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Parental Notification and *Ayotte v. Planned Parenthood of Northern New England*

name redacted
Legislative Attorney
American Law Division

Summary

This report discusses *Ayotte v. Planned Parenthood of Northern New England*, which will be decided by the U.S. Supreme Court this term. The case involves the constitutionality of the New Hampshire Parental Notification Prior to Abortion Act. In November 2004, the U.S. Court of Appeals for the First Circuit invalidated the act because it does not include an explicit exception that would waive the measure's requirements to preserve the health of the pregnant minor. Ayotte, the Attorney General of New Hampshire, contends that a judicial bypass procedure included in the act and other state statutes sufficiently preserve the health of a minor. The Court will review that position, and consider whether the First Circuit applied the correct standard of review when it heard the case in 2004.

In *Ayotte v. Planned Parenthood of Northern New England*, the U.S. Supreme Court will consider whether the New Hampshire Parental Notification Prior to Abortion Act (the "Act") may be upheld despite its lack of an explicit exception that would waive the act's requirements to preserve the health of a pregnant minor. In past abortion cases, the Court has discussed requiring such an exception in measures that regulate abortion at the pre- and postviability stages of pregnancy. In November 2004, the U.S. Court of Appeals for the First Circuit concluded that the act is unconstitutional because it does not include a health exception. The case was argued before the U.S. Supreme Court on November 30, 2005, and a decision is expected in 2006.

Under the act, no abortion shall be performed upon an unemancipated minor or female for whom a guardian or conservator has been appointed until at least 48 hours after written notice has been delivered to one parent of the minor.[1] While the act includes several exceptions to the notification requirement, including a judicial bypass procedure and a waiver of the requirement if the attending abortion provider certifies that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice (the so-called "death exception"), it does not include an explicit waiver that would allow an abortion to be performed to protect the health of the minor.

[1] N.H. Rev. Stat. Ann. § 132:25.

Ayotte, the Attorney General of New Hampshire, contends that the act's judicial bypass procedure and other state statutes sufficiently preserve the health of the minor. However, Planned Parenthood of Northern New England and the other respondents maintain that the act must have a health exception.

Ayotte also argues that the First Circuit failed to apply the correct standard of review when it heard the case in 2004. The respondents brought a "facial challenge" to the act. Unlike an "as applied" challenge, which considers the effect of a measure as applied to a particular individual, a facial challenge attempts to invalidate a measure before it takes effect. Rather than apply a more rigorous standard that was first articulated by the Court in a 1987 case, the First Circuit applied the undue burden standard recognized by the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[2] The Court's decision in *Ayotte* is expected to clarify which standard should be used in facial challenges to abortion measures.

Health Exception

The need for a health exception in abortion regulations was first discussed in *Roe v. Wade*. With regard to the State's interest in protecting fetal life after viability, the Court indicated that a State "may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother."[3] In *Stenberg v. Carhart*, a 2000 case involving the so-called "partial-birth" abortion procedure, the Court appeared to extend the health exception requirement to previability abortion regulation: "Since the law requires a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation."[4]

The respondents first challenged the act shortly after its passage in June 2003. In December 2003, a federal district court in New Hampshire concluded that the act is unconstitutional because it lacks a health exception and because its so-called "death exception" is too narrow. The court noted that "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 court found that other New Hampshire statutes do not provide an alternative health exception that could render the act constitutional. In addition, the court maintained that the act's judicial bypass procedure does not "save the act from the lack of a constitutionally required health exception."[6]

On appeal, the Attorney General defended the act and its lack of a health exception on four grounds. First, the Attorney General argued that parental notification statutes do not require a health exception because of the interests that are protected by these statutes;

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[2] For additional discussion of *Planned Parenthood of Southeastern Pennsylvania v. Casey* and other abortion decisions, see CRS Issue Brief IB95095, *Abortion: Legislative Response*, by Karen J. Lewis and (name redacted).

[3] 410 U.S. 113, 163-64 (1973).

[4] 530 U.S. 914, 930 (2000).

[5] *Planned Parenthood of Northern New England v. Heed*, 296 F.Supp.2d 59, 65 (D. N.H. 2003).

[6] *Heed*, 296 F.Supp.2d at 66.

that is, while a health exception is necessary for a statute that prohibits a particular method of abortion, it is not needed in a parental notification statute that protects minors from undertaking the risks of abortion without the advice and support of a parent. The First Circuit disagreed with the Attorney General, maintaining that the interests served by a statute do not have an impact on the need for a health exception: "[R]egardless of the interests served by New Hampshire's parental notice statute, it does not escape the Constitution's requirement of a health exception."[7]

The Attorney General's second argument focused on *Hodgson v. Minnesota*, a 1990 case in which the Court upheld Minnesota's parental notification statute despite the absence of a health exception. The Attorney General contended that the court's decision should be controlled by *Hodgson*. However, the First Circuit noted that the lack of a health exception was not raised as a reason to invalidate the statute at issue in *Hodgson*. Moreover, the First Circuit reasoned that even if the Court had considered the absence of a health exception in *Hodgson*, the Court's subsequent decisions in *Casey* and *Stenberg* would now require a health exception in the New Hampshire statute.

The Attorney General's remaining arguments were similar to those made before the district court. Acknowledging that the act contains no explicit health exception, the Attorney General argued that other provisions of New Hampshire law provide a functional equivalent. The Attorney General identified various statutes that preclude civil and criminal liability for health professionals who provide care under certain circumstances. For example, under one statute, a physician would be shielded from criminal liability if he provides emergency medical care when no one competent to consent to such care is available. Similarly, another statute would preclude civil liability for health professionals who render emergency medical care without consent.

The First Circuit concluded that the proffered statutes would not preclude all civil and criminal liability for medical personnel who violate the act's notice requirements to preserve a minor's health. While the statutes would protect medical personnel who provide treatment without consent, they would not necessarily protect such individuals when treatment is provided to a consenting minor without the parental notice required by the act. Moreover, the First Circuit indicated that the clear and unambiguous language of the act identifies only three exceptions to the parental notice requirement: when abortion is necessary to prevent the minor's death; when a parent certifies in writing that he or she has been notified; and when a court grants a judicial bypass. The First Circuit reasoned that it would be contrary to basic canons of statutory construction to construe other statutory provisions, like those identified by the Attorney General, as superceding the clear intent of the act and allowing other opportunities to avoid the notice requirement.

Finally, the Attorney General argued that the act's judicial bypass procedure preserves a minor's health by allowing for the prompt authorization of a health-related abortion without notice. The act's judicial bypass procedure provides for the prompt consideration of cases involving minors who do not want a parent to be notified. Under the act, a minor is afforded 24-hour, 7-day access to the courts, and a court must rule on a minor's petition within seven calendar days from the time a petition is filed. If a decision is appealed, a ruling must be issued within seven calendar days.

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[7] *Planned Parenthood of Northern New England v. Heed*, 390 F.3d 53, 60 (1st Cir. 2004).

The First Circuit was not convinced that the judicial bypass procedure adequately protects a minor's health: "Delays of up to two weeks can . . . 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."[8] The First Circuit determined that the bypass procedure could not replace the constitutionally required health exception because of the potential delay.

Death Exception

The First Circuit affirmed the district court's decision with respect to the act's death exception. The First Circuit maintained that the exception is too narrow and fails to safeguard a physician's good-faith medical determination concerning whether a minor's life is at risk. Because the course of medical complications cannot be predicted with precision, a physician cannot always determine whether death will occur within the 48-hour time period contemplated by the act. Consequently, the death exception forces a physician to gamble with a patient's life in hopes of complying with the notice requirement, or risk violating the act by providing an abortion without parental notification. The First Circuit believed that the threat of sanctions that arises from such a choice would have a chilling effect on the willingness of physicians to perform abortions when a minor's life is at risk. The court also found that the absence of a clear standard by which to judge a physician's decision to perform an abortion would have a similar chilling effect on a physician's willingness to provide lifesaving abortions.

Standard of Review

The Attorney General has asked the Court to consider whether the First Circuit applied the correct standard of review to the respondents' "facial challenge" of the act. In *United States v. Salerno*, a 1987 case involving a facial challenge to the Bail Reform Act, the Court determined that facial challenges require the challenger to establish that "no set of circumstances exists" under which a measure would be valid.[9] The *Salerno* standard requires that a measure be upheld even if it operates unconstitutionally under some circumstances.

Application of the *Salerno* standard, however, has been complicated by the Court's adoption of the undue burden standard in *Casey*. In *Casey* and *Stenberg*, the Court applied the undue burden standard to invalidate state restrictions on abortion. Among federal courts of appeals, only the Fifth Circuit has continued to apply the *Salerno* standard to facial challenges to abortion regulations. The undue burden standard is believed by some to be a less stringent standard because it would render an abortion regulation facially invalid if "in a large fraction of cases . . . it will operate as a substantial obstacle to a woman's choice to undergo an abortion."[10]

While the First Circuit acknowledged that the Court has never explicitly addressed the tension between the *Salerno* standard and the undue burden standard, it concluded that

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[8] *Heed*, 390 F.3d at 62.

[9] 481 U.S. 739, 745 (1987).

[10] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 895 (1992).

the act should be subject to the undue burden standard. The First Circuit was persuaded by the Court's application of that standard in *Casey* and *Stenberg*, as well as the use of the standard by a significant number of the courts of appeals.

The Attorney General maintains that the First Circuit should have applied the *Salerno* standard when it evaluated the act. The Attorney General has cited *Ohio v. Akron Center for Reproductive Health* and *Rust v. Sullivan*, two abortion cases from 1990 and 1991 in which the Court applied the *Salerno* standard, to support its position that the *Salerno* standard is appropriate for evaluating abortion regulations.[11] Moreover, the Attorney General argues that the *Salerno* standard is consistent with the Court's traditional practice of adjudicating constitutional questions only in concrete cases and controversies.

The respondents, however, insist that facial invalidation of the act is the only relief that effectively protects the health of minors. They argue that minors challenging the act on an as applied basis would have to "delay getting appropriate and urgently needed medical treatment until they get a constitutional ruling permitting it."[12]

The Court's application of the undue burden standard in *Casey* and *Stenberg* would seem to suggest that it no longer views the *Salerno* standard as appropriate for evaluating facial challenges to abortion regulations. The Court's refusal to review four abortion decisions in which the undue burden standard and not the *Salerno* standard was applied may further suggest that the Court endorses the use of the undue burden standard.[13]

The absence of a definitive statement by the Court concerning the *Salerno* standard and its application to abortion regulations following *Casey* has prompted considerable interest in *Ayotte*. If the Court reaffirms the use of the *Salerno* standard in abortion cases, the wholesale invalidation of future abortion statutes seems unlikely. Individual plaintiffs would have to challenge the constitutionality of an abortion measure as it was applied to them. Delays that could accompany a plaintiff's case would likely raise concerns about the possibility that a woman's health was being compromised.

In addition, a determination by the Court that an explicit health exception is not necessary because of the act's judicial bypass procedure and other New Hampshire statutes would also be significant. Such a decision would likely have an impact on the parental consent and notification laws that exist in forty-four states.[14] It would seem

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[11] *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990); *Rust v. Sullivan*, 500 U.S. 173 (1991).

[12] Brief for Respondents at 23-24, *Ayotte v. Planned Parenthood of Northern New England* (No. 04-1144).

[13] *See Women's Med. Prof. Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998); *Jane L. v. Bangerter*, 102 F.3d 1112 (10th Cir. 1996), *cert. denied sub nom.*, *Leavitt v. Jane L.*, 520 U.S. 1274 (1997); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452 (8th Cir. 1995), *cert. denied sub nom.*, *Janklow v. Planned Parenthood*, 517 U.S. 1174 (1996); *A Woman's Choice – East Side Women's Clinic v. Newman*, 305 F.3d 684 (7th Cir. 2002), *cert. denied*, 537 U.S. 1192 (2003).

[14] *See* Center for Reproductive Rights, *Restrictions on Young Women's Access to Abortion* (continued...)

possible that some state legislatures would amend their consent and notification requirements to remove existing health exceptions.

Questions posed by some of the justices during the oral argument on *Ayotte* seem to suggest that the Court might be willing to remand the case to the First Circuit to recognize a health exception that would then make the act constitutional. It is uncertain how the court would fashion such an exception. Responding to the justices' questions, counsel for the respondents indicated that allowing the First Circuit to find a health exception for the act would likely have the effect of encouraging states to write patently unconstitutional laws with the knowledge that a reviewing court would later correct any constitutional flaws. A remand of the case is not guaranteed. It is still possible that the Court could invalidate the act because of its lack of an explicit health exception. The Court's decision is not expected until 2006.

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[14] (...continued)
Services, at [http://www.crlp.org/pub_fac_restrictions.html].