

## New U.S. Supreme Court Decision – *Ayotte v. Planned Parenthood of Northern New England*

### Introduction

On January 18, 2006, the U.S. Supreme Court issued a unanimous decision in *Ayotte v. Planned Parenthood of Northern New England*, a case brought by Planned Parenthood against the state of New Hampshire seeking to prohibit the state from enforcing a parental notification law. The Supreme Court chose not to explicitly rule on either of the significant constitutional questions at issue in the case. Instead, it restated its precedent that abortion restrictions must contain an exception to protect women's health, then decided the case on essentially technical grounds and returned the case to the lower courts to determine whether a narrow injunction can cure the law's constitutional defect.

### Background

The law at issue requires parental notification before an unemancipated woman under 18 years of age may have an abortion.<sup>1</sup> The notification requirement may be waived only if a young woman's life is threatened (but even then only under certain circumstances), or if she obtains permission from a judge. The law makes no exception for victims of rape, incest, child abuse, or for circumstances in which a young woman's health is threatened. The question of the overall constitutionality of parental notification laws was not at issue in *Ayotte*; rather, the issues before the Supreme Court were the law's lack of an emergency health exception and the standard of review.

Four lower federal court judges, including three appointees of anti-choice presidents, found this law unconstitutional.<sup>2</sup> The case initially seemed easy and obvious: under squarely applicable precedent, abortion regulations must have an emergency health exception. Ominously, the Supreme Court granted certiorari; worse yet, the questions presented implicated virtually all of abortion rights law, not just parental involvement laws or health exceptions.

When it granted cert, the Supreme Court agreed to consider:

- **The requirement of a health exception:** Must a parental notification law contain an exception to protect young women's health?
- **The appropriate standard of review:** How many women must be harmed by an abortion-restriction law before a court may declare it unconstitutional? In other words, what is the

standard of review for abortion cases? Is it the standard set forth in *Planned Parenthood of Southeastern Pennsylvania v. Casey* or the much stricter standard, under which it would be virtually impossible to have a law declared unconstitutional, set forth in a non-abortion-related case (*United States v. Salerno*),?

The Bush administration filed an *amicus* brief supporting New Hampshire's positions, while NARAL Pro-Choice America filed an *amicus* brief in support of the reproductive rights groups.

## **Summary of Relevant Supreme Court Precedent and the *Ayotte* Decision**

### ***Clear Supreme Court Precedent: Women's Health Is Paramount***

For more than 30 years, the Supreme Court's abortion jurisprudence has required protections for women's health, and this doctrine has repeatedly been reaffirmed. *Roe v. Wade* forbids a state from interfering with a woman's choice to have an abortion if continuing the pregnancy would threaten her health.<sup>3</sup> An unbroken line of cases has carried this doctrine to the present. In *Colautti v. Franklin*, the Court disapproved of any "trade off" between the woman's health and an increased likelihood of fetal survival.<sup>4</sup> In *Thornburgh v. American College of Obstetricians & Gynecologists*, Pennsylvania's second-physician requirement failed to provide an exception for situations where waiting for a second doctor would endanger a woman's health. Accordingly, the statute was invalidated.<sup>5</sup> Most recently, by a narrow 5-4 vote, *Stenberg v. Carhart* invalidated Nebraska's law banning abortion procedures on the ground that it failed to protect women's health.<sup>6</sup>

### ***The Ayotte Decision: Mixed Results for Choice***

In a unanimous decision written by retiring Justice Sandra Day O'Connor, the Supreme Court wrote, "We do not revisit our abortion precedents today, but rather address a question of remedy."<sup>7</sup> The Court asked, "If enforcing a statute that regulates access to abortion would be unconstitutional in medical emergencies, what is the appropriate judicial response?" The Court held that invalidating a statute in its entirety is not always necessary or justified; lower courts could issue narrower declaratory and injunctive relief. As explained further below, this is a new and potentially ominous development in abortion jurisprudence.

The Court neither revisited nor expressly reaffirmed its precedents involving the protection of women's health. However, the Court did acknowledge the history of this area of the law, noting that even New Hampshire's attorney general who was defending the state's law agreed: "New Hampshire does not dispute, and our precedents hold, that a State may not restrict access to abortions that are 'necessary, in appropriate medical judgment, for preservation of the life or health of the mother.'"<sup>8</sup> Nonetheless, the Court in *Ayotte* departed somewhat from these precedents by providing states defending anti-choice laws with a new remedy to try to "save" a law's enforceability.

More specifically, the Court explained that “the lower courts need not have invalidated the law wholesale,”<sup>9</sup> and may instead essentially craft a health exception via judicial order, by issuing an injunction that would prohibit the state from enforcing the law in cases involving medical emergencies. So the Court returned the case to the lower courts with this guidance; in the meantime, the injunction prohibiting enforcement of the law will remain in place.

### *New Remedy for States Defending Anti-Choice Laws*

The type of partial injunction sanctioned by the Court in *Ayotte* is a new and potentially ominous remedy in reproductive rights jurisprudence; previously, a law would have been struck down – not “fixed” by the courts – for lacking a health exception.

In other words, the Court in *Ayotte* confirmed that abortion restrictions must not endanger women’s health in an emergency, but the Court has narrowed the courthouse doors. Henceforth, courts may be more likely to uphold challenged laws and only strike them down as applied to certain women in particular circumstances. State legislators may respond in an irresponsible fashion. They may read the ruling as giving them the green light to enact laws with constitutional defects, laws that will go into place except in those unconstitutional applications. The case appears to deprive women and their legal advocates of their most powerful remedial tools – complete injunction of a statute.

### *New Hampshire Legislators Intentionally Excluded a Health Exception*

The legal challenge to the parental notification law at issue in *Ayotte* continues. Now that New Hampshire’s attorney general has conceded that precedents require a health exception, and the Supreme Court has returned this issue to the lower courts, the intent of legislators who supported this law will be reviewed, and a court will have to make a factual finding as to whether the legislators preferred no law at all, or the implementation of a parental involvement law, so long as it did not apply in medical emergencies. Pro-choice advocates will contend that the legislature’s intentional exclusion of a health exception should not be rewarded with a judicial repair that would allow the law to be applied in most circumstances.

Given the Supreme Court’s clear rulings that abortion restrictions must contain a health exception, New Hampshire legislators certainly knew about the necessity of including such an exception in their parental notification law. New Hampshire legislators’ failure to follow unbroken Supreme Court precedent and lower court cases striking down statutes for failure to protect women’s health, demonstrates defiance towards the law’s requirements, defiance that should not be rewarded by fixing the statute for them.

New Hampshire’s 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 cosponsor of the bill, declared that the lawmakers intentionally left out a health exception, which she denounced as too broad.<sup>10</sup>
- Woods' comments were echoed by her colleague Fran Wendleboe, who told the Associated Press, "We didn't mistakenly forget to put in a health exception. We purposely crafted the bill without an exception."<sup>11</sup>
- 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 agree to hear the case]. 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."<sup>12</sup> Woods 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."<sup>13</sup>
- 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.<sup>14</sup>

NARAL Pro-Choice America is hopeful that, with the guidance the Supreme Court, the lower courts will recognize that the only appropriate remedy in this case is to strike the law in its entirety – to refuse to create a health exception that would permit the law to go into effect. If legislators had intended to include a health exception, they could have, but since they did not the issue should be returned to the legislature to resolve.

### *Other Cases on the Horizon*

Among many other pending cases, the Court will soon consider whether to hear appeals involving the Federal Abortion Ban. This law, signed by President Bush in 2003, could ban abortion nationwide as early as the 12th week of pregnancy, and – like New Hampshire's parental notification law – has no exception when a woman's health is in jeopardy. The *Ayotte* decision may foreshadow a remedy the Court did not invoke when it invalidated a similar state law six years ago in *Stenberg v. Carhart*.

### *Legislative Responses*

Given the Court's ruling in *Ayotte*, it will be all the more important for pro-choice state and federal legislators to ensure that the legislative history of any anti-choice measures clearly demonstrates a legislative intent to reject amendments that would cure constitutional defects. Otherwise, courts, relying on *Ayotte*, will be able to fashion judicial remedies on behalf of the anti-choice politicians who opted not to include protections for women's health.

### **Conclusion**

In *Ayotte v. Planned Parenthood of Northern New England*, the Supreme Court thankfully averted eliminating an essential protection of *Roe v. Wade*, that abortion restrictions must include an exception to protect women's health, a position advanced by New Hampshire and supported

by the Bush administration. The Court also declined to expressly alter the standard of review in abortion cases, an alteration that could have denied the right to choose to millions of American women.

However, if the lower court tries to remedy the law's defects by carving out an exception for medical emergencies, it will only encourage anti-choice legislators to enact more and more laws that flout constitutional requirements – relying on the courts to become inappropriately activist partners in the legislative process by repairing the statutes. It is also worth noting the opening line of the Court's opinion: "We do not revisit our abortion precedents *today*..." (emphasis added). The Court will certainly revisit those precedents in the future, and the Court will be sharply divided.

The posture of *Ayotte* serves to mask its political import. The Supreme Court issued a unanimous ruling, yet the real decision-making will occur at the lower court level, and in state legislatures across the country. The Court's unanimity could be misinterpreted by the public as suggesting that the right to choose is safe, when it is not. If Samuel Alito is confirmed to the Supreme Court, *Roe* itself may be within just one vote of being overturned, and some of its core protections will almost certainly be in danger of being eliminated. The new remedy provided by the *Ayotte* Court to states defending laws restricting a woman's right to choose could prove to be yet another tool for anti-choice forces to make safe and legal abortion even less available.

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<sup>1</sup> N.H. Rev. Stat. Ann. § 132:24 to :28 (Enacted 2003). A more detailed summary of the law is available here:

<http://www.prochoiceamerica.org/yourstate/whodecides/states/newhampshire/issue.cfm?issueid=2721>.

<sup>2</sup> Judge Joseph DiClerico, District of New Hampshire, appointed by President George H.W. Bush; Chief Judge Michael Boudin, U.S. Court of Appeals for the First Circuit, appointed by President George H.W. Bush; Judge Juan Torruella, U.S. Court of Appeals for the First Circuit, appointed by President Ronald Reagan (authored opinion); Judge Patti Saris, District Court judge sitting by designation on First Circuit,

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appointed by President Bill Clinton. *Planned Parenthood of Northern New England v. Heed*, 296 F. Supp 59 (D.N.H. 2003); *aff'd* 390 F.3d 53 (1st Cir. 2004).

<sup>3</sup> *Roe v. Wade*, 410 U.S. 113, 164 (1973).

<sup>4</sup> *Colautti v. Franklin*, 439 U.S. 379, 400 (1979).

<sup>5</sup> *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 771 (1986). Though much of *Thornburgh* has been overruled by *Casey*, its holding regarding the necessity for a health emergency exception is undisturbed.

<sup>6</sup> *Stenberg v. Carhart*, 530 U.S. 914 (2000). The Court also found the law to be an undue burden on a woman's right to choose a pre-viability abortion, because the ban's language was so broad it could have outlawed the most common of procedures used as early as the 12th week of pregnancy.

<sup>7</sup> *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. \_\_\_, No. 04-1144, p.1 (Jan. 18, 2006).

<sup>8</sup> *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. \_\_\_, No. 04-1144, p.5-6 (Jan. 18, 2006).

<sup>9</sup> *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. \_\_\_, No. 04-1144, p.9 (Jan. 18, 2006).

<sup>10</sup> Dan Gorenstein, *Parental Notification Law Faces Challenge*, New Hampshire Public Radio (Nov. 17, 2003), at <http://www.nhpr.org/node/5396>.

<sup>11</sup> *Abortion Law Was Dangerous*, PORTSMOUTH HERALD, Dec. 31, 2003, at <http://www.seacoastonline.com/2003news/12312003/opinion/68065.htm>.

<sup>12</sup> Dan Gorenstein, *Court Takes Up State's Parental Notification Law*, New Hampshire Public Radio (May 23, 2005), at <http://www.nhpr.org/node/8861>.

<sup>13</sup> Kaiser Daily Reports, *In the Courts: Planned Parenthood Affiliate, ACLU, Health Providers to File Suit To Block New Hampshire Parental Notification Abortion Law*, (Nov. 19, 2003), at [http://www.kaisernetwork.org/daily\\_reports/rep\\_index.cfm?DR\\_ID=20932](http://www.kaisernetwork.org/daily_reports/rep_index.cfm?DR_ID=20932) (quoting FOSTER'S DAILY DEMOCRAT, (Nov. 18, 2003)).

<sup>14</sup> Samuel E. Kastensmidt, *Federal Judge Strikes N.H. Parental Notification Law*, Center on Reclaiming America, at <http://www.reclaimamerica.org/pages/NEWS/newspage.asp?story=1500>.