence standard set out in RSA 626:2, I should not be applied. Thus, a physician cannot know whether his or her determination that a minor's life is at risk will be judged according to a standard (e.g., knowingly) that respects her good-faith medical assessment, or by an objective standard (negligently) that would leave the physician's judgment open to *post hoc* second guessing. The resulting uncertainty would, again, impermissibly chill physicians' willingness and ability to provide lifesaving abortions. *See Voinovich,* 130 F.3d at 205 (finding medical emergency exception unconstitutionally vague "because physicians

cannot know the standard under which their conduct will ultimately be judged"). As Dr. Goldner explained, "the Act forces doctors to think about criminal prosecution at a time when we need to be concentrating on doing what is best for our patients, thus creating unnecessary risk to patients' health and lives." Declaration of Wayne Goldner, M.D., at ¶ 19. That risk constitutes an undue burden for minors in need of life-saving abortions.

Because its time requirement is drawn too narrowly, and because it fails to safeguard a physician's good-faith medical judgment that a minor's life is at risk against criminal and civil liability, the Act's death exception is unconstitutional.

C. *Confidentiality*

The Act provides for judicial bypass of its notice provisions if, after a hearing, a judge "determines that the pregnant minor is mature and capable of giving informed consent to the proposed abortion," or, if she is not capable of giving informed consent, that "the performance of an abortion upon her without notification of her parent, guardian, or conservator would be in her best interests." RSA 132:26, II; *cf. Bellotti v. Baird,* 443 U.S. 622, 643-44, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) (requiring parental consent laws to provide for judicial bypass on same grounds). Appellees argue that the Act does not adequately provide for the confidentiality of these judicial bypass procedures. The Act indicates that "[p]roceedings in the court . . . shall be confidential," and "[a]n expedited confidential appeal shall be available." RSA 132:26, II(b)-(c).

Inadequate confidentiality provisions "raise the specter of public exposure and harassment of women who

choose to exercise their personal, intensely private, right, with their physician, to end a pregnancy." *Thornburgh,* 476 U.S. at 767, 106 S.Ct. 2169; *see also Bellotti v. Baird,* 443 U.S. 622, 644, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) (finding that judicial bypass proceeding "must assure that a resolution of the issue, and any appeals that follow, will be completed with anonymity"). In the instant case, a lack of confidentiality would also create a significant risk that a minor's parents could learn of her pregnancy and desire for an abortion, resulting in the very harms sought to be avoided by the bypass procedure. Alternatively, a minor might be compelled to delay or decline to seek an abortion out of fear that her parents would find out. Thus, for a large fraction of minors eligible for judicial bypass, inadequate confidentiality would impose an undue burden.

Confidentiality provisions must "take reasonable steps to prevent the public from learning of the minor's identity," but the Supreme Court has "refuse[d] to base a decision on the facial validity of a statute on the mere possibility of unauthorized, illegal disclosure by state employees." *Akron Ctr.,* 497 U.S. at 513, 110 S.Ct. 2972. Considerable grey area is left between these two standards. Because we have already found the Act in its entirety unconstitutional on other grounds, however, we find it unnecessary to delve further into an evaluation of its confidentiality provisions.

III. *Conclusion*

For the reasons stated above, we affirm the district court's order declaring the Act unconstitutional and enjoining its enforcement.

Affirmed.

296 F.Supp.2d 59

United States District Court,
D. New Hampshire.
PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, Concord Feminist Health Center, Feminist Health Center of Portsmouth, and Wayne Goldner, M.D.,

v.

Peter HEED, Attorney General of New Hampshire
No. CIV. 03-491-JD.

Dec. 29, 2003.

Dara Klassel, Planned Parenthood Federation of America, Inc., Jennifer Dalven, American Civil Liberties Union Foundation, New York City, Martin P. Honigberg, Sulloway & Hollis, Concord, NH, Lawrence A. Vogelman, Shuchman Krause & Vogelman, Exeter, NH, for Plaintiffs.

Daniel J. Mullen, NH Attorney General's Office, Concord, NH, for Defendant.

ORDER

DICLERICO, District Judge.

The plaintiffs bring an action pursuant to 42 U.S.C. § 1983, seeking to have the Parental Notification Prior to Abortion Act ("Act"),[1] passed by the New Hampshire legislature, declared unconstitutional. The plaintiffs also seek an injunction to prevent enforcement of the Act. The Attorney General contends that the Act is constitutional and objects to an injunction.

[1] 2003 N.H. Laws ch. 173, effective date, December 31, 2003, to be codified at N.H.Rev.Stat. Ann. ("RSA") § 132:24-:28.

At the plaintiff's request, this case has been given expedited consideration by the court in view of the fact that the Act is due to become effective on December 31, 2003.

After carefully reviewing the provisions of the Act and the applicable United States Supreme Court precedents, the court has concluded that the Act fails to meet the constitutional requirements as determined by the United States Supreme Court. Therefore, the Act cannot be enforced.

Background

In June of 2003, the New Hampshire Senate and House of Representatives passed "AN ACT requiring parental notification before abortions may be performed on unemancipated minors." The Act defines "abortion" as:

> the use or prescription of any instrument, medicine, drug, or any other substance or device intentionally to terminate the pregnancy of a female known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove an ectopic pregnancy or the products from a spontaneous miscarriage.

RSA 132:24, I (eff.12/31/03). The central provision of the Act is a prohibition on abortion in the absence of parental notification:

> No abortion shall be performed upon an unemancipated minor or upon a female for whom a guardian or conservator has been appointed pursuant to RSA 464-A because of a finding of incompetency,

> until at least 48 hours after written notice of the pending abortion has been delivered in the manner specified in paragraphs II and III.

RSA 132:25, I. Paragraph II requires written notice to be addressed to the parent at the parent's "usual place of abode" and to be "delivered personally by the physician or an agent." Paragraph III provides an alternative to allow notice by certified mail, return receipt requested, with delivery restricted to the addressee.

Notice is not required if the physician "certifies in the pregnant minor's medical record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice; or [ ][t]he person or persons who are entitled to notice certify in writing that they have been notified." RSA 132:26,I. If the pregnant minor does not want to notify a parent, she may, alternatively, seek court authorization for the abortion. RSA 132:26, II. In that case, the court is required to hold a hearing and then determine whether "the pregnant minor is mature and capable of giving informed consent to the proposed abortion" or "whether the performance of an abortion upon her without notification of her parent, guardian, or conservator would be in her best interests." *Id.* Such court proceedings "shall be confidential and shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant minor." RSA 132:26,II(b).

Violation of the Act carries penalties. "Performance of an abortion in violation of this subdivision shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied notification." RSA 132:27. Liability may be avoided if the person who performed the

abortion can establish "by written evidence that the person relied upon evidence sufficient to convince a careful and prudent person that the representations of the pregnant minor regarding the information necessary to comply with this section are bone [sic] fide and true, or if the person has attempted with reasonable diligence to deliver notice, but has been unable to do so." *Id.*

The plaintiffs simultaneously filed their complaint and a motion for a preliminary injunction to prevent the Act from being enforced once it becomes effective on December 31, 2003. The Attorney General filed an objection, and the plaintiffs filed a reply. No surreply was filed. The parties have agreed that the court may decide the plaintiffs' requests for a declaratory judgment and permanent injunctive relief on the merits based on their present filings.

Discussion

The plaintiffs contend that the Act is unconstitutional because it lacks an exception to the parental notice requirement in circumstances when the delay would threaten the health of the pregnant minor. They also contend that the Act's exception to prevent death is unconstitutionally narrow and that the confidentiality requirement for court proceedings is insufficient. The Attorney General argues that a health exception is not constitutionally required in a parental notification law, that either the judicial bypass or other New Hampshire statutes adequately protect the health of a pregnant minor, that the Act would not be applied to physicians who act in good faith, and that the confidentiality provision is sufficient.

I. *Declaratory Judgment*

Pursuant to 28 U.S.C. § 2201(a), the court "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." The plaintiffs seek a declaration that the Act is unconstitutional on its face.

The parties dispute the appropriate standard for evaluating a facial challenge to the validity of a state law regulating abortion. When plaintiffs bring a facial constitutional challenge to state law, they ordinarily must show that "'no set of circumstances exists under which the Act would be valid.'" *Pharm. Res. & Mfrs. of Am. v. Concannon,* 249 F.3d 66, 77 (1st Cir.2001) (quoting *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)), *aff'd sub nom Pharm. Research & Mfrs. of Am. v. Walsh,* 538 U.S. 644, 123 S.Ct. 1855, 155 L.Ed.2d 889 (2003). That high hurdle, however, applies only when the plaintiffs challenge a state law "that does not regulate constitutionally protected conduct." *Donovan v. City of Haverhill,* 311 F.3d 74, 77 (1st Cir.2002).

In *Casey,* the Court considered the facial constitutionality of a Pennsylvania law that imposed conditions on performing abortions for both adult and minor patients and, without mentioning *Salerno,* applied a standard of whether the challenged law imposes an "undue burden" or "will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 874, 877 & 895, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). In *Stenberg v. Carhart,* 530 U.S. 914, 921, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000), the Court concluded that a Nebraska abortion statute was unconstitutional, after applying a three level

test, including the "undue burden" standard, also without mentioning *Salerno.*

The First Circuit has not addressed the question of whether the *Salerno* standard applies in the context of abortion legislation.[2] Several other courts have concluded, however, that *Casey* and *Stenberg* provide the governing standard and that the *Salerno* standard does not apply. *See, e.g., A Woman's Choice-East Side Women's Clinic v. Newman,* 305 F.3d 684, 687 (7th Cir.2002), *cert. denied A Woman's Choice-East Side Women's Clinic v. Brizzi,* 537 U.S. 1192, 123 S.Ct. 1273, 154 L.Ed.2d 1026 (2003); *Planned Parenthood of the Rocky Mts. Servs. v. Owens,* 287 F.3d 910, 917 (10th Cir.2002); *Planned Parenthood of Cent. N.J. v. Farmer,* 220 F.3d 127, 142-43 (3d Cir.2000); *Planned Parenthood of Southern Ariz. v. Lawall,* 180 F.3d 1022, 1025-26 (9th Cir.1999), *amended on denial of rehear'g,* 193 F.3d 1042 (9th Cir.1999); *R.I. Med. Soc'y v. Whitehouse,* 66 F.Supp.2d 288, 312-13 (D.R.I.1999) (citing additional cases). The Fourth and Fifth Circuits alone have chosen to apply *Salerno* in the context of abortion legislation. *See Manning v. Hunt,* 119 F.3d 254, 269 (4th Cir.1997) (noting circuit split and citing cases). This court is satisfied that the *Casey* and *Stenberg* standard applies in the context of abortion legislation, as is well documented by a majority of courts that have considered the question. Therefore, that standard will be followed in this case.

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[2] However, having limited *Salerno* to cases that do not involve constitutionally protected conduct, it appears likely that the First Circuit would not apply *Salerno* in cases involving laws restricting access to abortion services. *See Donovan,* 311 F.3d at 77.

The United States Supreme Court decided in 1973 that the "right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe v. Wade,* 410 U.S. 113, 153, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). In *Roe,* the Supreme Court held that a Texas criminal statute which excepted "only a lifesaving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment." *Id.* at 164, 93 S.Ct. 705. The Supreme Court has also held that minors, as well as adults, have a constitutional right to choose an abortion. *See Bellotti v. Baird,* 443 U.S. 622, 633, 642, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979); *Planned Parenthood of Mo. v. Danforth,* 428 U.S. 52, 72-5, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976). During the three decades that have passed since *Roe v. Wade,* the Supreme Court and lower federal courts and state courts have continued to address issues arising from the recognition of a woman's constitutional right to decide whether to terminate a pregnancy. *See, e.g., Stenberg,* 530 U.S. at 920, 120 S.Ct. 2597; *Casey,* 505 U.S. at 843-44, 112 S.Ct. 2791; *Owens,* 287 F.3d at 917; *Humphreys v. Clinic for Women, Inc.,* 796 N.E.2d 247 (Ind.2003); *Simat Corp. v. Ariz. Health Care Cost Containment Sys.,* 203 Ariz. 454, 56 P.3d 28 (2002).

The right to choose to terminate a pregnancy may be subject to limitation, the degree of which depends upon the stage of the pregnancy and the state's interest both in the health of the mother and in promoting "the potentiality of

human life." *Roe,* 410 U.S. at 164, 93 S.Ct. 705. "[B]efore 'viability . . . the woman has a right to choose to terminate her pregnancy.'" *Stenberg,* 530 U.S. at 921, 120 S.Ct. 2597 (quoting *Casey,* 505 U.S. at 870, 112 S.Ct. 2791). "'[A] law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability' is unconstitutional[,] . . . [and][a]n 'undue burden is . . . shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.'" *Id.* After viability of the fetus, the state may "'"regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."'" *Id.* (quoting *Casey,* 505 U.S. at 879, 112 S.Ct. 2791, *quoting Roe,* 410 U.S. at 164-65, 93 S.Ct. 705).

The Supreme Court has upheld state laws requiring parental notification prior to performing abortions on minors. *See Lambert v. Wicklund,* 520 U.S. 292, 117 S.Ct. 1169, 137 L.Ed.2d 464 (1997); *Casey,* 505 U.S. at 899, 112 S.Ct. 2791. In *Lambert,* cited by the Attorney General, the Court rejected the plaintiff's argument that the judicial bypass procedure, incorporated in the state law, was deficient because it required a showing that parental notification was not in the minor's best interests rather than a showing that an abortion without notification was in her best interest. 520 U.S. at 294, 117 S.Ct. 1169. However, the *Lambert* Court did not consider the issues that have been raised in this case.

A. Health Exception

In *Casey,* the Supreme Court considered five provisions of Pennsylvania law pertaining to abortion. 505 U.S. at 844, 112 S.Ct. 2791. One of those provisions required a minor to obtain the informed consent of a parent before the procedure but also provided a judicial bypass option and an exception for a medical emergency. *Id.* The plaintiffs challenged the consent provision on the single ground that it required informed parental consent. *Id.* Given the limited challenge and the judicial bypass and emergency exceptions to the consent requirement, the Court concluded that the provision passed constitutional muster. *Id.* at 899, 112 S.Ct. 2791.

The Supreme Court later reiterated and clarified *Casey,* a plurality opinion, in *Stenberg,* stating that "the governing standard requires an exception 'where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother.'"[3] *Stenberg,* 530 U.S. at 931, 120 S.Ct. 2597 (quoting *Casey,* 505 U.S. at 879, 112 S.Ct. 2791). A health exception is required at any stage of a pregnancy because "a State may promote but not endanger a woman's health when it regulates the methods of abortion." *Id.*

The Tenth Circuit considered the constitutionality of a Colorado parental notification law, which is similar to the New Hampshire Act, under *Roe, Casey,* and *Stenberg. Owens,* 287 F.3d at 915-16. The court concluded that

[3] In addition, the Court noted that a law regulating a woman's access to abortion which "applies both previability and postviability aggravates the constitutional problem presented. The State's interest in regulating abortion previability is considerably weaker than postviability." *Stenberg,* 530 U.S. at 930, 120 S.Ct. 2597.

because circumstances exist in which a pregnancy complication could seriously threaten a pregnant minor's health, the Colorado law, which lacked a health exception, would "infringe[ ] on the ability of pregnant women to protect their health."[4] *Id.* at 920. The court held that the Colorado law was unconstitutional "because it fails to provide a health exception as required by the Constitution of the United States." *Id.* at 926.

Although the New Hampshire Act includes an exception to the notification requirement when an abortion is necessary to prevent the *death* of a pregnant minor, it does not include an exception to protect her *health* short of fatality. Therefore, on its face, the Act does not comply with the constitutional requirement that laws restricting a woman's access to abortion must provide a health exception.[5]

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[4] In this case, the parties do not dispute that pregnant minors, subject to the requirements of the Act, could experience complications in their pregnancies that would endanger their health. Dr. Wayne Goldner, who is a plaintiff in this case, is an obstetrician and gynecologist practicing in Manchester, New Hampshire, and is board certified by the American Board of Obstetricians and Gynecologists and a fellow in the American College of Obstetricians and Gynecologists. Dr. Goldner provided his declaration that describes medical complications which may occur during pregnancy putting pregnant minors at risk and requiring prompt or immediate termination of the pregnancy.

[5] To the extent that the Attorney General argues that a health exception is not constitutionally required in parental notification statutes, despite *Stenberg* and *Casey,* that argument lacks merit. *Rust v. Sullivan,* 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991), and *H.L. v. Matheson,* 450 U.S. 398, 101 S.Ct. 1164, 67 L.Ed.2d 388 (1981), cited by the Attorney General, do not support that argument. The Utah statute at issue in *Matheson* required parental notification "if possible" and was challenged for an unconstitutional violation of the right to privacy, not for lack of a health exception. *See id.* at 407, 101 S.Ct. 1164.

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The Attorney General contends that other New Hampshire statutes would provide adequate protection for a pregnant minor's health. The Attorney General cites RSA 153-A:18, which exempts a health care provider from civil liability for failure to obtain consent for emergency medical care, and RSA 627:6,VII(b), which allows certain Department of Corrections medical care providers to use force to provide treatment in an emergency. Those statutes do not address the need for a health exception in the Act. RSA 153-A:18 provides only an exemption from civil liability for lack of consent while the Act requires parental notification, not consent, prior to medical care and imposes both criminal and civil liability for violations. RSA 627:6, VII(b) pertains only to Department of Corrections medical care providers in unusual circumstances that are irrelevant to the Act. Therefore, the cited statutes do not provide an alternative health exception that is required for the Act to be constitutional.

The Attorney General also argues that the judicial bypass provision of the Act would allow an abortion, without notification, to protect the health of a pregnant minor. Even with the provisions for expediting such proceedings, the judicial bypass process necessarily delays an abortion in a health emergency.[6] Dr. Goldner states in

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Rust addressed the constitutionality of a restriction on doctors receiving federal subsidies that precluded advice on abortion as a family planning method. 500 U.S. at 179-80, 111 S.Ct. 1759. The Court upheld the challenged regulations explaining that while abortion could not be counseled as a means of family planning under the regulations, because it was beyond the scope of the funded project, the regulations did not preclude referral of women for abortions for purposes other than family planning, such as in medical emergencies. *Id.* at 195-96, 111 S.Ct. 1759.

[6] Pertaining to the speed of judicial proceedings under the Act, the judicial bypass provision requires only that those proceedings "shall be

(Continued on following page)

his declaration, which is not opposed by the Attorney General, that certain medical conditions during pregnancy require immediate abortion to protect the health of the mother and that any delay would jeopardize her health. The Attorney General has not explained how the judicial bypass provision would address the need for an immediate abortion to protect the health of the mother, and the provision on its face is insufficient to meet such a need. Therefore, the judicial bypass process does not save the Act from the lack of a constitutionally required health exception.

B. *Death Exception*

The plaintiffs contend that the death exception in the Act is unconstitutionally narrow. The plaintiffs challenge the condition that the "attending abortion provider certifies in the pregnant minor's medical record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice." RSA 132:26, I(a). Dr. Goldner states in his declaration, which is unopposed, that physicians cannot predict the course of medical complications with sufficient precision to comply with that requirement. In addition, the plaintiffs argue that abortion may at times not be the only treatment available, as the use of the limiting word "necessary" implies, but nevertheless would be the safest and most

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given precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant minor," that the court must rule within seven calendar days, that a pregnant minor would have access to the courts twenty-four hours a day and seven days each week, and that appeals would be expedited. RSA 132:26(b) & (c).

medically appropriate method to treat the patient's condition. Further, the plaintiffs contend that the statute violates physicians' due process rights by failing to allow them to rely on their good faith medical judgment in treating their patients.

In response, the Attorney General concedes that the death exception must be construed to include a scienter requirement to avoid constitutional infirmity. *See Colautti v. Franklin,* 439 U.S. 379, 395, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979). The court, however, is not authorized to construe a state statute to include unwritten limitations "unless such a construction is reasonable and readily apparent." *Stenberg,* 530 U.S. at 944, 120 S.Ct. 2597 (internal quotation marks omitted). The implied scienter requirement suggested by the Attorney General, that physicians who make a good faith, objectively reasonable effort to comply with the Act would not be subject to prosecution, is neither reasonable nor readily apparent from the context of RSA 132:26,I(a). In addition, even if that construction were appropriate, it would not be likely to save the death exception since the same language, expressly included in an abortion statute, has been held by the Sixth Circuit to be unconstitutionally vague and therefore not a scienter requirement at all. *See, e.g., Women's Med. Prof'l Corp. v. Voinovich,* 130 F.3d 187, 203-10 (6th Cir.1997).

Therefore, the death exception provided in RSA 132:26,I(a) is unconstitutional.

C. *Confidentiality*

A judicial bypass procedure, included as part of a parental notification law, must protect the anonymity of

the minor who is seeking judicial authorization for an abortion. *Bellotti,* 443 U.S. at 644, 99 S.Ct. 3035. Anonymity is required because laws regulating abortion that "raise the specter of public exposure and harassment of women who choose to exercise their personal, intensely private, right, with their physician, to end a pregnancy . . . pose an unacceptable danger of deterring the exercise of that right, and must be invalidated." *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists,* 476 U.S. 747, 767, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986), *overruled on other grounds by Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674. In this context, "[c]onfidentiality differs from anonymity, but we do not believe that the distinction has constitutional significance." *Ohio v. Akron Ctr. for Reprod. Health,* 497 U.S. 502, 513, 110 S.Ct. 2972, 111 L.Ed.2d 405 (1990). The Supreme Court, however, has "refuse[d] to base a decision on the facial validity of a statute on the mere possibility of unauthorized, illegal disclosure by state employees." *Id.*

RSA 132:26, II(b) provides only that court proceedings under that chapter "shall be confidential." The plaintiffs argue that the lack of specificity makes the statute insufficient to comply with the constitutionally mandated confidentiality requirement. The Attorney General defends the confidentiality provision, contending that it is constitutionally sufficient.

As might be expected, courts applying *Bellotti* and *Akron* have come to differing conclusions about the sufficiency of confidentiality provisions in similar contexts. *See, e.g., Planned Parenthood of S. Ariz. v. Lawall,* 307 F.3d 783, 787-89 (9th Cir.2002); *Planned Parenthood of the Blue Ridge v. Camblos,* 155 F.3d 352, 379-80 (4th Cir.1998). The confidentiality requirement in the New Hampshire Act does raise a constitutional question. However, in view of

the fact that the Act is otherwise unconstitutional, the court declines to rule on the facial validity of the confidentiality provision at this time.

D. *Severability*

The Attorney General contends that if the court were to find parts of the Act unconstitutional, then the severability provision of the Act, RSA 132:28, should be invoked and the unconstitutional parts of the Act should be severed from the remainder. The lack of a health exception renders the entire Act unconstitutional and, therefore, severing parts would not remedy that deficiency. Similarly, severing the constitutionally deficient death exception from the remainder of the Act would add to its infirmity, due to the complete absence of a death exception to the parental notification requirement. Therefore, the severability clause is of no use in these circumstances.

E. *Declaratory Judgment*

For the foregoing reasons, the Act, to be codified at RSA 132:24 through RSA 132:28, is declared to be unconstitutional.

II. *Injunction*

The plaintiffs seek an injunction to prevent enforcement of the Act upon its effective date, December 31, 2003, and thereafter. The Attorney General opposes an injunction.

"In order to issue a permanent injunction, a district court typically must find that (1) the plaintiff has demonstrated actual success on the merits of its claims; (2) the

plaintiff would be irreparably injured in the absence of injunctive relief; (3) the harm to the plaintiff from defendant's conduct would exceed the harm to the defendant accruing from the issuance of an injunction; and (4) the public interest would not be adversely affected by an injunction." *United States v. Mass. Water Res. Auth.,* 256 F.3d 36, 51 n. 15 (1st Cir.2001). Here, the plaintiffs have demonstrated actual success by showing that the Act is unconstitutional, entitling them to a declaratory judgment. In the particular circumstances of a case challenging the constitutionality of abortion legislation, "a conclusion that a particular requirement is probably unconstitutional necessarily entails a decision as to the other preliminary injunction criteria as well." *Planned Parenthood League of Mass. v. Bellotti,* 641 F.2d 1006, 1023 (1st Cir.1981). The same is true in the context of a permanent injunction.

Denying the requested injunction to bar enforcement of the Act "may result in other women not having abortions that they would otherwise have had" but for the unconstitutional Act. *Id.* Dr. Goldner states in his declaration that the lack of a health exception and the narrow death exception put pregnant minors at substantial risk if the Act were enforced. The balance between the state's interest in "the potentiality of human life" and the plaintiffs' interest in protecting the health of pregnant minors must necessarily be struck in favor of the plaintiffs. *See Stenberg,* 530 U.S. at 930, 120 S.Ct. 2597. Although an injunction would negatively affect the benefits of involving parents in a pregnant minor's decision whether or not to terminate her pregnancy, the public interest in the health of pregnant minors under emergency circumstances would be protected by an injunction. Therefore, on balance, a

permanent injunction against enforcement of the Act is appropriate in this case.

Conclusion

For the foregoing reasons, the plaintiffs' motion for an injunction (document no. 6) is subsumed into the plaintiffs' request for a permanent injunction, which is granted. The plaintiffs' request in the complaint for a declaratory judgment is also granted. The Parental Notification Prior to Abortion Act, 2003 N.H. Laws ch. 173, effective date, December 31, 2003, to be codified at RSA 132:24-:28, is unconstitutional for the reasons previously stated.

Injunction Order

The Attorney General of the State of New Hampshire, and those acting pursuant to and under his direction and authority, are hereby enjoined from enforcing the Parental Notification Prior to Abortion Act, 2003 N.H. Laws ch. 173, to be codified at RSA 132:24-28, on its effective date or at any time thereafter.

The clerk of court shall enter judgment accordingly.

SO ORDERED.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Planned Parenthood of
Northern New England,
Concord Feminist Health
Center, Feminist Health
Center of Portsmouth, and
Wayne Goldner, M.D.

v. Civil No. 03-491-JD.
Opinion No. 2003 DNH 222

Peter Heed,
Attorney General
of New Hampshire

ORDER

(Filed: Dec. 29, 2003)

The plaintiffs bring an action pursuant to 42 U.S.C. § 1983, seeking to have the Parental Notification Prior to Abortion Act ("Act"),[1] passed by the New Hampshire legislature, declared unconstitutional. The plaintiffs also seek an injunction to prevent enforcement of the Act. The Attorney General contends that the Act is constitutional and objects to an injunction.

At the plaintiff's request, this case has been given expedited consideration by the court in view of the fact that the Act is due to become effective on December 31, 2003.

After carefully reviewing the provisions of the Act and the applicable United States Supreme Court precedents,

[1] 2003 N.H. Laws ch. 173, effective date, December 31, 2003, to be codified at N.H.Rev.Stat. Ann. ("RSA") § 132:24-:28.

the court has concluded that the Act fails to meet the constitutional requirements as determined by the United States Supreme Court. Therefore, the Act cannot be enforced.

Background

In June of 2003, the New Hampshire Senate and House of Representatives passed "AN ACT requiring parental notification before abortions may be performed on unemancipated minors." The Act defines "abortion" as:

> the use or prescription of any instrument, medicine, drug, or any other substance or device intentionally to terminate the pregnancy of a female known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove an ectopic pregnancy or the products from a spontaneous miscarriage.

RSA 132:24, I (eff.12/31/03). The central provision of the Act is a prohibition on abortion in the absence of parental notification:

> No abortion shall be performed upon an unemancipated minor or upon a female for whom a guardian or conservator has been appointed pursuant to RSA 464-A because of a finding of incompetency, until at least 48 hours after written notice of the pending abortion has been delivered in the manner specified in paragraphs II and III.

RSA 132:25, I. Paragraph II requires written notice to be addressed to the parent at the parent's "usual place of abode" and to be "delivered personally by the physician or

an agent." Paragraph III provides an alternative to allow notice by certified mail, return receipt requested, with delivery restricted to the addressee.

Notice is not required if the physician "certifies in the pregnant minor's medical record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice; or [ ] [t]he person or persons who are entitled to notice certify in writing that they have been notified." RSA 132:26, I. If the pregnant minor does not want to notify a parent, she may, alternatively, seek court authorization for the abortion. RSA 132:26, II. In that case, the court is required to hold a hearing and then determine whether "the pregnant minor is mature and capable of giving informed consent to the proposed abortion" or "whether the performance of an abortion upon her without notification of her parent, guardian, or conservator would be in her best interests." *Id.* Such court proceedings "shall be confidential and shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant minor." RSA 132:26, II(b).

Violation of the Act carries penalties. "Performance of an abortion in violation of this subdivision shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied notification." RSA 132:27. Liability may be avoided if the person who performed the abortion can establish "by written evidence that the person relied upon evidence sufficient to convince a careful and prudent person that the representations of the pregnant minor regarding the information necessary to comply with this section are bone [sic] fide and true, or if the

person has attempted with reasonable diligence to deliver notice, but has been unable to do so." *Id.*

The plaintiffs simultaneously filed their complaint and a motion for a preliminary injunction to prevent the Act from being enforced once it becomes effective on December 31, 2003. The Attorney General filed an objection, and the plaintiffs filed a reply. No surreply was filed. The parties have agreed that the court may decide the plaintiffs' requests for a declaratory judgment and permanent injunctive relief on the merits based on their present filings.

Discussion

The plaintiffs contend that the Act is unconstitutional because it lacks an exception to the parental notice requirement in circumstances when the delay would threaten the health of the pregnant minor. They also contend that the Act's exception to prevent death is unconstitutionally narrow and that the confidentiality requirement for court proceedings is insufficient. The Attorney General argues that a health exception is not constitutionally required in a parental notification law, that either the judicial bypass or other New Hampshire statutes adequately protect the health of a pregnant minor, that the Act would not be applied to physicians who act in good faith, and that the confidentiality provision is sufficient.

I. Declaratory Judgment

Pursuant to 28 U.S.C. § 2201(a), the court "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not

further relief is or could be sought." The plaintiffs seek a declaration that the Act is unconstitutional on its face.

The parties dispute the appropriate standard for evaluating a facial challenge to the validity of a state law regulating abortion. When plaintiffs bring a facial constitutional challenge to state law, they ordinarily must show that "'no set of circumstances exists under which the Act would be valid.'" *Pharm. Res. & Mfrs. of Am. v. Concannon,* 249 F.3d 66, 77 (1st Cir. 2001) (quoting *United States v. Salerno,* 481 U.S. 739, 745 (1987)), *aff'd sub nom., Pharm. Research & Mfrs. of Am. v. Walsh,* 538 U.S. 644 (2003). That high hurdle, however, applies only when the plaintiffs challenge a state law "that does not regulate constitutionally protected conduct." *Donovan v. City of Haverhill,* 311 F.3d 74, 77 (1st Cir. 2002).

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The United States Supreme Court decided in 1973 that the "right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to

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encompass a woman's decision whether or not to terminate her pregnancy." *Roe v. Wade,* 410 U.S. 113, 153 (1973). In *Roe,* the Supreme Court held that a Texas criminal statute which excepted "only a lifesaving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment." *Id.* at 164. The Supreme Court has also held that minors, as well as adults, have a constitutional right to choose an abortion. *See Bellotti v. Baird,* 443 U.S. 622, 633, 642 (1979); *Planned Parenthood of Mo. v. Danforth,* 428 U.S. 52, 72-5 (1976). During the three decades that have passed since *Roe v. Wade,* the Supreme Court and lower federal courts and state courts have continued to address issues arising from the recognition of a woman's constitutional right to decide whether to terminate a pregnancy. *See, e.g., Stenberg*, 530 U.S. at 920; *Casey*, 505 U.S. at 843-44; *Owens,* 287 F.3d at 917; *Humphreys v. Clinic for Women, Inc.,* 796 N.E.2d 247 (Ind. 2003); *Simat Corp. v. Ariz. Health Care Cost Containment Sys*., 56 P.3d 28 (Ariz. 2002).

The right to choose to terminate a pregnancy may be subject to limitation, the degree of which depends upon the stage of the pregnancy and the state's interest both in the health of the mother and in promoting "the potentiality of human life." *Roe,* 410 U.S. at 164. "[B]efore 'viability . . . the woman has a right to choose to terminate her pregnancy.'" *Stenberg,* 530 U.S. at 921 (quoting *Casey,* 505 U.S. at 870)). "'[A] law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability' is unconstitutional[,] . . . [and] [a]n 'undue burden is . . . shorthand for the conclusion that a state regulation has the purpose or

effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.'" *Id.* After viability of the fetus, the state may "'"regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."'" *Id.* (quoting *Casey,* 505 U.S. at 879, *quoting Roe,* 410 U.S. at 164-65).

The Supreme Court has upheld state laws requiring parental notification prior to performing abortions on minors. *See Lambert v. Wicklund,* 520 U.S. 292 (1997); *Casey,* 505 U.S. at 899. In *Lambert,* cited by the Attorney General, the Court rejected the plaintiff's argument that the judicial bypass procedure, incorporated in the state law, was deficient because it required a showing that parental notification was not in the minor's best interests rather than a showing that an abortion without notification was in her best interest. 520 U.S. at 294. However, the *Lambert* Court did not consider the issues that have been raised in this case.

A. Health Exception

In *Casey,* the Supreme Court considered five provisions of Pennsylvania law pertaining to abortion. 505 U.S. at 844. One of those provisions required a minor to obtain the informed consent of a parent before the procedure but also provided a judicial bypass option and an exception for a medical emergency. *Id.* The plaintiffs challenged the consent provision on the single ground that it required informed parental consent. *Id.* Given the limited challenge and the judicial bypass and emergency exceptions to the consent requirement, the Court concluded that the provision passed constitutional muster. *Id.* at 899.

The Supreme Court later reiterated and clarified *Casey,* a plurality opinion, in *Stenberg,* stating that "the governing standard requires an exception 'where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother.'"[3] *Stenberg,* 530 U.S. at 931 (quoting *Casey,* 505 U.S. at 879). A health exception is required at any stage of a pregnancy because "a State may promote but not endanger a woman's health when it regulates the methods of abortion." *Id.*

The Tenth Circuit considered the constitutionality of a Colorado parental notification law, which is similar to the New Hampshire Act, under *Roe, Casey,* and *Stenberg*. *Owens,* 287 F.3d at 915-16. The court concluded that because circumstances exist in which a pregnancy complication could seriously threaten a pregnant minor's health, the Colorado law, which lacked a health exception, would "infringe[ ] on the ability of pregnant women to protect their health."[4] *Id.* at 920. The court held that the Colorado law was unconstitutional "because it fails to provide a

[3] In addition, the Court noted that a law regulating a woman's access to abortion which "applies both previability and postviability aggravates the constitutional problem presented. The State's interest in regulating abortion previability is considerably weaker than postviability." *Stenberg,* 530 U.S. at 930.

[4] In this case, the parties do not dispute that pregnant minors, subject to the requirements of the Act, could experience complications in their pregnancies that would endanger their health. Dr. Wayne Goldner, who is a plaintiff in this case, is an obstetrician and gynecologist practicing in Manchester, New Hampshire, and is board certified by the American Board of Obstetricians and Gynecologists and a fellow in the American College of Obstetricians and Gynecologists. Dr. Goldner provided his declaration that describes medical complications which may occur during pregnancy putting pregnant minors at risk and requiring prompt or immediate termination of the pregnancy.

health exception as required by the Constitution of the United States." *Id.* at 926.

Although the New Hampshire Act includes an exception to the notification requirement when an abortion is necessary to prevent the *death* of a pregnant minor, it does not include an exception to protect her *health* short of fatality. Therefore, on its face, the Act does not comply with the constitutional requirement that laws restricting a woman's access to abortion must provide a health exception.[5]

The Attorney General contends that other New Hampshire statutes would provide adequate protection for a pregnant minor's health. The Attorney General cites RSA 153-A:18, which exempts a health care provider from civil liability for failure to obtain consent for emergency medical care, and RSA 627:6, VII(b), which allows certain Department of Corrections medical care providers to use force to provide treatment in an emergency. Those statutes do not address the need for a health exception in the Act.

[5] To the extent that the Attorney General argues that a health exception is not constitutionally required in parental notification statutes, despite *Stenberg* and *Casey,* that argument lacks merit. *Rust v. Sullivan,* 500 U.S. 173 (1991), and *H.L. v. Matheson,* 450 U.S. 398 (1981), cited by the Attorney General, do not support that argument. The Utah statute at issue in *Matheson* required parental notification "if possible" and was challenged for an unconstitutional violation of the right to privacy, not for lack of a health exception. *See id.* at 407. *Rust* addressed the constitutionality of a restriction on doctors receiving federal subsidies that precluded advice on abortion as a family planning method. 500 U.S. at 179-80. The Court upheld the challenged regulations explaining that while abortion could not be counseled as a means of family planning under the regulations, because it was beyond the scope of the funded project, the regulations did not preclude referral of women for abortions for purposes other than family planning, such as in medical emergencies. *Id.* at 195-96.

RSA 153-A:18 provides only an exemption from civil liability for lack of consent while the Act requires parental notification, not consent, prior to medical care and imposes both criminal and civil liability for violations. RSA 627:6, VII(b) pertains only to Department of Corrections medical care providers in unusual circumstances that are irrelevant to the Act. Therefore, the cited statutes do not provide an alternative health exception that is required for the Act to be constitutional.

The Attorney General also argues that the judicial bypass provision of the Act would allow an abortion, without notification, to protect the health of a pregnant minor. Even with the provisions for expediting such proceedings, the judicial bypass process necessarily delays an abortion in a health emergency.[6] Dr. Goldner states in his declaration, which is not opposed by the Attorney General, that certain medical conditions during pregnancy require immediate abortion to protect the health of the mother and that any delay would jeopardize her health. The Attorney General has not explained how the judicial bypass provision would address the need for an immediate abortion to protect the health of the mother, and the provision on its face is insufficient to meet such a need. Therefore, the judicial bypass process does not save the

[6] Pertaining to the speed of judicial proceedings under the Act, the judicial bypass provision requires only that those 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 interests of the pregnant minor," that the court must rule within seven calendar days, that a pregnant minor would have access to the courts twenty-four hours a day and seven days each week, and that appeals would be expedited. RSA 132:26(b) & (c).

Act from the lack of a constitutionally required health exception.

B. Death Exception

The plaintiffs contend that the death exception in the Act is unconstitutionally narrow. The plaintiffs challenge the condition that the "attending abortion provider certifies in the pregnant minor's medical record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice." RSA 132:26, I(a). Dr. Goldner states in his declaration, which is unopposed, that physicians cannot predict the course of medical complications with sufficient precision to comply with that requirement. In addition, the plaintiffs argue that abortion may at times not be the only treatment available, as the use of the limiting word "necessary" implies, but nevertheless would be the safest and most medically appropriate method to treat the patient's condition. Further, the plaintiffs contend that the statute violates physicians' due process rights by failing to allow them to rely on their good faith medical judgment in treating their patients.

In response, the Attorney General concedes that the death exception must be construed to include a scienter requirement to avoid constitutional infirmity. *See Colautti v. Franklin,* 439 U.S. 379, 395 (1979). The court, however, is not authorized to construe a state statute to include unwritten limitations "unless such a construction is reasonable and readily apparent." *Stenberg,* 530 U.S. at 944 (internal quotation marks omitted). The implied scienter requirement suggested by the Attorney General, that physicians who make a good faith, objectively reasonable effort to

comply with the Act would not be subject to prosecution, is neither reasonable nor readily apparent from the context of RSA 132:26, I(a). In addition, even if that construction were appropriate, it would not be likely to save the death exception since the same language, expressly included in an abortion statute, has been held by the Sixth Circuit to be unconstitutionally vague and therefore not a scienter requirement at all. *See, e.g., Women's Med. Prof'l Corp. v. Voinovich,* 130 F.3d 187, 203-10 (6th Cir. 1997).

Therefore, the death exception provided in RSA 132:26, I(a) is unconstitutional.

C. Confidentiality

A judicial bypass procedure, included as part of a parental notification law, must protect the anonymity of the minor who is seeking judicial authorization for an abortion. *Bellotti,* 443 U.S. at 644. Anonymity is required because laws regulating abortion that "raise the specter of public exposure and harassment of women who choose to exercise their personal, intensely private, right, with their physician, to end a pregnancy . . . pose an unacceptable danger of deterring the exercise of that right, and must be invalidated." *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists,* 476 U.S. 747, 767 (1986), *overruled on other grounds by Casey,* 505 U.S. 833. In this context, "[c]onfidentiality differs from anonymity, but we do not believe that the distinction has constitutional significance." *Ohio v. Akron Ctr. for Reprod. Health,* 497 U.S. 502, 513 (1990). The Supreme Court, however, has "refuse[d] to base a decision on the facial validity of a statute on the mere possibility of unauthorized, illegal disclosure by state employees." *Id.*

RSA 132:26, II(b) provides only that court proceedings under that chapter "shall be confidential." The plaintiffs argue that the lack of specificity makes the statute insufficient to comply with the constitutionally mandated confidentiality requirement. The Attorney General defends the confidentiality provision, contending that it is constitutionally sufficient.

As might be expected, courts applying *Bellotti* and *Akron* have come to differing conclusions about the sufficiency of confidentiality provisions in similar contexts. *See, e.g., Planned Parenthood of S. Ariz. v. Lawall,* 307 F.3d 783, 787-89 (9th Cir. 2002); *Planned Parenthood of the Blue Ridge v. Camblos,* 155 F.3d 352, 379-80 (4th Cir. 1998). The confidentiality requirement in the New Hampshire Act does raise a constitutional question. However, in view of the fact that the Act is otherwise unconstitutional, the court declines to rule on the facial validity of the confidentiality provision at this time.

D. Severability

The Attorney General contends that if the court were to find parts of the Act unconstitutional, then the severability provision of the Act, RSA 132:28, should be invoked and the unconstitutional parts of the Act should be severed from the remainder. The lack of a health exception renders the entire Act unconstitutional and, therefore, severing parts would not remedy that deficiency. Similarly, severing the constitutionally deficient death exception from the remainder of the Act would add to its infirmity, due to the complete absence of a death exception to the parental notification requirement. Therefore, the severability clause is of no use in these circumstances.

E. Declaratory Judgment

For the foregoing reasons, the Act, to be codified at RSA 132:24 through RSA 132:28, is declared to be unconstitutional.

II. Injunction

The plaintiffs seek an injunction to prevent enforcement of the Act upon its effective date, December 31, 2003, and thereafter. The Attorney General opposes an injunction.

"In order to issue a permanent injunction, a district court typically must find that (1) the plaintiff has demonstrated actual success on the merits of its claims; (2) the plaintiff would be irreparably injured in the absence of injunctive relief; (3) the harm to the plaintiff from defendant's conduct would exceed the harm to the defendant accruing from the issuance of an injunction; and (4) the public interest would not be adversely affected by an injunction." *United States v. Mass. Water Res. Auth.,* 256 F.3d 36, 51 n.15 (1st Cir. 2001). Here, the plaintiffs have demonstrated actual success by showing that the Act is unconstitutional, entitling them to a declaratory judgment. In the particular circumstances of a case challenging the constitutionality of abortion legislation, "a conclusion that a particular requirement is probably unconstitutional necessarily entails a decision as to the other preliminary injunction criteria as well." *Planned Parenthood League of Mass. v. Bellotti,* 641 F.2d 1006, 1023 (1st Cir. 1981). The same is true in the context of a permanent injunction.

Denying the requested injunction to bar enforcement of the Act "may result in other women not having abortions that they would otherwise have had" but for the

unconstitutional Act. *Id.* Dr. Goldner states in his declaration that the lack of a health exception and the narrow death exception put pregnant minors at substantial risk if the Act were enforced. The balance between the state's interest in "the potentiality of human life" and the plaintiffs' interest in protecting the health of pregnant minors must necessarily be struck in favor of the plaintiffs. *See Stenberg,* 530 U.S. at 930. Although an injunction would negatively affect the benefits of involving parents in a pregnant minor's decision whether or not to terminate her pregnancy, the public interest in the health of pregnant minors under emergency circumstances would be protected by an injunction. Therefore, on balance, a permanent injunction against enforcement of the Act is appropriate in this case.

Conclusion

For the foregoing reasons, the plaintiffs' motion for an injunction (document no. 6) is subsumed into the plaintiffs' request for a permanent injunction, which is granted. The plaintiffs' request in the complaint for a declaratory judgment is also granted. The Parental Notification Prior to Abortion Act, 2003 N.H. Laws ch. 173, effective date, December 31, 2003, to be codified at RSA 132:24-:28, is unconstitutional for the reasons previously stated.

Injunction Order

The Attorney General of the State of New Hampshire, and those acting pursuant to and under his direction and authority, are hereby enjoined from enforcing the Parental Notification Prior to Abortion Act, 2003 N.H. Laws ch. 173,

to be codified at RSA 132:24-28, on its effective date or at any time thereafter.

The clerk of court shall enter judgment accordingly.

SO ORDERED.

/s/ Joseph A. DiClerico, Jr.
Joseph A. DiClerico, Jr.
United States District Judge

December 29, 2003

cc: Jennifer Dalven, Esquire
Martin P. Honigberg, Esquire
Dara Klassel, Esquire
Daniel J. Mullen, Esquire
Lawrence A. Vogelman, Esquire

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Planned Parenthood of Northern New England, et al.

v. Civil Action No. C.03-491-JD

Peter Heed, Attorney General of New Hampshire

JUDGMENT

(Filed Dec. 29, 2003)

In accordance with the Order this date by United States District Judge Joseph A. DeClerico, Jr., judgment is hereby entered.

By the Court,

/s/ James Starr
James R. Starr, Clerk

December 29, 2003

cc: Jennifer Dalven, Esq.
Martin P. Honigberg, Esq.
Lawrence Vogelman, Esq.
Dara Klassel, Esq.
Daniel Mullen, Esq.