UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND et al, PLAINTIFFS	)	
v.	)	No. C-03-491-JD
KELLY AYOTTE, DEFENDANT	)	

PARTIALLY ASSENTED-TO MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

NOW COMES amicus curiae NARAL Pro-Choice America Foundation, by and through local counsel Borofsky, Amodeo-Vickery & Bandazian, P.A., and respectfully requests that this Honorable Court grant it leave to file the accompanying Brief in Support of Plaintiffs' Cross-Motion for Summary Judgment and Opposition to Defendant's Motion for Partial Summary Judgment and in support thereof states as follows:

1. NARAL Pro-Choice America Foundation, NARAL Pro-Choice America, and the 24 state-based affiliates and chapters of NARAL Pro-Choice America (collectively, "NARAL Pro-Choice America") are organizations that work through the legislative process, in Congress and in the states, to secure policies that reduce unintended pregnancy and the need for abortion, while ensuring access to the full range of reproductive health services and safeguarding the constitutional right to privacy.

2. NARAL Pro-Choice America tracks state and federal legislation, writes reports and amicus briefs, educates the public, serves as a legislative consulting service,

and organizes citizens and legislators to protect the freedom to choose. Its work nationally and in the states, including its annual publication *Who Decides? The Status of Women's Reproductive Rights in the United States*, inform this brief.

3. As *amicus curiae*, NARAL Pro-Choice America seeks to inform the Court about the decision-making processes surrounding the drafting, debate, and enactment of New Hampshire's Parental Notification Prior to Abortion Act as well as the politics involved in abortion legislation generally.

4. The accompanying brief will offer the Court additional legal and factual analysis that will aid the Court in deciding this matter.

5. Counsel for the Plaintiff Planned Parenthood of Northern New England, Jennifer Dalven, assents to this motion.

6. The undersigned Attorney Bodwell attempted to reach counsel for the Defendant Kelly Ayotte, Laura Lombardi, to obtain her consent, but was unable to reach her.

WHEREFORE, NARAL Pro-Choice America respectfully requests that this Honorable Court:

A. Grant the within Motion for Leave to File Amicus Curiae Brief;

B. File the accompanying Brief in Support of Plaintiffs' Cross-Motion for Summary Judgment and Opposition to Defendant's Motion for Partial Summary Judgment; and

C. Grant such other relief as may be just and equitable.

Respectfully submitted,

October 2, 2006

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CERTIFICATE OF SERVICE

I hereby certify that this Motion was served on the following persons on this date and in the manner specified herein:

Electronically served through ECF:
Jennifer Dalven, Esquire, ACLU
Laura Lombardi, Esquire, Assistant Attorney General

Dated: October 2, 2006

/s/ Erica Bodwell
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PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND et al, PLAINTIFFS	)	
v.	)	No. C-03-491-JD
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BRIEF OF AMICUS CURIAE NARAL PRO-CHOICE AMERICA FOUNDATION IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

INTERESTS OF AMICUS CURIAE

NARAL Pro-Choice America Foundation, NARAL Pro-Choice America, and the 24 state-based affiliates and chapters of NARAL Pro-Choice America (collectively, "NARAL Pro-Choice America") are organizations that work through the legislative process, in Congress and in the states, to secure policies that reduce unintended pregnancy and the need for abortion, while ensuring access to the full range of reproductive health services and safeguarding the constitutional right to privacy.[1] NARAL Pro-Choice America tracks state and federal legislation, writes reports and amicus briefs, educates the public, serves as a legislative consulting service, and organizes citizens and legislators to protect the freedom to choose. Our work nationally and

[1] For a complete list of NARAL Pro-Choice America affiliates and chapters that have signed on to this brief, *see* attached Exhibit 1.

in the states, including our annual publication *Who Decides? The Status of Women's Reproductive Rights in the United States*, inform this brief.

As *amicus curiae*, NARAL Pro-Choice America seeks to inform the Court about the decision-making processes surrounding the drafting, debate, and enactment of New Hampshire's Parental Notification Prior to Abortion Act as well as the politics involved in abortion legislation generally. Although it may seem counterintuitive, the New Hampshire legislature probably would have preferred no parental involvement law at all to one with a health exception. Because the Court cannot be sure, the prudent course is to invalidate the New Hampshire Act and allow the legislature to enact a new law that comports with constitutional standards if it so desires.

ARGUMENT

I. AS THE NEW HAMPSHIRE LEGISLATURE WAS WELL AWARE, RESTRICTIONS ON ABORTION MUST INCLUDE PROTECTIONS FOR WOMEN'S HEALTH.

For more than 30 years, U.S. Supreme Court jurisprudence has required that lawmakers include protection for women's health when regulating abortion. Yet, whether or not to include a health exception remains one of the central issues debated in legislatures considering restrictions on abortion. In many instances, anti-abortion lawmakers and advocates would prefer to have no regulation over a regulation with exceptions, because they believe such exceptions render the regulation hollow. In the instant case, the New Hampshire legislature, defying more than 30 years of unambiguous case law, deliberately chose not to include a health exception in the Parental Notification Prior to Abortion Act. N.H. Rev. Stat. Ann. §§ 132:24-132:28.

A. For More Than Three Decades, the U.S. Supreme Court's Abortion Jurisprudence has Made Clear that Restrictions on the Right to Abortion Must Contain Protections for Women's Health to Pass Constitutional Muster.

In *Roe v. Wade*, the Supreme Court invalidated a Texas law prohibiting abortions not necessary to save the woman's life because, *inter alia*, the law did not contain any exception for the preservation of a woman's health. *Roe v. Wade*, 410 U.S. 113 (1973). The Court held that the Fourteenth Amendment's right to privacy is broad enough to encompass a woman's right to decide whether to terminate her pregnancy and noted the detriment the state would impose on a woman by denying her this choice. *Id.* at 153. In discussing the limited circumstances a state could regulate and even proscribe abortion, the Court emphasized that a state must make exceptions "where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.* at 165. The Court explained that even when the state's interest in fetal life is at its apex late in pregnancy, a state is forbidden from interfering with a woman's choice to have an abortion if continuing the pregnancy would threaten her health. 410 U.S. at 164-65.

An unbroken line of cases has reaffirmed that restrictions on abortion must contain protections for women's health. In *Colautti v. Franklin,* the Court disapproved of any "trade off" between the woman's health and an increased likelihood of fetal survival. 439 U.S 379, 400 (1979). In *Thornburgh v. American College of Obstetricians & Gynecologists,* the Court invalidated a Pennsylvania statute that included a second-physician requirement because it failed to provide an exception for situations where waiting for a second physician would endanger a woman's health. 476 U.S. 747, 771 (1986). Although the Court later overruled much of *Thornburgh* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S 833 (1992), its holding regarding the necessity for a health emergency exception was undisturbed. *Ayotte v. Planned Parenthood of N. New England*, 126 S. Ct. 961, 967 (2006).

In *Casey,* the Court reiterated *Roe*'s prohibition on requirements that burden women's health. Indeed, in assessing the Pennsylvania statute at issue, the Court began by assessing the adequacy of the health emergency definition and referenced *Roe*: that is, the health exception is an independent doctrinal necessity and its adequacy was the very first point of inquiry for the Court in determining the provision's constitutionality. The Court noted that the "essential holding of *Roe* forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." 505 U.S. at 880. In upholding Pennsylvania's law providing for parental consent, the Court found that the "medical emergency" exception of Section 3202 was sufficiently broad to protect women's health. *Id.* This section of the opinion, Part V-A, was joined by two concurring justices and, thus, was the opinion of the Court. It was a ringing reaffirmation that regulations must explicitly protect women facing health emergencies.

The continued vitality of the health exception was underscored in another context eight years later in *Stenberg v. Carhart,* where the Court struck down Nebraska's ban on abortion procedures for at least "two independent reasons," one being that it failed to include the required health exception. 530 U.S. 914, 930 (2000). Finally, the Supreme Court recently reaffirmed the doctrine in this case. *Ayotte v. Planned Parenthood of N. New England*, 126 S. Ct. 961, 967 (2006) (states are prohibited from restricting access to abortions that are necessary to preserve the health of a woman).

Given the well-publicized and unambiguous state of the law, New Hampshire legislators were on notice about the constitutional necessity to include a health exception in their regulation. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97 (1979). Other states certainly understand

this constitutional requirement. In fact, the vast majority of states that have enacted parental involvement laws have included explicit protections for minors facing a medical emergency.

B. The New Hampshire Legislature's Failure to Include a Health Exception Was Clearly Intentional.

In fact, New Hampshire legislators were well aware that the Parental Notification Prior to Abortion Act would be unconstitutional if it did not contain a health exception. Nevertheless, they passed the Act without the constitutionally-required exception. The legislature's decision, although it may seem counterintuitive, reveals that it preferred an unconstitutional statute to a statute with a health exception. Indeed, the plain text of the Act as well as the Act's legislative history demonstrates as much.

The most salient fact in construing the statute is what the statute itself says. This statute provides no exception for minors' health; the only exception concerns threats to minors' lives. The New Hampshire statute is crystal clear: doctors may waive the parental notice requirement to protect a minor who may die, but not one who may suffer serious threats to her health.

The failure to include a health exception was not a mere drafting error or legislative oversight that might arguably warrant a judicial remedy to implement the legislature's overall intent. On the contrary, key sponsors of the legislation trumpeted their pride in not including a health exception. Former State Representative Phyllis Woods, a co-sponsor of the bill, declared that the lawmakers intentionally left out a health exception.[2] Her comments were echoed by her colleague Fran Wendleboe, who told the Associated Press, "We didn't mistakenly forget to put

[2] Dan Gorenstein, *Parental Notification Law Faces Challenge*, NEW HAMPSHIRE PUBLIC RADIO (Nov. 17, 2003), *available at* http://www.nhpr.org/node/5396.

in a health exception. We purposely crafted a bill without an exception."[3] Woods wanted the Supreme Court to take the case so that the law requiring health exceptions could be challenged:

> It's what we were hoping for [that the Court would grant certiorari]. It's one of the reasons we wrote the law the way we did. Because we thought it would go through all the courts and it would be challenged.[4]

She said that it does not include a health exception because, "[i]f we had written that into the bill[,] it would have made it useless."[5] Similarly, Roger Stenson, director of New Hampshire Citizens for Life, who testified in favor of the bill, derided all health exceptions when the law was enjoined for want of a health exception.[6]

The legislators recently confirmed that legislative intent in their *amicus curiae* brief filed at the U.S. Supreme Court. The *amicus* brief of New Hampshire legislators who supported the parental involvement law attacks the health exception, claiming erroneously that including a health exception would render "the statutory duty of parental notification . . . nugatory."[7] The legislators further argue that the alleged health benefits of involving parents outweigh the health risks to minors facing emergencies of delaying the procedure[8] – a risk/benefit analysis not found in Supreme Court jurisprudence.

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[3] *Abortion Law was Dangerous*, PORTSMOUTH HERALD, Dec. 31, 2003, *available at* http://www.seacoastonline.com/2003news/12312003/opinion/68065.htm.

[4] Dan Gorenstein, *Court Takes Up State's Parental Notification Law*, NEW HAMPSHIRE PUBLIC RADIO (May 23, 2005), *available at* http://www.nhpr.org/node/8861.

[5] KAISER DAILY WOMEN'S HEALTH POLICY, *In the Courts: Planned Parenthood Affiliate, ACLU, Health Providers File Suit To Block New Hampshire Parental Notification Abortion Law* (Nov. 19, 2003) (quoting FOSTER'S DAILY DEMOCRAT, Nov. 18, 2003), *at* http://www.kaisernetwork.org/daily_reports/rep_index.cfm?DR_ID=20932.

[6] Samuel E. Kastensmidt, *Federal Judge Strikes N.H. Parental Notification Law*, Center for Reclaiming America for Christ (Jan. 5, 2004), *at* http://www.reclaimamerica.org/pages/NEWS/newspage.asp?story=1500.

[7] Brief of New Hampshire Legislators as Amicus Curiae at 26, Ayotte v. Planned Parenthood of Northern New England, 126 S. Ct. 961 (Aug. 8, 2005) (No. 04-1144).

[8] *Id.* at 26-28.

In contrast, in addition to testifying about the potential harm a parental involvement statute could cause to minors, opponents of the then-proposed restriction testified about the constitutional infirmities of a regulation without a health exception. Laura Thibault, Executive Director of NARAL Pro-Choice New Hampshire testified:

> By failing to provide an exception in the case of a medical emergency that threatens the minor's health, HB 763 violates a fundamental constitutional principle that protecting a woman's health must be a paramount consideration. *Stenberg v. Carhart*, 530 U.S. 914 (2000). The U.S. Supreme Court has repeatedly stated, from *Roe v. Wade* to *Planned Parenthood v. Casey* to *Stenberg* that a woman's health must be protected. This unconstitutional provision is certain to incite a lawsuit, costing the state necessary funds and further increasing New Hampshire's already overwhelming budget deficit.[9] (Attached Exhibit 2)

In short, there is little doubt that the New Hampshire legislature deliberately opted not to include a health exception in the Parental Notification Prior to Abortion Act. As the text of the law and its legislative history illustrate, the legislature made a deliberate decision to exclude health protections for minors. Under New Hampshire law, this Court cannot and should not attempt to repair its unwise choice.[10]

II. THE NEW HAMPSHIRE LEGISLATURE'S OMISSION OF A HEALTH EXCEPTION IS CONSISTENT WITH A NATIONAL POLITICAL STRATEGY TO ELIMINATE CONSTITUTIONAL PROTECTIONS FOR WOMEN'S HEALTH.

A. The New Hampshire Legislature's Refusal to Include a Health Exception is Part and Parcel of a Larger Anti-Abortion Political Strategy.

The New Hampshire Legislature's refusal to include a health exception is entirely consistent with efforts by national anti-abortion organizations and their nationwide legislative,

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[9] *Hearing on H.B. 763 Before the Senate Judiciary Comm*, 2003 Leg., 158th Sess. (N.H. 2003) (written statement of Laura Thibault, Executive Director of NARAL Pro-Choice New Hampshire).

[10] A few of the many cases where the Supreme Court has found that the failure of a legislature to adopt legislation is a significant indicator of Congressional intent are: *Tanner v. United States*, 483 U.S. 107, 122-25 (1987); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 441-43 (1987); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985); *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 665 n.3 (1985).

litigation, and public relations strategies to eliminate the health exception requirement from the law. For example, Judie Brown, the head of the American Life League, and Douglas Johnson, the Federal Legislative Director of the National Right to Life Committee ("NRLC"), have each attacked the health exception. Johnson in particular has urged NRLC affiliates to resist amendments providing for very limited health exceptions in the context of legislation to ban abortion procedures.[11] NRLC, with chapters in all 50 states and the District of Columbia, is the principal legislative arm of the pro-life movement. It has denounced as unacceptable any exceptions that would protect women from "serious and permanent impairment of a major bodily function." A book entitled *Abortion and the Constitution: Reversing Roe v. Wade Through the Courts* features strategy papers, one of which declares: "Reversal strategy, which begins by weakening 'viability' and 'health' abortion arguments, is calculated to attack the framework of the abortion privacy doctrine at its most vulnerable point."[12] Countless other anti-abortion advocates have proudly expressed their intent to weaken health protections. The Pro-Life Action League, for example, "rejects abortion for the alleged purpose of preserving the health of the mother."[13] Likewise, the American Life League contends that "there is no problem so severe that it would justify killing the child."[14]

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[11] *See* Judie Brown, *The Exception,* ALL ABOUT ISSUES, Mar.-Apr. 1992, *available at* http://www.prolife.org.au/articles/abt015.htm (opposing all exceptions to abortion bans); Memorandum from Douglas Johnson, National Right to Life Committee Federal Legislative Director and Mary Spaulding Balch, NRLC State Legislative Director, to NRLC State Affiliates and Other Interested Parties (Nov. 22, 1996) (on file with NARAL Pro-Choice America).

[12] Victor G. Rosenblum & Thomas J. Marzen, *Strategies for Reversing* Roe v. Wade *Through the Courts*, *in* ABORTION AND THE CONSTITUTION: REVERSING ROE V. WADE THROUGH THE COURTS 200 (Dennis J. Horan et al., eds. 1987).

[13] Pro-Life Action League, *Where We Stand*, *at* http://www.prolifeaction.org/faq/stand.htm#rape (last visited Sept. 25, 2006).

[14] American Life League, *Issues: Pro-Life Urban Legends*, *at* http://www.all.org/issues_urbanlegends.php (last visited Sept. 25, 2006).

B. Legislatures Around the Country, Including the U.S. Congress, Have Chosen to Have No Restriction on Abortion Rather than to Accept One with a Health Exception.

The strength of the objection to a health exception – even when it means that a legislature will be left with no restriction on abortion – is perhaps best reflected in the legal and political struggle surrounding laws banning so-called "partial-birth abortion." By the year 2000, 30 states had passed such bans. *See Stenberg v. Carhart*, 530 U.S. 914, 989 (2000) (Thomas, J., dissenting). In June of that year, the Supreme Court held that such bans were unconstitutional without a health exception. *Stenberg*, 530 U.S. at 930. Despite a separate opinion by Justice O'Connor – who provided the decisive fifth vote to strike down the ban – that explicitly stated that a properly drafted ban with a health exception would pass constitutional muster, *see id*. at 950-51, none of the state legislatures chose to pass new bans with health exceptions.[15] Instead, they chose no ban at all, rather than to accept one with a health exception.[16]

Congress made a similar decision three years after *Stenberg* when it too chose to enact the "Partial Birth Abortion Ban Act" without a health exception. That Act bars any physician

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[15] Ohio has passed an abortion ban that contains a limited health exception, but the state enacted it before *Stenberg*. The Ohio ban includes a limited physical health exception that the U.S. Court of Appeals for the Sixth Circuit upheld. Ohio Rev. Code. Ann. § 2919.151(B) (2000). *Women's Prof'l Med. Corp. v. Taft*, 353 F.3d 436 (6th Cir. 2003). After *Stenberg*, Michigan passed a very broad ban on abortion and included a health exception that, as the U.S. District Court for the Eastern District of Michigan recognized, was entirely hollow; the court therefore declared the Michigan ban unconstitutional because, *inter alia*, it failed to adequately protect women's health. Mich. Comp. Laws Ann. §§ 333.1081 to 1085 (2004); *Northland Family Planning Clinic v. Cox,* 394 F. Supp. 2d 978 (E.D. Mich. Sept. 12, 2005), *appeal docketed,* No. 05-2418 (6th Cir. Oct. 21, 2005).

[16] This is just one group of examples in which legislatures chose to have no restriction at all rather than to pass a restriction that conformed to constitutional standards. There are many more. For example, some states have declined to fix parental involvement laws that have been struck down. For those legislatures, their second choice was no law at all, rather than a law which was constitutional. For instance, Nevada's law was declared unconstitutional in 1991 because the bypass was insufficient. *Glick v. McKay*, 937 F.2d 434 (9th Cir. 1991) (preliminary injunction upheld); *Glick v. McKay*, No. CV-N-85-331-ECR (D. Nev. Oct. 10, 1991) (permanent injunction issued). In addition, New Mexico's Attorney General opined in 1990 that its parental involvement law was unenforceable because it lacked a bypass procedure. N.M. Att'y Gen. Op. No. 90-19 (Oct. 3, 1990) *available at* 1990 WL 509590. Neither of those legislatures has revised their laws in the many years since those decisions.

from knowingly performing a "partial-birth abortion" and subjects physicians to civil and criminal penalties, including up to two years of incarceration. 18 U.S.C. § 1531 (2003). Three U.S. Courts of Appeals have held the Act is unconstitutional because, *inter alia*, it contains no exception to preserve a woman's health. *Planned Parenthood Federation of America v. Gonzales*, 435 F.3d 1163 (9th Cir. 2006), *cert. granted*, 126 S. Ct. 2901 (U.S. June 19, 2006); *National Abortion Federation v. Gonzales*, 437 F.3d 278 (2d Cir. 2006); *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005), *cert. granted*, 126 S. Ct. 1314 (U.S. Feb. 21, 2006). In determining the remedy for the flawed Act, the U.S. Court of Appeals for the Ninth Circuit in *Planned Parenthood Federation of America v. Gonzales* refused to graft in a health exception, explaining:

> Congress did not inadvertently omit a health exception from the Act. It was not only fully aware of *Stenberg's* holding that a statute regulating "partial-birth abortion" requires a health exception, but it adopted the Act in a deliberate effort to persuade the Court to reverse that part of its decision. Congress was advised repeatedly that if it passed an abortion ban without a health exception, the statute would be declared unconstitutional, yet it rejected a number of amendments that would have added such an exception. It considered the omission of the exception to be a critical component of the legislation it was enacting. Both of the Act's main sponsors, as well as various co-sponsors, asserted that the purpose of the Act would be wholly undermined if it contained a health exception and that, if an exception were included, the statute would be of little force or effect. Enacting a "partial-birth abortion" ban *with no health exception* was clearly one of Congress's primary motivations in passing the Act.

435 F.3d at 1185-87 (9th Cir. 2006).

Similarly, South Dakota recently enacted an outright ban on abortion that provides no exception to protect a woman's health. The South Dakota ban prohibits any person from knowingly prescribing, administering, procuring or selling any medicine, drug or other substance to pregnant women with the intent to cause or aid in "the termination of the life of an unborn human being." The law also prohibits any person from knowingly employing or using any

instrument or procedure on a pregnant woman with the intent to cause or abet "the termination of the life of an unborn human being." Any violation of these provisions is a felony. H.B. 1215, 81st Legis. Assem., Reg. Sess. (S.D. 2006). The ban's author, Rep. Roger W. Hunt, fought against adding any exceptions to the bill, claiming that it would lose its focus and therefore have no impact on the national arena.[17] Similarly, "LifeNews" reporting on the ban noted that "Senators rejected a proposed health exception that would have gutted the intent of the [South Dakota abortion ban] bill."[18]

Against this strategic backdrop, it would be contrary to the intent of the New Hampshire legislature for this Court to repair the statute by inserting a provision to protect minors facing health crises. Like the U.S. Congress and so many other state legislators around the country, New Hampshire legislators made a calculated political decision to omit a health exception.

III. THE COURT WOULD BE ENGAGING IN SHEER GUESSWORK IF IT WERE TO TRY TO SAVE THE LAW BY DRAFTING A HEALTH EXCEPTION FOR THE LEGISLATURE.

Where, as here, a legislature fails to include a constitutionally-required provision in a statute, state law governs whether a court should invalidate the Act entirely or essentially insert a provision to save the Act. New Hampshire law obligates a court to strike a statute in its entirety if the court is unable to say that the legislature would have enacted a constitutional statute. *Claremont Sch. Dist. v. Governor*, 744 A.2d 1107, 1112 (N.H. 1999). In *Claremont School*

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[17] Megan Myers, *State Ban Bill Enters Senate*, ARGUSLEADER.COM, Feb. 22, 2006; "'The momentum for a change in the national policy on abortion is going to come in the not-too-distant future,' said Rep. Roger W. Hunt, a Republican who sponsored the bill. To his delight, abortion opponents succeeded in defeating all amendments designed to mitigate the ban, including exceptions in the case of rape or incest or the health of the woman. Hunt said that such 'special circumstances' would have diluted the bill and its impact on the national scene." Evelyn Nieves, *S.D. Abortion Bill Takes Aim at 'Roe,'* WASH. POST., Feb. 23, 2006, at A1.

[18] Steven Ertelt, *South Dakota Senate Approves Pro-Life Bills Limiting Abortions*, LIFENEWS.COM, Mar. 1, 2005, *at* http://www.lifenews.com/state927.html.

District, the New Hampshire Supreme Court invalidated a statewide uniform education property tax. *Id.* The court explained: "We simply cannot say whether 'the legislature would have enacted the [statewide property tax] without the offending provision.'" *Id.* at 1112 (alteration in original) (citation omitted). The same is true here. The Court cannot say for sure that New Hampshire legislators would have preferred a law with a health exception to no law at all. Moreover, even if the Court could discern any such intent, the Court would still have to ascertain the precise scope and terms of any health exception that the legislators would have wanted. In this case, if the Court were to write a health exception to save the law, its guess would in all likelihood differ from anything that could have gained consensus among New Hampshire legislators.

A. States Have Enacted at Least Twelve Different Health Emergency Exceptions

Crafting a health exception is clearly within the competence of the New Hampshire state legislature, as state legislatures have almost uniformly understood the necessity to protect minors' health in emergency situations. Other states certainly understand these requirements. In fact, the great majority of states that have enacted parental involvement laws have included explicit health exceptions.[19]

[19] Forty-four states have enacted a parental involvement law. Nine of the 44 state laws have been enjoined or are otherwise not enforceable: AK, CA, ID, IL, MT, NV, NH, NJ, and NM. (A federal court held that Illinois' law is unenforceable because the Illinois Supreme Court refused to promulgate rules concerning the judicial waiver procedure. *Zbaraz v. Ryan*, No. 84 C 771 (N.D. Ill. Feb. 8, 1996). On September 20, 2006 the Illinois Supreme Court promulgated rules for the judicial bypass procedure. However, this law is still enjoined pending further action from the state's attorney general.) NARAL Pro-Choice America & NARAL Pro-Choice America Foundation, *Who Decides? The Status of Women's Reproductive Rights in the United States* 17 (14th ed. 2005) ("*Who Decides?*"). The laws in force are: Ala. Code § 26-21-3; Ariz. Rev. Stat. Ann. § 36-2152; Ark. Code Ann. §§ 20-16-801 *et seq.*; Colo. Rev. Stat. § 12-37.5-104; Del. Code Ann. tit. 24 § 1783; Fla. Stat. Ann. § 390.01114; Ga. Code Ann. § 15-11-112; Ind. Code Ann. § 16-34-2-4; Iowa Code Ann. § 135L.3; Kan. Stat. Ann. § 65-6705; Ky. Rev. Stat. Ann. § 311.732; La. Rev. Stat. Ann. § 40:1299.35.5; Me. Rev. Stat. Ann. tit. 22 § 1597-A; Md. Code Ann. § 20-103; Mass. Gen. Laws Ann. ch. 112, § 12S; Mich. Comp. Laws Ann. § 722.903; Minn. Stat. Ann. § 144.343; Miss. Code Ann. § 41-41-53; Mo. Ann. Stat. § 188.028; Neb. Rev. Stat. § 71-6902; N.C.

No state statute's language is identical to any other state: there are at least twelve formulations of emergency health exceptions. The twelve types are:

1. "serious risk of substantial and irreversible impairment of major bodily function";[20]
2. "risk of serious impairment of [a] major bodily function";[21]
3. "grave peril of immediate and irreversible loss of major bodily function";[22]
4. "immediate threat and grave risk to . . . health";[23]
5. "immediate threat and grave risk to . . . permanent physical health";[24]
6. "grave impairment of the physical or mental health of the woman";[25]
7. "grave physical injury";[26]

Gen. Stat. Ann. § 90-21.7; N.D. Cent. Code § 14-02.1-03; Ohio Rev. Code Ann. § 2919.121; Okla. Stat. Ann. tit. 63, § 1-740.2; 18 Pa. Cons. Stat. Ann. § 3206; R.I. Gen. Laws § 23-4.7-6; S.C. Code Ann. § 44-41-31; S.D. Codified Laws §34-23A-7; Tenn. Code Ann. § 37-10-303; Tex. Occ. Code Ann. § 164.052; Utah Code Ann. § 76-7-304; Va. Code Ann. § 16.1-241; W. Va. Code Ann. § 16-2F-3; Wis. Stat. Ann. § 48.375; and Wyo. Stat. Ann. § 35-6-118.

Thirty-nine states have explicitly provided some protection for a minor's health in enacting parental involvement/bypass laws. Three other states give the physician sufficient discretion to provide the abortion to protect a minor's health generally or in an emergency. Del. Code Ann. tit. 24 § 1783, 1787; Md. Code Ann. § 20-103; Me. Rev. Stat. Ann. tit. 22 § 1597-A.

Only 4 states – Minnesota, Missouri, North Dakota, and Wyoming – have parental involvement laws that make no explicit provision for minors' health in an emergency.

To date, no court has upheld a parental involvement law that lacked a health exception when that issue was squarely before the court.

[20] Ariz. Rev. Stat. § 36-2152(G)(2); Ark. Code Ann. §§ 20-16-802, 805; Colo. Rev. Stat. §§ 12-37.5-103(5), 105; Del. Code Ann. Tit. 24 §§ 1782(5), 1787; Fla. Stat. Ann. § 390.01114; Idaho Code § 18-604 (enjoined); 750 Ill. Comp. Stat. § 70/10 (enjoined); Ky. Rev. Stat. §§ 311.720(12), 732(8); Mich. Comp. Laws §§ 722.902(b), 905; Mont. Code Ann. §§ 50-20-203(5), 50-20-208; N.J. Stat. Ann. §§ 9:17A-1.3, 1.6; Okla. Stat. tit. 63, § 1-740.2; 18 Pa. Cons. Stat. Ann. §§ 3203, 3206; S.D. Codified Laws §§ 34-23A-7, 34-23A-1; Tex. Occ. Code Ann. §§ 164.052 (a)(19); Utah Code Ann. §§ 76-7-301, 305; Va. Code Ann. § 18.2-76.

[21] Iowa Code Ann. §§ 135L.1, *et seq.*

[22] N.D. Cent. Code §§ 14-02.1-03(1), 14-02.1-03.1(12), 14-02.1-02(7).

[23] Ind. Code § 16-34-2-4(i); Neb. Rev. Stat. § 71-6906; W. Va. Code § 16-2F-5.

[24] La. Rev. Stat. § 40:1299.35.12.

[25] N.M. Stat. Ann. § 30-5-1(C) (enjoined).

8. "immediately necessary to preserve the patient's life or health";[27]

9. "medical emergency [that so] complicates the pregnancy [as] to require an immediate abortion";[28]

10. "emergency exists that so compromises the health, safety or well-being of the mother as to require an immediate abortion";[29]

11. "medical emergency requiring immediate medical action";[30]

12. "emergency requiring immediate action."[31]

These twelve types of laws spotlight the speculation that would be involved in attempting to draft an exception the New Hampshire legislature chose not to draft.

B. The Court Would Have To Make at Least Five Legislative Choices To Save the Statute.

In addition to the above factors, if the Court were to write in a health exception to avoid invalidation of the Act, the Court would have to make decisions along at least five axes: severity, time, what is at risk, the likely duration of the health problem, and who decides whether the minor faced a health threat. Legislatures have made divergent choices as to:

1. **The severity of the risk:** compare "serious threat" (18 states), with "emergency exists" (AL, AR, CA, GA, KS, MS, NC, ND, RI, SC), "risk" (IA), "likely" (NM), and "grave risks" (IN, LA, NE, WV).

2. **The immediacy of the threat:** compare necessitates/requires immediate (medical) action/abortion (AL, CA, GA, IA, KY, LA, MI, MS, NJ, NC, OH, PA, RI, TN, UT, VA, WI), with delay will create serious risk (AZ, AR, CO, DE, FL, ID, IL, IA, KY, MI, MT, NJ, OK, PA, UT, VT), insufficient time to obtain consent (AR, CO, FL, NE, SD, TX),

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[26] S.C. Code Ann. § 44-41-30(C).

[27] Nev. Rev. Stat. § 442.255.

[28] Miss. Code § 41-41-57; N.C. Gen. Stat. § 90-21.9; Tenn. Code Ann. § 37-10-305; Wis. Stat. § 48.375(4)(b). Georgia substitutes "condition of the minor" for "pregnancy." Ga. Code Ann. § 15-11-116.

[29] Ala. Code § 26-21-5; Kan. Stat. Ann. § 65-6705(j)(1)(B) (minor difference in language from Alabama's).

[30] Calif. Health & Safety Code § 123450(a) (enjoined).

[31] Mass. Gen. Laws Ch. 112 § 12S; R.I. Gen. Laws § 23-4.7-4.

emergency need for a medical procedure to be performed (IN, WV), continuation of pregnancy provides immediate threat (NE), no immediacy/emergency requirement (NM), "emergency exists" (SC), and "to avoid serious risk" (TX). (Note that many states demand compliance with more than one criterion.)

3. **What is threatened:** compare "grave physical injury" (SC) with "physical health" (OH), "grave impairment of physical or mental health" (NM), "impairment of major bodily function" (AZ, AR, CO, DE, FL, ID, IL, KY, MI, MT, NJ, OK, PA, SD, TX, UT, VA), "threaten the health, safety or well-being of the mother" (AL, KS) "the pregnancy" (MS, NC, TN, WI), "the condition of the minor" (GA), unspecified medical emergency (CA, MA, RI), "loss of major bodily function" (ND), "potential suicide" (WI), and preservation of health (NV).

4. **The duration of the health risk:** "irreversible" (18 states) or silent as to duration (19 states).

5. **Physician's judgment:** Compare "best" judgment (KS, MS, MT, NE, NC, TN, WI) with "good faith" (AZ, CO, DE, FL, IL, MI, MT, NJ, ND, PA, SD, TX, UT), "judgment of the physician" (NV), and "physician determines" (SC). Some states require a certification (possibly triggering other charges for false statements or certifications), either immediately or within 24 hours (GA, IN, IA, LA, OH, RI, SD, TX, VA, WA). One state just requires the physician to record the reasons in writing (MS).

With at least five variables, each with multiple options, it is clear that the Court would be throwing darts if it tried to craft a health exception on behalf of the New Hampshire state legislature. Because the Court cannot say for sure whether the legislature would have enacted the Act with a health exception, or if so, exactly what it would have enacted, the Court must invalidate the Act in its entirety.

C. Public Choice Theory Confirms That New Hampshire's Second-Choice Wishes Cannot Be Ascertained.

One method the Court cannot credibly employ is to assume what New Hampshire's legislature would have done if it were told to draft a health exception. What the legislature would do, faced with such a task, simply cannot be predicted. The New Hampshire House of Representatives has between 375 and 400 members, and the Senate has 24 members.[32] Each

[32] N.H. Const. p.2 Arts. 9, 25.

legislator has a distinct constituent base, self-interest in re-election, and particular policy convictions. *See* Kenneth A. Shepsle, *Congress is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 248 (1992). The entire legislature, and indeed each chamber, does not speak with a collective voice, other than when it enacts legislation, nor does it have a single collective intent. *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POLY, 61, 68 (1994). The fiction of a collective intent, other than as actually expressed in legislation, precludes this Court from guessing whether the New Hampshire legislature would have passed a different parental notification statute with a constitutionally required medical health exception, or no legislation at all, much less which of the various formulations of a health exception it might have chosen.

Moreover, even in the face of clear evidence (and *no evidence* has been adduced here) that some members of the New Hampshire legislature would have preferred a statute with a health exception to no statute at all, it is not certain such a statute would have been enacted.[33] Arrow's Theorem shows the difficulty in predicting legislative action.[34] If presented with three choices, A, B, and C, Option A may defeat Option B; Option B may defeat Option C; but Option A will not necessarily defeat Option C. The New Hampshire legislature had at least three options: pass no bill, pass a bill with a health exception, or pass a bill without a health exception. If the Court fashions a health exception, it is far from clear that it would implement the collective will of the legislature. The issue becomes still more complicated once we factor in the twelve existing types of health exceptions, and the five dimensions of decision-making with respect to those exceptions.

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[33] *See generally* Lauren Gilbert, *Fields of Hope, Fields of Despair: Legisprudential and Historic Perspectives on the AgJobs Bill of 2003*, 42 HARV. J. ON LEGIS. 417 (2005).

[34] *See* Shepsle, *Congress is a "They," Not an "It"*, 12 INT'L REV. L. & ECON. at 241-42 (describing Arrow's Theorem).

The process of voting on successive amendments, or "logrolling" (when a legislator votes against a bill she favors in order to gain support for a bill she favors more, for example), and the role of interest groups and self-interest, all create uncertainty in the legislative process. As Judge Easterbrook has written:

> [T]he order of decisions and logrolling are . . . so integral to the legislative process that judicial predictions of how the legislature would have decided issues it did not in fact decide are bound to be little more than wild guesses, and thus to lack the legitimacy that might be accorded to astute guesses.

Frank Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 548 (1983). The bill as enacted by the legislature represents the legislators' compromise, summing all the political forces and interests and ideologies at work at that particular time.[35] This Court should not attempt to recreate the voting patterns of the New Hampshire legislature and insert provisions the Court believes the legislature might have adopted, in an attempt to save unconstitutional legislation. The prudent course is to strike New Hampshire's parental notice law and allow New Hampshire to enact the medical emergency/waiting period/notification process it favors, if it can muster the votes for any particular formulation.

CONCLUSION

The New Hampshire statute at issue in this case, N.H. Rev. Stat. Ann. §§ 132:24-28, contains fatal constitutional flaws, including its obvious lack of a health exception. Courts cannot and should not graft provisions onto this statute to render it constitutional. Consistent with the Court's role and function, the Court must strike down New Hampshire's law as unconstitutional and allow the New Hampshire legislature to make the quintessentially

[35] *See* Jerry Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI. KENT L. REV. 123, 134 (1989).

legislative decision of how to protect minors' health in emergency situations, consistent with the Constitution.

Respectfully submitted,

October 2, 2006

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CERTIFICATE OF SERVICE

I hereby certify that this Brief was served on the following persons on this date and in the manner specified herein:

Electronically served through ECF:
Jennifer Dalven, Esquire, ACLU
Laura Lombardi, Esquire, Assistant Attorney General

Dated: October 2, 2006

/s/ Erica Bodwell
Erica Bodwell
8514

AMICUS CURIAE NARAL PRO-CHOICE AMERICA FOUNDATION
EXHIBIT 1

NARAL Pro-Choice Arizona
NARAL Pro-Choice California
NARAL Pro-Choice Colorado
NARAL Pro-Choice Connecticut
NARAL Pro-Choice Georgia
NARAL Pro-Choice Maryland
NARAL Pro-Choice Massachusetts
MARAL Pro-Choice Michigan
NARAL Pro-Choice Minnesota
NARAL Pro-Choice Missouri
NARAL Pro-Choice Montana
NARAL Pro-Choice New Hampshire
NARAL Pro-Choice New Jersey
NARAL Pro-Choice New Mexico
NARAL Pro-Choice New York
NARAL Pro-Choice North Carolina
NARAL Pro-Choice Ohio
NARAL Pro-Choice Oregon
NARAL Pro-Choice South Dakota
NARAL Pro-Choice Texas
NARAL Pro-Choice Virginia
NARAL Pro-Choice Washington
NARAL Pro-Choice Wisconsin
NARAL Pro-Choice Wyoming

AMICUS CURIAE NARAL PRO-CHOICE AMERICA FOUNDATION
EXHIBIT 2

NARAL-NH
Reproductive Freedom & Choice

To: Senate Judiciary Committee
From: Laura Thibault, NARAL-NH
Date: May 13, 2003
Re: HB 763-FN, relative to parental notification for minors

Mr. Chairman and Members of the Committee:

My name is Laura Thibault, and I am the Executive Director of the National Abortion and Reproductive Rights Action League of New Hampshire (NARAL-NH). I am here today on behalf of our 2,500 members statewide to express our opposition to HB 763-FN.

HB 763 IS UNCONSTITUTIONAL

- Section I(a) provides an exception only if the procedure "is necessary to prevent the minor's death."
- By failing to provide an exception in the case of a medical emergency that threatens the minor's health, HB 763 violates a fundamental constitutional principle that protecting a woman's health must be a paramount consideration. *Stenberg v. Carhart*, 530 U.S. 914 (2000).
- The U.S. Supreme Court has repeatedly stated, from *Roe v. Wade* to *Planned Parenthood v. Casey* to *Stenberg* that a woman's health must be protected.
- This unconstitutional provision is certain to incite a lawsuit, costing the state necessary funds and further increasing New Hampshire's already overwhelming budget deficit.

HB 763 IS FLAWED AND ATTEMPTS TO REDEFINE WIDELY ACCEPTED MEDICAL DEFINITIONS

- The bill incorrectly defines a fetus as "any individual human organism from fertilization until birth."
- According to Williams Obstetrics, the fetal period of a pregnancy occurs eight weeks after fertilization, or 10 weeks after the onset of the last menstrual period. (1997, Appleton & Lange. Stamford, CT at 155).
- The bill's sponsors, who are out of step with the mainstream, are attempting to redefine a fetus under New Hampshire law. This flawed definition has the potential to undermine women's access to a broad range of basic reproductive health services.

HB 763 THREATENS YOUNG WOMEN'S HEALTH

- Studies confirm that when parental involvement is mandated by law, many adolescents – fearing abuse, punishment or parental disappointment – delay or avoid seeking needed medical care. The leading reason that adolescents do not seek health care is that they do not want their parents to know about their medical condition.
- Laws requiring parental involvement actually harm the young women they purport to protect by increasing family violence, suicide, self-induced abortion, later abortion, and unwanted childbirth.
- Nearly half of pregnant teens who have a history of abuse report being assaulted during their pregnancy, most often by a family member.[1]
- Among minors who did not tell a parent of their abortion, 30 percent had experienced violence in their family or feared violence or being forced to leave home.[2]
- Medical experts do not support mandatory parental involvement. The American Medical Association noted that "[b]ecause the need for privacy may be compelling, minors may be driven to desperate measures to maintain the confidentiality of their pregnancies. They may run away from home, obtain a 'back alley' abortion, or resort to self-induced abortion. The desire to maintain secrecy has been one of the leading reasons for illegal abortion deaths since . . . 1973."[3]

This bill is not about women's health or protecting the health of young women, it is designed to restrict access to abortion. The right to choose is a basic right of our democratic society, and chipping away at the choices available to a vulnerable, non-voting group within this society is an important aim of this legislation. Underneath the rhetoric of "parental rights" and "family communication" lies the goal of restricting abortions, first for young women and ultimately for all women. Please vote HB 763-FN Inexpedient to Legislate.

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1. American Psychological Association, *Parental Consent Laws for Adolescent Reproductive Health Care: What Does the Psychological Research Say?* (Feb. 2000), *citing* A.B. Berenson, et al., *Prevalence of Physical and Sexual Assault in Pregnant Adolescents*, 13 J. OF ADOLESCENT HEALTH 466-69 (1992).

2. Stanley K. Henshaw & Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions*, 24 FAMILY PLANNING PERSPECTIVES 197, 207 (1992).

3. Council on Ethical and Judicial Affairs American Medical Association, *Mandatory Parental Consent to Abortion*, 269 JAMA 83 (1993).