No. 04-1144

In the Supreme Court of the United States

KELLY A. AYOTTE, ATTORNEY GENERAL OF NEW HAMPSHIRE, PETITIONER

v.

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether a plaintiff bringing a facial challenge to a statute regulating abortion must show that there is no set of circumstances under which the statute would be valid.

2. Whether respondents' facial challenge to the New Hampshire Parental Notification Prior to Abortion Act, N.H. Rev. Stat. Ann. §§ 132:24-132:28 (Supp. 2004), lacked merit because the statute was not required to contain an express health exception and contained a sufficient life exception.

TABLE OF CONTENTS

Table of Contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

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INTEREST OF THE UNITED STATES

This case concerns the constitutionality of New Hampshire's Parental Notification Prior to Abortion Act, which, with certain exceptions, prohibits a physician from performing an abortion on an unemancipated minor until 48 hours after written notice is delivered to a parent or guardian. Although that statute contains a judicial-bypass provision and an express exception for cases in which the abortion is necessary to preserve the life of the mother, it contains no express exception for the health of the mother.

In 2003, Congress enacted, and the President signed, the Partial-Birth Abortion Ban Act, Pub. L. No. 108-105, 117 Stat. 1201 (to be codified at 18 U.S.C. 1531) (the Act). The Act prohibits a physician from knowingly performing a partial-birth abortion (as defined in the statute) in or affecting interstate commerce. § 3, 117 Stat. 1206-1207. Like the New

Hampshire statute at issue in this case, the Act contains an express exception for cases in which the abortion is necessary to preserve the life of the mother, but no express exception for the health of the mother. Congress, however, made extensive factual findings that a partial-birth abortion is never medically indicated to preserve a mother's health. § 2, 117 Stat. 1201-1206.

Facial challenges to the federal Act were filed within days of the President's signing the Act into law. Those challenges are currently pending in the lower courts, which are considering, *inter alia*, the question whether the Act is unconstitutional because it lacks an express health exception. See *Carhart* v. *Gonzales*, 413 F.3d 791 (8th Cir. 2005); *National Abortion Fed'n* v. *Ashcroft*, 330 F. Supp. 2d 436 (S.D.N.Y. 2004), appeal pending, No. 04-5201 (2d Cir. filed Sept. 29, 2004); *Planned Parenthood Found.* v. *Ashcroft*, 320 F. Supp. 2d 957 (N.D. Cal. 2004), appeal pending, No. 04-16621 (9th Cir. filed Aug. 20, 2004). Because the Court's decision in this case on the standard for facial challenges to statutes regulating abortion, and on the ultimate validity of New Hampshire's parental-notification statute, may have direct relevance to the government's defense of an Act of Congress in ongoing litigation, the United States has a substantial interest in the outcome of this case.

STATEMENT

1. In 2003, the New Hampshire Legislature enacted the Parental Notification Prior to Abortion Act. N.H. Rev. Stat. Ann. §§ 132:24-132:28 (Supp. 2004). That statute prohibits a physician from performing an abortion on an unemancipated minor until 48 hours after written notice is delivered to a parent (or guardian). *Id.* § 132:25(I).[1] Notice may be pro-

[1] The statute imposes a similar requirement with regard to a woman for whom a guardian or conservator has been appointed because of a finding of incompetency. See N.H. Rev. Stat. Ann. § 132:25(I) (Supp. 2004).

vided in one of two ways: (1) by personal delivery to the parent by the physician or an agent, or (2) by certified mail addressed to the parent at the parent's residence, with restricted delivery and return receipt requested. *Id.* § 132:25(II) and (III). In the latter instance, delivery is deemed to have occurred at noon on the first day after mailing on which mail delivery takes place. *Id.* § 132:25(III). Notice is not required in two circumstances: (1) if the parent certifies in writing that he or she has in fact been notified, or (2) if the doctor "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." *Id.* § 132:26(I).

The statute also contains a judicial-bypass provision. N.H. Rev. Stat. Ann. § 132:26(II) (Supp. 2004). If a minor "elects not to allow the notification of her parent," she may petition "any judge of a court of competent jurisdiction" to authorize her doctor to perform an abortion without notification. *Ibid.* The judge may authorize the abortion (1) if the judge determines that the minor is mature and capable of giving informed consent to the abortion, or (2) if the judge determines that performance of the abortion without notification would be in the minor's best interests. *Ibid.* The judicial-bypass provision specifies that the minor is entitled to court-appointed counsel, *id.* § 132:26(II)(a), and that proceedings shall be confidential, *id.* § 132:26(II)(b). It further specifies that proceedings "shall be given such precedence over other pending matters * * * that the court may reach a decision promptly and without delay so as to serve the best interest of the pregnant minor," and that the court must rule no later than "within 7 calendar days from the time the petition is filed." *Ibid.* The provision allows the minor to proceed with a similarly expedited appeal if the trial court denies the petition, *id.* § 132:26(II)(c), and states that access to the courts

for the purposes of such a petition "shall be afforded * * * 24 hours a day, 7 days a week," *ibid.*

The statute imposes civil and criminal penalties on a person who performs an abortion in violation of the statute, but creates a safe harbor if (1) the person establishes that he or she reasonably believed that representations of the minor regarding relevant information were bona fide and true or (2) the person attempted with reasonable diligence to deliver notice, but was unable to do so. N.H. Rev. Stat. Ann. § 132:27 (Supp. 2004). The statute also contains a broad severability provision. *Id.* § 132:28.

2. Before the statute took effect, respondents, three abortion-clinic operators and a doctor who performs abortions, filed suit in federal district court against the Attorney General of New Hampshire, seeking declaratory and injunctive relief.[2] Respondents brought a facial challenge to the statute, contending that the statute was unconstitutional in its entirety because (1) it lacked an express exception for cases in which an abortion was necessary to preserve the health of the mother and (2) it contained an insufficient exception for cases in which an abortion was necessary to preserve the life of the mother.[3] The district court held that the statute was unconstitutional on both grounds, and permanently enjoined its enforcement. Pet. App. 24-40. As a preliminary matter, the district court rejected the State's contention that the appropriate standard for a facial challenge to

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[2] During the course of this litigation, petitioner Kelly A. Ayotte succeeded Peter Heed as the Attorney General of New Hampshire. For simplicity, we refer to the defendant in this litigation as "the State."

[3] Respondents also contended that the requirement that proceedings under the judicial-bypass provision be confidential was insufficient. The district court and the court of appeals both declined to address that contention after holding that the statute was unconstitutional on other grounds. See Pet. App. 21-22 (court of appeals); *id.* at 36-38 (district court).

a statute regulating abortion was whether there was "no set of circumstances" under which the statute would be valid. *Id.* at 28 (citing *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)). Instead, the court reasoned that this Court's decisions in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992), and *Stenberg* v. *Carhart*, 530 U.S. 914 (2000), "provide[d] the governing standard" for facial challenges in the abortion context. Pet. App. 29.

On the merits, the district court first held that the statute was invalid because it failed to "comply with the constitutional requirement that laws restricting a woman's access to abortion must provide a health exception." Pet. App. 33. The court rejected the State's contention that the judicial-bypass provision would sufficiently preserve the health of the mother, concluding that "the judicial bypass process necessarily delays an abortion in a health emergency." *Id.* at 34. The court cited the declaration of respondent Dr. Wayne Goldner, who stated that "certain medical conditions during pregnancy require immediate abortion to protect the health of the mother and that any delay would jeopardize her health." *Id.* at 35. The court then held that the statute insufficiently preserved the life of the mother because the statutory term "necessary" was unconstitutionally vague and because the statute could not be given a saving construction. *Id.* at 36.

3. The court of appeals affirmed. Pet. App. 1-23. On the question of the correct standard for facial challenges to abortion statutes, the court conceded that there was "tension" between the "no set of circumstances" standard from *Salerno* and the "undue burden" standard from *Casey* and *Stenberg*. *Id.* at 7. Ultimately, however, the court concluded that the "undue burden" standard "supersede[d] *Salerno* in the context of abortion regulation." *Id.* at 9.

As to respondents' claim that the statute was invalid because it lacked an express health exception, the court of ap-

peals reasoned that, in *Stenberg*, this Court "identified a specific and independent constitutional requirement that an abortion regulation must contain an exception for the preservation of a pregnant woman's health." Pet. App. 9. Thus, the court of appeals concluded, "a statute regulating abortion must contain a health exception in order to survive constitutional challenge." *Id.* at 10. The court reasoned that this requirement applied "regardless of the interests served by New Hampshire's parental notice statute," *id.* at 12, and notwithstanding this Court's earlier decision in *Hodgson* v. *Minnesota*, 497 U.S. 417 (1990), upholding a parental-notification statute that lacked a health exception, Pet. App. 12. Like the district court, the court of appeals rejected the State's contention that the judicial-bypass provision sufficed to preserve the health of the mother. *Id.* at 16-17. The court of appeals reasoned that "[d]elays of up to two weeks can * * * occur" under that provision, and added that, "[e]ven when the courts act as expeditiously as possible, those minors who need an immediate abortion to protect their health are at risk." *Id.* at 17.

As to respondents' claim that the statute was invalid because it contained an insufficient life exception, the court of appeals reasoned that "the time component of the [statute's] death exception forces physicians either to gamble with their patient's lives in hopes of complying with the notice requirement before a minor's death becomes inevitable, or to risk criminal and civil liability by providing an abortion without parental notice." Pet. App. 18-19. In addition, the court noted, "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 [his or] her good-faith medical assessment, or by an objective standard (negligently) that would leave the physician's judgment open to *post hoc* second guessing." *Id.* at 20. The court concluded that "[t]he resulting uncertainty would * * * impermissibly

chill physicians' willingness and ability to provide lifesaving abortions." *Ibid.*

SUMMARY OF ARGUMENT

In facially invalidating the New Hampshire parental-notification statute, the court of appeals misapplied this Court's precedents both on facial challenges and on the substantive law concerning abortion. Under the standard articulated in *United States* v. *Salerno*, 481 U.S. 739 (1987), a plaintiff bringing a facial challenge to a statute (and thus seeking to render it void in all its applications) must demonstrate that the statute is in fact invalid in all its applications. That standard is both consistent with separation-of-powers principles and easy to administer. This Court's decision in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992), did not purport to alter the standard for facial challenges in the abortion context generally. At most, it altered the standard for facial challenges in the narrow context of spousal-notification provisions. Because the Court did not purport to modify the facial-challenge standard more broadly, the default rule of *Salerno* controls here. There is no reason to abandon *Salerno* for facial challenges to statutes regulating abortion, or to import overbreadth principles that are tailored to the First Amendment free-speech context. To the extent that it is desirable to allow access to courts to challenge problematic *applications* of an abortion-related statute before plaintiffs suffer irreparable injury, such challenges can go forward on an as-applied basis, without the need facially to invalidate the entirety of the statute.

In any event, the dispute concerning whether to employ the "no set of circumstances" *Salerno* standard or the "large fraction" *Casey* standard is largely beside the point in this case. Because the vast majority of the applications of New Hampshire's parental-notification statute raise no constitu-

tional concern, the statute would survive facial attack under either standard. The court of appeals struck down the statute only by applying what amounts to an anti-*Salerno* standard, under which the possibility of a single unconstitutional application doomed the statute *in toto*. That was error.

The court of appeals likewise erred in extrapolating from this Court's decision in *Stenberg* v. *Carhart*, 530 U.S. 914 (2000), a bright-line requirement that any statute regulating abortion must contain an express health exception: that is, an exception for cases in which an abortion, or a particular type of abortion, is necessary to preserve the health of the mother. Such a reading of *Stenberg* would be inconsistent with numerous cases in which this Court has upheld parental-notification statutes without demanding that those statutes contain an express health exception. Instead, under *Stenberg*, an express health exception is necessary only in those contexts in which the absence of such an exception itself represents an undue burden. The absence of a health exception in some laws regulating abortion, such as a recordkeeping statute, would in no way impose an undue burden. Just as there is no need for a health exception to a recordkeeping statute, so too there is no need for a general health exception to a parental-notification statute. In cases involving non-emergency health issues, compliance with the statute's notification (or judicial-bypass) procedures can occur without imposing any undue burden.

To be sure, constitutional difficulties may arise to the extent the statute is applied in the specific context of emergency health risks, in which the emergency character of the situation would not allow time for the notification or judicial-bypass options to run their course. But it is the *emergency* context specifically, not the health context more generally, that creates potential difficulties. The courts below, however, appear to have faulted the statute for the absence of a more general health exception and did not require any spe-

cific showing as to the frequency with which health-related emergencies would arise. Respondents, for their part, presented no evidence to suggest that cases in which there will be emergencies that would preclude the ordinary operation of the statute constitute more than a small fraction of the statute's total applications, and thus provided no basis for striking down the statute in all its applications.

Finally, respondents failed to demonstrate any deficiency in the statute's life exception, which provides that a doctor may perform an immediate abortion upon concluding, in his or her subjective professional judgment, that an abortion is necessary to preserve the mother's life. The court of appeals' decision to invalidate the statute on that basis was thus also erroneous.

ARGUMENT

RESPONDENTS' FACIAL CHALLENGE TO NEW HAMPSHIRE'S PARENTAL-NOTIFICATION STATUTE LACKS MERIT

I. RESPONDENTS WERE REQUIRED TO SHOW THAT THERE IS NO SET OF CIRCUMSTANCES UNDER WHICH THE STATUTE WOULD BE VALID

The court of appeals first erred by rejecting the State's contention that, in order to mount a successful facial challenge, respondents had to demonstrate that there was "no set of circumstances" under which the New Hampshire parental-notification statute would be valid. That standard is generally applicable to facial challenges, and there is no justification for departing from that standard here.

A. The "No Set of Circumstances" Test Is The Correct Test For Facial Challenges

1. A facial challenge is "a claim that [a] law is 'invalid *in toto*—and therefore incapable of any valid application.'" *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*,

455 U.S. 489, 494 n.5 (1982) (quoting *Steffel* v. *Thompson*, 415 U.S. 452, 474 (1974)). Because the remedy being sought in a facial challenge is to invalidate the challenged statute in all its applications, it logically follows that a plaintiff bringing a facial challenge must show that the statute has no valid application. This Court most clearly articulated that principle in *United States* v. *Salerno*, 481 U.S. 739 (1987), in which the Court stated that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Id.* at 745.

In the years since *Salerno*, the Court has applied the "no set of circumstances" standard in a variety of contexts, including in facial challenges to statutes regulating abortion. See, *e.g.*, *Anderson* v. *Edwards*, 514 U.S. 143, 155 n.6 (1995) (state regulation concerning Aid to Families with Dependent Children program); *Reno* v. *Flores*, 507 U.S. 292, 301 (1993) (INS regulation governing release of detained alien juveniles); *Rust* v. *Sullivan*, 500 U.S. 173, 183 (1991) (HHS regulations prohibiting federally funded projects from engaging in abortion-related activities); *Ohio* v. *Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990) (*Akron II*) (statute requiring parental notification); *Webster* v. *Reproductive Health Servs.*, 492 U.S. 490, 523-524 (1989) (O'Connor, J., concurring in part and concurring in judgment) (statute prohibiting use of public facilities for performing abortions).

2. For two primary reasons, *Salerno*'s standard for facial challenges should apply here, and the New Hampshire statute should be invalidated in its entirety only if it is unconstitutional in all, rather than most or many, of its applications.

First, the *Salerno* standard is compelled by core limitations on the scope of the judicial power, as well as by broader separation-of-powers principles. Like other federal courts, this Court "has no jurisdiction to pronounce any statute

* * * void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies." *Liverpool, N.Y. & Philadelphia S.S. Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 39 (1885). Because declaring a statute unconstitutional "is the gravest and most delicate duty that this Court is called on to perform," *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.), the Court has noted that the power to do so "is not to be exercised with reference to hypothetical cases thus imagined," *United States* v. *Raines*, 362 U.S. 17, 22 (1960). The *Salerno* standard ensures that a court will not "frustrate the expressed will of Congress or that of the state legislatures" by enjoining the enforcement of a law even in situations in which such enforcement is, or would be, constitutional. *Barrows* v. *Jackson*, 346 U.S. 249, 256-257 (1953). And a proper respect for federalism complements the separation-of-powers interests underlying the *Salerno* rule to the extent that a plaintiff asks a federal court to invalidate a state statute in its entirety before "state courts [have] the opportunity to construe [the statute] to avoid constitutional infirmities." *New York* v. *Ferber*, 458 U.S. 747, 768 (1982); see *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973) (noting that the invalidation of a statute "prohibit[s] a State from enforcing the statute against conduct that is admittedly within its power to proscribe").

Second, *Salerno* provides a readily administrable standard by which a court can evaluate the validity of a challenged statute. If a court were required to determine whether a statute was invalid in most or many of its applications, it would have to "consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation," *Barrows*, 346 U.S. at 256, and make a quantitative judgment based on the actual or hypothetical application of the statute to parties not presently before it. See *Sabri* v. *United States*, 541 U.S. 600, 609 (2004) (noting

that facial challenges "invite judgments on fact-poor records"); cf. *Ferber*, 458 U.S. at 768 ("By focusing on the factual situation before us * * *, we face flesh-and-blood legal problems with data relevant and adequate to an informed judgment.") (internal quotation marks and footnotes omitted). Difficult questions about defining the number of unconstitutional applications in the "numerator" and the total relevant universe of applications in the "denominator" would abound. By requiring a court merely to determine whether the plaintiff can show that the statute lacks a single valid application, the *Salerno* standard obviates the need to count (and weigh) the number of valid and invalid applications.

B. The Doctrine Of Overbreadth Applies Only To Facial Challenges Under The First Amendment

1. The doctrine of overbreadth constitutes an exception to the rule that "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others." *Broadrick*, 413 U.S. at 610. Under the overbreadth doctrine, a person whose conduct is not constitutionally protected may nevertheless challenge the constitutionality of a statute. *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985). Such a plaintiff by definition cannot show that the statute is invalid in all of its applications (because the statute is not invalid as applied to the plaintiff). The plaintiff thus need only demonstrate that the statute's overbreadth is "substantial * * *, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. The Court has stressed, however, that "[a]pplication of the overbreadth doctrine * * * is, manifestly, strong medicine," and has employed that doctrine "sparingly and only as a last resort." *Id.* at 613.

2. This Court has expressly stated that the doctrine of overbreadth is applicable only in the "limited context" of

First Amendment speech claims. *Salerno*, 481 U.S. at 745; accord *Virginia* v. *Hicks*, 539 U.S. 113, 118 (2003); *Massachusetts* v. *Oakes*, 491 U.S. 576, 581 (1989); *Schall* v. *Martin*, 467 U.S. 253, 268 n.18 (1984).[4] Although the Court recently suggested that it has "recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term)" in other settings, *Sabri*, 541 U.S. at 609, the cases cited by the Court from other contexts did not involve "overbreadth" in the traditional sense, but instead involved statutes that were invalid in all of their applications under the relevant standards for evaluating the *merits* of the underlying constitutional claims. For example, in *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964), the Court held that a statute that prohibited members of communist organizations from obtaining passports was not narrowly tailored and therefore infringed on the Fifth Amendment right to travel. *Id.* at 505-514. Similarly, in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), the Court held that a statute that "appear[ed] * * * to attempt a substantive change in constitutional protections" did not satisfy the congruence and proportionality test for enforcement legislation under Section 5 of the Fourteenth Amendment. *Id.* at 529-536. None of this Court's cases has actually applied the strong medicine of the overbreadth doctrine outside the First Amendment context.

3. There is no valid justification for extending the overbreadth doctrine to abortion cases—and thus to privilege access to an abortion over the panoply of constitutional rights to which the overbreadth doctrine does not apply. To be sure, the doctrine of overbreadth is justified by "the concern that the threat of enforcement of an overbroad law may deter or 'chill'" constitutionally protected conduct by other

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[4] The overbreadth doctrine does not apply even to all speech claims. See, *e.g.*, *Bates* v. *State Bar of Ariz.*, 433 U.S. 350, 380-381 (1977) (commercial speech).

regulated persons. *Hicks*, 539 U.S. at 119; accord *Oakes*, 491 U.S. at 581 (citing "the danger that an overly broad statute, if left in place, may cause persons whose expression is constitutionally protected to refrain from exercising their rights for fear of criminal sanctions"). In noting that the overbreadth doctrine is limited to the First Amendment context, however, the Court has emphasized the fact that any "chilling" of the exercise of First Amendment rights would "harm[] not only [other regulated persons] but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Hicks*, 539 U.S. at 119. Even assuming that women who wished to obtain abortions would be unwilling to "undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation,"[5] the unavailability of the overbreadth doctrine in the abortion context does not have an impact on unregulated persons that is analogous to the harm to the marketplace of ideas in the First Amendment context. *Ibid.*

Moreover, in the abortion context, any potential chilling effect that flows from the need for access to courts before plaintiffs suffer irreparable injury can be addressed directly through other mechanisms that facilitate such access, and should not be addressed indirectly by altering the standard for facial challenges. As noted below, see pp. 25-28, *infra*, the potential for constitutional difficulties with the New Hampshire statute lies not in the absence of an express general health exception, but rather in the possible application

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[5] Such an assumption would be somewhat in tension with the Court's repeated reliance on the existence of judicial-bypass provisions as a basis for sustaining abortion regulations. See, *e.g.*, *Akron II*, 497 U.S. at 510-517; *Hodgson* v. *Minnesota*, 497 U.S. 417, 461 (1990) (O'Connor, J., concurring in part and concurring in judgment in part); *id.* at 497-501 (Kennedy, J., concurring in judgment in part and dissenting in part); *Planned Parenthood Ass'n of Kansas City, Mo.* v. *Ashcroft*, 462 U.S. 476, 490-493 (1983).

of the statute in the exigent circumstances of a health-threatening emergency. Courts may be understandably reluctant to insist that a plaintiff suffer through an emergency before the plaintiff can challenge a statute. But courts need not change the rules for when a statute is invalid in its entirety to allow early access to the courts.

Specifically, a plaintiff may seek declaratory or injunctive pre-enforcement relief, in an individual or class action, on an as-applied basis before irreparable injury has actually been suffered—and obtain relief that reaches other, similarly situated individuals. See *Steffel*, 415 U.S. at 474 (observing, in upholding the availability of pre-enforcement declaratory relief in an as-applied challenge, that "[a] declaratory judgment of a lower federal court that a state statute is invalid *in toto*—and therefore incapable of any valid application * * *—will likely have a more significant potential for disruption of state enforcement policies than a declaration specifying a limited number of impermissible applications of the statute"); cf. *Bresgal* v. *Brock*, 843 F.2d 1163, 1170-1171 (9th Cir. 1987) (noting that "an injunction is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—if such breadth is necessary to give prevailing parties the relief to which they are entitled").[6] In addition, as the court of appeals noted (Pet. App. 5 n.2), to the extent that a woman may be deterred from bringing such a suit,

[6] Of course, a question of ripeness may arise in such an as-applied action. Because respondents have brought only a facial challenge, however, this case does not provide a suitable vehicle to address such questions definitively. The salient point is that any concern about pre-enforcement access to court can be addressed *directly* through the ripeness doctrine. There is thus no need to address that concern indirectly by distorting the distinct doctrine of facial challenges and providing that a state statute can be struck down in its entirety based on the mere possibility of some unconstitutional applications.

abortion clinics and doctors who perform abortions "routinely have *jus tertii* standing" to assert the rights of women whose access to abortion is restricted. See, *e.g.*, *City of Akron* v. *Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 440 n.30 (1983) (*Akron I*); *Singleton* v. *Wulff*, 428 U.S. 106, 117 (1976) (plurality opinion); *Planned Parenthood of Cent. Mo.* v. *Danforth*, 428 U.S. 52, 62 (1976); *Doe* v. *Bolton*, 410 U.S. 179, 188 (1973). And a lawsuit raising an as-applied challenge could proceed even after the woman had an abortion, because challenges to statutes regulating abortion ordinarily qualify for the exception to general mootness principles for cases capable of repetition, yet evading review. *Roe* v. *Wade*, 410 U.S. 113, 124-125 (1973). When taken together, these doctrines directly address the problem of ensuring early access to court, and thereby alleviate the need to address the issue indirectly by distorting the facial-challenge standard and invalidating a statute even in constitutionally unproblematic contexts.

C. This Court's Decision In *Casey* Did Not Alter The Standard For Facial Challenges Outside The Context Of Spousal-Notification Provisions

1. In *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992), the Court considered the constitutionality of various provisions of the Pennsylvania Abortion Control Act of 1982, including provisions that required a woman to give her informed consent before having an abortion; that required a minor to obtain the consent of one parent; and that, with certain exceptions, required a married woman to provide notice to her husband. The Court sustained the constitutionality of the entire statute, except for the spousal-notification provision. In Part IV of their joint opinion, Justices O'Connor, Kennedy, and Souter concluded that regulations that imposed an "undue burden" on a woman's right to an abortion were unconstitutional, and set

out the "undue burden" test. *Id.* at 878. Specifically, the joint opinion noted that "[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Ibid.* In Part V(C) of the joint opinion, Justices O'Connor, Kennedy, and Souter (joined in that subpart by Justices Blackmun and Stevens) applied the "undue burden" standard to invalidate the spousal-notification provision. *Id.* at 898. In the course of that discussion, the Court noted that, "in a large fraction of the cases in which [the provision] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Id.* at 895. Elsewhere in that part of the joint opinion, the Court twice noted that the statute was likely to prevent a "significant number of women" from seeking abortions. *Id.* at 893, 894.

2. The joint opinion in *Casey* did not purport to alter the standard for facial challenges to all statutes regulating abortion. At most, the joint opinion applied a distinct standard for facial challenges to spousal-notification provisions. The joint opinion made no reference to a "large fraction" standard in upholding any of the other provisions that were under challenge, including the informed-consent and parental-consent provisions. See, *e.g.*, 505 U.S. at 881-887, 899-900. Moreover, the joint opinion expressly noted, immediately after its single reference to a "large fraction" of cases in its analysis of the spousal-notification provision, that the same method of analysis would not apply to parental-notification and parental-consent provisions. See *id.* at 895. Accordingly, outside the context of spousal-notification provisions, *Casey* left the law of facial challenges unaffected, and thus the default standard of *Salerno* applies. Indeed, even in the portion of the opinion discussing the spousal-notification provision, the joint opinion did not so much as cite *Salerno*, despite the fact that the Court had routinely applied the

Salerno standard in other, then-recent cases involving facial challenges to statutes regulating abortion. See *Rust*, 500 U.S. at 183; *Akron II*, 497 U.S. at 514; *Webster*, 492 U.S. at 523-524 (O'Connor, J., concurring in part and concurring in judgment). The joint opinion in *Casey* should thus not be read to have overruled *Salerno* more broadly, and to have altered the standard for facial challenges to abortion regulations more generally. See, *e.g.*, *Hohn* v. *United States*, 524 U.S. 236, 252-253 (1998) (noting that "[o]ur decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality").

II. RESPONDENTS' FACIAL CHALLENGE LACKS MERIT BECAUSE THE STATUTE WAS NOT REQUIRED TO CONTAIN AN EXPRESS HEALTH EXCEPTION AND CONTAINED A SUFFICIENT LIFE EXCEPTION

Regardless whether respondents were required to show that the New Hampshire parental-notification statute was invalid in all of its applications or merely a "large fraction" of them, the court of appeals erred by sustaining respondents' facial challenge and invalidating the entirety of the statute. Respondents failed to demonstrate that the statute was deficient either because it lacked an express health exception or because it contained an excessively narrow life exception.

A. The Court Of Appeals Applied An Improper Standard For Facial Challenges To Statutes Regulating Abortion

1. As a preliminary matter, in sustaining respondents' facial challenge on the ground that the New Hampshire parental-notification statute lacked an express health exception, the court of appeals suggested that the mere *possibility* that the statute could be applied unconstitutionally was a

sufficient basis on which to invalidate the statute on its face. Specifically, the court of appeals rejected the State's contention that the statute's judicial-bypass provision would sufficiently protect a mother's health, on the ground that "delays of up to two weeks *can* * * * occur" if a minor invokes the judicial-bypass provision. Pet. App. 17 (emphasis added). The court of appeals' reasoning, however, would seemingly turn the *Salerno* standard entirely on its head, by allowing a plaintiff to obtain facial invalidation of a statute by showing the mere possibility of an unconstitutional application, rather than demonstrating that the statute is unconstitutional in all its applications—a virtual presumption of facial invalidity that this Court has roundly rejected even in the unique context of the First Amendment. See *Ferber*, 458 U.S. at 772 ("We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application.") (quoting *Broadrick*, 413 U.S. at 630 (Brennan, J., dissenting)); see generally *Salerno*, 481 U.S. at 745 (noting that "[t]he fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid").

2. This Court has rejected similar reasoning in the specific context of parental-notification statutes. In *Akron II*, this Court upheld a parental-notification statute despite a claim that the statute's judicial-bypass procedure "could take up to 22 calendar days" and thus "increase by a substantial measure * * * the medical risks of an abortion." 497 U.S. at 513. The Court reasoned that the lower court "should not have invalidated the * * * statute on a facial challenge based upon a worst-case analysis that may never occur," and added that "the mere possibility that the procedure may require up to 22 days in a rare case is plainly insufficient to invalidate the statute on its face." *Id.* at 514. The court of appeals likewise erred to the extent that it relied on a "worst-

case analysis" in facially invalidating the New Hampshire statute.

B. This Court's Decision In *Stenberg* Did Not Require Every Statute Regulating Abortion To Contain An Express Health Exception

The court of appeals also erred by reading this Court's decision in *Stenberg* v. *Carhart*, *supra*, to impose a *per se* requirement that a statute regulating abortion must contain an express "health" exception: that is, an exception for cases in which an abortion, or a particular type of abortion, is necessary to preserve the health of the mother. See, *e.g.*, Pet. App. 9, 10. Indeed, to the extent that the court of appeals concluded that the statute was facially invalid because it lacked a provision to account for the statute's potential application to situations implicating the health of the mother, that also amounted to the adoption of an anti-*Salerno* standard, insofar as the court condemned the statute in its entirety based on the mere *possibility* of some unconstitutional applications.

1. In *Stenberg*, the Court considered a facial challenge to a Nebraska statute that banned "partial birth abortion" (as defined in the statute) unless the procedure was necessary to save the life of the mother. The Court held that the statute was invalid "for at least two independent reasons." 530 U.S. at 930. First, and more relevant here, the Court reasoned that the statute was unconstitutional because it lacked an express exception for the preservation of the health of the mother. *Id.* at 930-938. Second, the Court reasoned that the statute was unconstitutional because it could be read to cover not just the "dilation and extraction" abortion procedure commonly known as partial-birth abortion, but also the more frequently used "dilation and evacuation" procedure, and therefore posed an undue burden on a woman's access to an abortion. *Id.* at 938-946.

2. The Court did hold in *Stenberg* that the Nebraska statute was invalid because it "lack[ed] any exception" for cases in which the regulated procedure was necessary to preserve the health of the mother. 530 U.S. at 930. The Court, however, did not impose a bright-line requirement that *every* statute regulating *any* aspect of abortion must contain an express health exception, but instead required the statute at issue to contain a health exception only after determining, consistent with the "undue burden" test from the joint opinion in *Casey*, that "substantial medical authority support[ed] the proposition" that "[the] statute * * * create[d] a significant health risk." *Id.* at 938. The Court seemingly agreed with Nebraska that its statute "[did] not require a health exception unless there [was] a need for such an exception," *id.* at 931, but disagreed with Nebraska's premise that there was no need for such an exception. See *id.* at 932 (concluding, after reviewing the district court's "relevant findings and evidence," that "the findings and evidence support[ed]" the plaintiff). If the Court had imposed a *per se* requirement that statutes regulating abortion contain an express health exception, the Court's analysis of the "findings and evidence" would have been entirely unnecessary. Instead, the Court held that a health exception is necessary when the absence of such an exception represents an undue burden—and concluded, after reviewing the findings and evidence in the record in that case, that the Nebraska statute imposed such a burden.[7]

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[7] *Stenberg* similarly did not adopt a rule that a plaintiff can successfully bring a facial challenge to an abortion statute that does not contain an express health exception if the plaintiff demonstrates that the statute would impose a health risk on even a single woman. To the contrary, the Court repeatedly noted that the critical question was whether the statute would pose "*significant* health risks for women"—a formulation that is better read (consistent with *Casey*, see 505 U.S. at 893, 894) to suggest that the plaintiff must demonstrate that the statute would pose a substantial health risk to at least a "significant" number of women. *Stenberg*, 530

3. The logical consequence of the court of appeals' reading of *Stenberg* would be that *any* statute touching on abortion—even, for example, statutes imposing recordkeeping or reporting requirements—would be required to contain an express health exception. At a minimum, such a broad reading would be irreconcilable with the many cases in which this Court has upheld parental-notification (and parental-consent) statutes without imposing such a requirement. See, *e.g.*, *Lambert* v. *Wicklund*, 520 U.S. 292, 293 & n.1, 299 (1997) (per curiam); *Akron II*, 497 U.S. at 507, 510; *Hodgson* v. *Minnesota*, 497 U.S. 417, 422, 423 (1990); *Planned Parenthood Ass'n of Kansas City, Mo.* v. *Ashcroft*, 462 U.S. 476, 479 n.4, 493 (1983) (opinion of Powell, J.).

Most notably, in *Hodgson*, the Court upheld a parental-notification statute that lacked an express health exception and was also similar in other respects to the statute at issue here. Compare 497 U.S. at 423 n.1, 424 n.4, 426 nn.6-8, 427 n.9, with Pet. App. 2-6. Although the plaintiffs in *Hodgson* did not contend that the statute was unconstitutional specifically because it lacked an express health exception, they did contend that the judicial-bypass provision was necessary in order to prevent minors whose health was at risk from delaying or forgoing abortions, see Cross-Resp. Br. at 15 & n.29, *Hodgson*, *supra* (No. 88-1309), and the defendants countered that there was no evidence that a delay of 48 or even 72 hours was "medically significant," see Cross-Pet. Br. at 17-18, *Hodgson*, *supra* (No. 88-1309). In upholding the

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U.S. at 932; see also *id.* at 931 (noting that "a State cannot subject *women's* health to *significant* risks" and adding that "[o]ur cases have repeatedly invalidated statutes that * * * imposed *significant* health risks"); *id.* at 938 (concluding that the statute at issue "creates a *significant* health risk"); *ibid.* (suggesting that an express health exception is required "where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger *women's* health") (all emphases added).

parental-consent provision at issue in *Casey*, the joint opinion cited *Hodgson* with approval. See 505 U.S. at 899. And in *Lambert*, which postdated *Casey*, the Court again upheld a parental-notification statute without suggesting that a health exception was constitutionally required. See 520 U.S. at 299.[8] In *Stenberg*, the Court certainly provided no indication that it believed that the parental-notification statutes at issue in those earlier cases were in fact unconstitutional to the extent that they lacked express health exceptions—as the Court presumably would have done if it had imposed a blanket requirement that all statutes regulating abortion contain such exceptions.

4. Although the courts below seemed to embrace the view that all abortion statutes must contain a general health exception, there is no justification for requiring such an exception, as opposed to a narrower exception for medical emergencies, in the context of statutes (such as parental-notification or informed-consent statutes) that impose procedural requirements with attendant waiting periods. In the specific context of parental-notification statutes, there is no inherent tension between the government's underlying interests—ensuring informed choice and parental involvement when appropriate—and the mother's undoubted interest in preserving her health. In cases involving non-emergency health issues, all of those interests can be vindicated without difficulty. Potential tension arises only in cases implicating health-related *emergencies*—and even then, the source of the tension is not the notification requirement itself, but rather the associated waiting period.

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[8] The statute at issue in *Lambert* did contain a limited exception (not otherwise discussed in the Court's opinion) for cases in which "a medical emergency exists and there is insufficient time to provide notice." See 520 U.S. at 293 n.1 (quoting statute).

Thus, the absence of a general health exception in New Hampshire's statute does not pose an undue burden on a minor's access to an abortion. In the numerous applications of the statute in which no health issues arise, the statute's notification, judicial-bypass, and waiting-period provisions operate without any constitutional concern. Likewise, when an abortion is necessary to preserve the minor's health, but no emergency or exigent circumstances exist, the statute raises no difficulties. The New Hampshire statute ordinarily requires a minor seeking an abortion to wait until 48 hours after notice is delivered, but allows notice (and the subsequent waiting period) to be waived if the parent certifies in writing that he or she has in fact been notified (as will presumably be the case when the parent accompanies the minor). N.H. Rev. Stat. Ann. § 132:26(I) (Supp. 2004). Moreover, under the statute's judicial-bypass provision, a minor can obtain a waiver of the notice (and waiting-period) requirement (1) if the minor is mature and capable of giving informed consent, or (2) if performance of the abortion without notification is in the minor's best interests. *Id.* § 132:26(II). When an abortion is necessary to preserve the minor's health on a nonemergency basis, the abortion in many cases will be able to be performed immediately (because the parent signs a certification), and in all other cases will be able to be performed a short time later. Even in emergency situations, the statute does not raise difficulties if the parent signs a certification, and the statute expressly accounts for life-threatening situations. Especially in light of the State's particular interest in ensuring that a minor's decision to have an abortion is "knowing and intelligent," *Hodgson*, 497 U.S. at 448 (opinion of Stevens, J.), any burden imposed by the statute's possible application to a subset of emergencies—which potentially could be addressed in a pre-enforcement as-applied challenge, see pp. 13-16, *supra*—is certainly not "undue."

C. Respondents Failed To Demonstrate That Health Emergencies Would Preclude The Ordinary Operation Of The Statute In More Than A Small Fraction Of The Cases To Which The Statute Applies

The New Hampshire parental-notification statute has the potential to pose an undue burden within the meaning of this Court's cases only if it is applied in cases in which an abortion is necessary to preserve the mother's health on an emergency basis. Cf. *Casey*, 505 U.S. at 879-880 (upholding generally applicable "medical emergency" exception to Pennsylvania abortion statute). Because respondents failed to demonstrate, however, that medical emergencies would arise in a significant fraction of the statute's overall applications, much less that the ordinary operation of the New Hampshire parental-notification statute would not accommodate emergency health risks in a significant fraction of applications, the statute should be sustained against respondents' facial challenge.[9]

1. It is beyond dispute that, whatever the appropriate standard for facial challenges, it is the plaintiff, and not the defendant, who bears the burden of proof. See, *e.g.*, *Salerno*, 481 U.S. at 745 (noting that "*the challenger* must establish that no set of circumstances exists under which the Act would be valid" (emphasis added)). Placing the burden of proof on the plaintiff is consistent with the venerable presumption of constitutionality that attends state statutes.

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[9] Before the court of appeals, the State contended that "other New Hampshire statutes allow medical providers to provide medical treatment to minors in the case of an emergency." Pet. C.A. Br. 14. The court of appeals rejected that contention. Pet. App. 14-16. The following discussion assumes *arguendo* that other New Hampshire statutes do not provide a "medical emergency" exception.

See, *e.g.*, *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.*, 282 U.S. 251, 257-258 (1931).[10]

2. Respondents failed to demonstrate that emergency health risks would preclude the ordinary operation of the New Hampshire parental-notification statute in more than a small fraction of its applications. Since the court of appeals held that the statute was *per se* invalid because it lacked an express health exception, it did not discuss the factual record at all. For its part, the district court made only one relevant factual finding, determining that minors subject to the statute "could experience complications in their pregnancies that would endanger their health." Pet. App. 33 n.4. That observation, however, does little more than acknowledge the possibility of cases in which an immediate abortion may be necessary to preserve the mother's health. The district court did not even attempt to quantify the number of such health emergencies and compare them to the number of constitutionally valid applications of the statute. Nor did the district court consider how many such health emergencies would arise in situations in which the parent could provide an immediate certification or the minor could obtain a timely judicial bypass, or how many such health emergencies could also implicate the mother's life (and thus trigger the statutory life exception).

The only relevant evidence presented by respondents before the district court was the declaration of respondent Dr. Wayne Goldner, who "describe[d] medical complications which may occur during pregnancy putting pregnant minors at risk and requiring prompt or immediate termination of the

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[10] This Court's decision in *Stenberg* is not to the contrary. *Stenberg* did not purport to place the burden of proof on the defendant, but instead noted only that, after the plaintiff had presented "substantial medical authority" demonstrating the need for an express health exception, the defendant had failed to present any evidence in rebuttal. See, *e.g.*, 530 U.S. at 932, 937-938.

pregnancy." Pet. App. 33 n.4. Dr. Goldner, however, merely identified various health complications that could result if a minor could not have an "immediate" abortion, see J.A. 23-26, and made no effort to quantify the cases in which such complications would occur—and indeed did not identify a single case, from his two decades of experience, in which such complications did in fact occur. In addition, Dr. Goldner conceded that "[t]he majority of [his] teenage patients who seek abortions (approximately 60 to 70 percent) bring a parent with them to the appointment." J.A. 22. In those cases (and, presumably, in others), the minor would be able to have an abortion without waiting for the statutory 48-hour notice period to run because the parent could certify that he or she had been notified. That concession alone suffices to demonstrate that, even in the universe of cases involving medical emergencies, the statute could operate without imposing an undue burden in the majority of its applications.

Moreover, Dr. Goldner, like the court of appeals, noted the hypothetical possibility that, if a minor sought to take advantage of the judicial-bypass provision, "the abortion *may* be delayed for a week, two weeks, and possibly longer." J.A. 23 (emphasis added). Dr. Goldner did not affirmatively claim, however, that the judicial-bypass provision—which by its terms provides that access to the courts "shall be afforded * * * 24 hours a day, 7 days a week," N.H. Rev. Stat. Ann. § 132:26(II)(c) (Supp. 2004)—*would* be insufficient, in any significant number of relevant cases, to preserve the health of minors with emergency health complications that required an abortion before the waiting period expired. Even if Dr. Goldner had demonstrated that emergency health risks would arise in more than a small fraction of cases, therefore, he did not additionally demonstrate that those risks could not be accommodated in some or all of those cases through the ordinary operation of the statute (*i.e.*, through prompt parental certification or judicial bypass).

In sum, because respondents failed to show that emergency health risks would preclude the ordinary operation of the statute in more than a small fraction of the cases to which the statute applies, respondents' claim that the statute was facially invalid should have been rejected under any standard. At most, the case should be remanded to allow respondents to make the requisite factual showing.

D. Respondents Failed To Demonstrate That The Statute's Life Exception Was Insufficient

Finally, the court of appeals erred by sustaining respondents' facial challenge on the alternative ground that the life exception in the New Hampshire statute was insufficient.

1. The statute's life exception provides that notice is not required if the doctor "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." N.H. Rev. Stat. Ann. § 132:26(I) (Supp. 2004). The primary basis on which the court of appeals found the life exception to be insufficient was that it "fails to safeguard a physician's good-faith medical judgment that a minor's life is at risk against criminal and civil liability." Pet. App. 21.

That conclusion was mistaken. The court of appeals correctly noted (Pet. App. 20) that the provision of the statute imposing criminal and civil liability for violations lacks any scienter requirement. See N.H. Rev. Stat. Ann. § 132:27 (Supp. 2004). Such a requirement, however, is unnecessary here to protect good-faith judgments or to ensure that a doctor has "broad discretion" to determine whether an abortion is necessary to preserve the life of the mother. *Colautti* v. *Franklin*, 439 U.S. 379, 394 (1979); accord *United States* v. *Vuitch*, 402 U.S. 62, 69-72 (1971). Although the statute does not contain an express scienter requirement, it does allow a doctor to perform an abortion without notice if the doctor

certifies, in writing, that the abortion is necessary to preserve the mother's life. N.H. Rev. Stat. Ann. § 132:26(I)(a) (Supp. 2004). By the plain terms of the statute, therefore, when a doctor makes such a certification, the doctor is insulated from liability. The statute at issue here is thus readily distinguishable from the statute invalidated in the case on which the court of appeals principally relied, *Women's Medical Professional Corp.* v. *Voinovich*, 130 F.3d 187 (6th Cir. 1997), cert. denied, 523 U.S. 1036 (1998). In that case, the relevant statutory provisions "contain[ed] both subjective and objective elements[,] in that a physician must believe that the abortion is necessary *and* his belief must be objectively reasonable to other physicians." *Id.* at 204. The court reasoned that the use of an *objective* standard, together with the absence of a scienter requirement, was "especially troublesome" for constitutional purposes. *Id.* at 205. In this case, by contrast, because a doctor is immune from liability upon concluding that, in his or her *subjective* professional judgment, an abortion is necessary to preserve the mother's life, the statute's life exception is constitutionally sufficient.

2. The other basis on which the court of appeals found the life exception to be insufficient was that "its time requirement is drawn too narrowly." Pet. App. 21. Specifically, the court of appeals reasoned that, because a doctor is required to certify not only that the abortion is necessary to preserve the life of the mother but also that there is insufficient time to provide the required notice, a doctor is effectively forced "either to gamble with [his or her] patients' lives in hopes of complying with the notice requirement before a minor's death becomes inevitable, or to risk criminal and civil liability by providing an abortion without parental notice." *Id.* at 18-19.

The statute, however, does not force a doctor to make such a choice. If a doctor believes at the outset that a minor has a medical condition that is presently life-threatening, the

doctor can certify that an abortion is necessary without notice, and proceed to perform the abortion. If, on the other hand, the doctor believes that a minor has a non-emergency medical condition that may later become life-threatening, either the doctor can comply with the notice requirement or the minor can take advantage of the statute's judicial-bypass provision. And if the doctor, after initially complying with the statute's notice requirement, subsequently determines (before the waiting period has elapsed) that there is an imminent threat to the minor's life, the doctor can then certify that an abortion is necessary without notice, and proceed to perform the abortion. Respondents thus have not demonstrated that the life exception contains any ambiguity or deficiency, let alone one that would justify the facial invalidation of the entirety of New Hampshire's parental-notification statute.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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