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3 KELLY A. AYOTTE, :

4 ATTORNEY GENERAL OF :

5 NEW HAMPSHIRE, :

6 Petitioner :

7 v. : No. 04-1144

8 PLANNED PARENTHOOD OF :

9 NORTHERN NEW ENGLAND, :

10 ET AL. :

11 -----X

12 Washington, D.C.

13 Wednesday, November 30, 2005

14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United
16 States at 11:02 a.m.

17 APPEARANCES:

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19 Concord, N.H.; on behalf of the Petitioner.

20 MR. PAUL D. CLEMENT, ESQ, Solicitor General,
21 Department of Justice, Washington, D.C.; as
22 amicus curiae, supporting Petitioner.

23 MS. JENNIFER DALVEN, ESQ., New York, N.Y.; on behalf
24 of the Respondents.

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2	MS. KELLY A. AYOTTE, ESQ.	3
3	On behalf of the Petitioner.	
4	MR. PAUL D. CLEMENT, ESQ.	19
5	As amicus curiae, supporting	
6	Petitioner.	
7	MS. JENNIFER DALVEN, ESQ.	30
8	On behalf of the Respondents.	
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1 parent, there is a judicial bypass mechanism
2 available which requires New Hampshire courts to act
3 promptly and without delay and in the best interests
4 of the minor.

5 JUSTICE SOUTER: May I interrupt you at
6 this point? Because there is one thing that I'm not
7 sure that I understand about your position, and one
8 way of reading your brief takes you a step beyond
9 what you have just said. So I would like to get
10 clear on this.

11 And I understood your argument to be that
12 given the safeguards such as judicial override, there
13 simply was no -- there was no need to read the health
14 exception in, that in fact it was taken care of --
15 any of the issues that might be raised in arguing for
16 the need for health exception in fact were addressed
17 by the statute.

18 The point at which I'm not clear on your
19 position is -- occurs in what you've said on page 11
20 of your yellow brief, if you could get that out. Do
21 you have the carry over paragraph on 11? You go
22 through the kind of a worst case analysis. And you
23 say, well, you know, assuming that all of the
24 safeguards somehow do not work, finally, in the
25 unlikely event that a parent refuses to waive the

1 48-hour waiting period and so on, a doctor who
2 performs an emergency abortion under such
3 circumstances would not be subject to either criminal
4 prosecution or civil liability because his or her
5 conduct would not only be constitutionally protected
6 but would be independently justifiable, and then you
7 cite the competing harms. What do you mean when you
8 say it would be constitutionally protected?

9 I read that as suggesting that there was
10 indeed a constitutional requirement for some kind of
11 a health exception, but that may not be what you
12 meant. What do you mean by constitutionally
13 protected? What are you getting at?

14 MS. AYOTTE: Justice Souter, in that
15 instance, we did not say that it was an independent
16 constitutional requirement that there be a health
17 exception, but certainly reading this Court's cases,
18 we should apply our act in a manner to protect if
19 that rare case arises where an emergency abortion
20 would come forward. And, if a physician were
21 prosecuted under those circumstances, we believe not
22 only would he have a statutory ability to say this
23 prosecution is inappropriate given our law, but also
24 given those rare circumstances, we do not think that
25 he, under the Constitution, may be prosecuted.

1 JUSTICE SOUTER: And if he said, "I may
2 not be prosecuted under the Constitution because,"
3 what follows "because," in your view?

4 MS. AYOTTE: I may not because New
5 Hampshire's act may not be applied in a manner to
6 ensure that if a minor in that rare circumstance
7 needs an immediate abortion, that she receives that
8 immediate medical care in those circumstances.

9 JUSTICE SOUTER: Doesn't that mean because
10 there is a required health exception? I mean, isn't
11 that what you're saying?

12 MS. AYOTTE: Justice Souter, not that
13 there is an express requirement of a health exception
14 but that the law cannot be implied in a manner to
15 infringe on the minor's health if that rare emergency
16 case arises.

17 JUSTICE KENNEDY: Your first answer to
18 Justice Souter was that the physician would say you
19 can't be prosecuted under our law. Do you mean this
20 act that we're looking at here? Or do you mean the
21 law generally including constitutional protections
22 that this Court has proclaimed?

23 MS. AYOTTE: Justice Kennedy, in that
24 limited circumstance, we do not believe that the
25 physician would be prosecuted under our parental

1 notification act, given that there is a mechanism --

2 JUSTICE KENNEDY: Because of the text of
3 the act or because of some policy that the attorney
4 general would follow in order just to decline to
5 prosecute? We want to know what this act says in the
6 instance posed by Justice Souter.

7 MS. AYOTTE: Justice Kennedy, with
8 respect to the act itself, assuming it were a life --
9 excuse me, a health emergency short of a
10 life-threatening emergency, where a minor did not
11 want to notify her parents and assuming those
12 situations came forward and someone was unable to
13 reach a judge, the act itself provides a mechanism in
14 it that anticipates providing a judge where
15 necessary, and so that would be the ability of a
16 minor in those circumstances to seek a judge.

17 But if for some reason all of those
18 situations came together and the minor could not seek
19 a judicial bypass in those instances, there is an
20 existing provision of New Hampshire law, our
21 competing harms defense, that we believe protects the
22 physician in those circumstances.

23 JUSTICE BREYER: Let's just imagine a real
24 circumstance. A 15 year-old walks in 2:00 in the
25 morning on Saturday into the emergency room and the

1 doctor looks at her, she's pregnant, she has this
2 very high blood pressure, whatever. And the doctor
3 thinks to himself, he thinks, well, immediate
4 abortion, no question, immediately deliver the child.
5 If I don't, I don't think she's going to die but
6 she'll never have children.

7 And he's thinking that. What's supposed
8 to happen? He calls up Pam Pevagoglio or Pam
9 Livingston and there is no answer. It's 2:00 in the
10 morning and there is one of those things, leave a
11 message, okay? Should I call your parents? No.
12 They don't know I'm pregnant. Now, what's supposed
13 to happen?

14 MS. AYOTTE: Justice Breyer, the
15 physician in those instances could perform the
16 immediate abortion.

17 JUSTICE BREYER: It doesn't say that in
18 the statute. It suggests the contrary. So what is
19 the particular provision of New Hampshire law that
20 tells that -- I mean, the doctor -- all these things
21 are, you know, questions of probability. And he
22 doesn't want to risk being prosecuted and he doesn't
23 want to risk losing his license. And so what
24 particular provision -- he happens to have his lawyer
25 with him.

1 (Laughter.)

2 JUSTICE BREYER: What does the lawyer say?
3 Okay? What's the provision that saves him? There is
4 no health exemption in this statute.

5 MS. AYOTTE: Your Honor, his lawyer
6 would advise him, in those circumstances, that the
7 competing harms defense would protect his actions
8 because he needs to act urgently necessary -- in an
9 urgently necessary circumstance.

10 JUSTICE O'CONNOR: Would it protect him
11 from a civil damages action as well as prosecution in
12 a criminal case?

13 MS. AYOTTE: Justice O'Connor, by the
14 plain language of the competing harms defense, it
15 also precludes civil liability. I would also say that
16 that lawyer would also advise him, if given the
17 opportunity, the attorney general is prepared also to
18 issue an opinion describing the applicability of the
19 competing harms defense in this very rare
20 circumstance, should it arise.

21 JUSTICE BREYER: How do we know? I mean,
22 what you're saying is fine, but how do we know that
23 that's actually the law? I mean, there are a lot of
24 people who absolutely in very good faith would say
25 that it isn't competing harm. They would say that

1 the competing right that the life of the fetus is more
2 important than the possibility of the mother having
3 children in the future herself.

4 See, there are people in good faith on
5 both sides of this argument. And so how do we know
6 that the New Hampshire statute is going to do -- not
7 the statute, but your competing harms defense is
8 going to do for this particular woman what a health
9 exception would do?

10 MS. AYOTTE: Justice Breyer, because
11 the harm that is being weighed here is the harm of
12 urgently providing care to this minor who needs it,
13 as opposed to the harm that the act is trying to get
14 at, which is notification of parents. It's not
15 whether or not the minor can have an abortion. The
16 minor can always go forward and have an abortion
17 under these circumstances.

18 So people aren't weighing the right of the
19 fetus, in this instance, to the right of the mother's
20 health. So the weighing is quite easy. And if given
21 the opportunity, my office would be prepared to issue
22 an opinion as to the applicability of this defense.

23 JUSTICE GINSBURG: But, your opinion --
24 that's the real problem here for the doctor who is on
25 the line. And you said the lawyer would say, oh,

1 you've got this defense of -- what do you call it harm --

2 JUSTICE SOUTER: Competing harm.

3 JUSTICE GINSBURG: Competing harms, a defense --

4 I think that a lawyer who cares about his client

5 would say, defense is not what we want. What we want

6 is there is no claim, not that you have to put up a defense

7 and maybe the attorney general will give us a

8 letter saying that we come under that defense.

9 Wouldn't a careful lawyer say, what you need to be

10 protected is that there is no claim for doing what

11 you're doing?

12 MS. AYOTTE: Justice Ginsburg, in the

13 Simopoulos case considered by this Court, one of

14 the issues that was raised was a medical -- the

15 physician was prosecuted for performing an abortion

16 outside the parameters of the Virginia act. And the

17 physician failed to raise a medical necessity defense.

18 This Court held that that was sufficient prosecution,

19 that that was okay. And this would work the same way.

20 Once the physician raises a competing harms defense --

21 JUSTICE STEVENS: General, may I just point

22 this -- suppose the lawyer or the doctor are aware of

23 the legislative history and say, well, generally that's

24 true. But when you have a legislative history that

25 suggests that the legislature considered this very

1 defense and rejected it in the statute, would then that
2 then give them some concern?

3 MS. AYOTTE: Justice Stevens, the
4 legislative history -- there certainly was some
5 indication that the legislature did not want a
6 general health exception. There is no indication in
7 the legislative history that the legislature intended
8 to preclude this narrow category of cases which
9 constitute emergency cases short of that.

10 JUSTICE STEVENS: But if they discussed
11 the issue on the floor of the legislature, why
12 wouldn't they have drafted the precise protection
13 they thought appropriate?

14 MS. AYOTTE: Your Honor, when they
15 discussed the history on the floor of the House and
16 Senate, they felt that it protected for emergencies
17 and there was no discussion of this narrow category
18 of cases short of death.

19 JUSTICE SCALIA: And you have another
20 point here, don't you, about how general this statute
21 is. We don't normally interpret statutes this way,
22 that they are totally invalid if any application of
23 them would be unconstitutional. That's not what we do
24 with statutes normally, is it?

25 MS. AYOTTE: Justice Scalia, no. In

1 fact, the analysis, if you look at this one potential
2 application, this -- the standard applied by the
3 Court of Appeals in this case goes well beyond even a
4 substantial overbreadth test that is applied by this
5 Court in the first amendment context.

6 JUSTICE SCALIA: In the first amendment.

7 CHIEF JUSTICE ROBERTS: Am I right in
8 reading your briefs that you don't object to a
9 pre-enforcement challenge to the bypass procedure
10 itself brought by physicians, for example?

11 MS. AYOTTE: Mr. Chief Justice, no, we
12 do not object in that sense. We think that is a very
13 good mechanism to bring forth a case given that this
14 Court has granted third-party standing to physicians
15 to resolve these types of claims. And teh benefit --

16 CHIEF JUSTICE ROBERTS: And I gather that
17 the debate on the evidence and the circumstances that
18 might arise in that case would be quite similar to
19 the debate in the present context. In other words,
20 there would be the same discussion between the
21 different physicians about what emergencies arise and
22 in what circumstances and whether that creates a
23 problem and whether you can get to the courts in time
24 and so on. It would be the same underlying sort of
25 evidence that we have here, right?

1 MS. AYOTTE: Mr. Chief Justice, it
2 would, but it would be much more narrowly focused in
3 terms of bringing it as an as-applied challenge, this
4 was brought --

5 JUSTICE GINSBURG: How would it be
6 as-applied? Look at your reply brief at page 3. And
7 you've made it very clear, and I think that it is helpful
8 that you did, that there could be this pre-enforcement
9 action by doctors who would not have to wait until faced
10 with an actual medical emergency to bring the suit.

11 You've talking about this small category of
12 cases, but I take it from what you have read -- what the
13 lines I've just read, that you envision a doctor who says,
14 sooner or later, I'm going to have such a case. Right
15 now, I don't know and I can't know until it's too late to
16 come to any court, so I'm going to bring this
17 pre-enforcement which you characterized as-applied. But I
18 don't see how its as-applied, if if the physician just
19 says, as you put it, I don't have to wait until faced with
20 an actual medical emergency to bring this suit. So what
21 is the relief, what is the lawsuit that you envision would
22 be proper?

23 MS. AYOTTE: Justice Ginsburg, the
24 lawsuit would be a pre-enforcement as-applied
25 challenge and the physician would bring the claim and

1 would say, as applied to me, I perform abortions, I
2 also perform abortions on minors. I need to perform
3 an abortion in these emergency settings. The court
4 can issue an order, presuming it's not satisfied with
5 the protections that are set forth in New Hampshire
6 law that I've described.

7 JUSTICE GINSBURG: Could you do that as a
8 class action?

9 MS. AYOTTE: Depending on the
10 circumstance, he may be able to.

11 JUSTICE GINSBURG: What is the
12 circumstance? All you said here is there could be a
13 pre-enforcement challenge by doctors who would not have to
14 wait until faced with an actual medical emergency.

15 MS. AYOTTE: Justice -- I'm sorry.

16
17 JUSTICE STEVENS: Why isn't that this
18 case? I don't understand.

19 JUSTICE GINSBURG: Yes, exactly.

20 MS. AYOTTE: Justice Stevens, this is
21 not this case because this case was brought as a
22 facial challenge. Our entire act was struck down
23 based upon that one potential --

24 JUSTICE STEVENS: You mean he has to bring the
25 as-applied challenge when he has the patient in

1 his office? He has to wait until he has the patient
2 in the office, is that what you mean?

3 MS. AYOTTE: No, he doesn't. He can
4 bring it before the patient is in his office and then
5 the court could issue relief which would be much more
6 consistent with the principles of certainly separation of
7 powers and allowing the overwhelming number of our
8 applications of our statutes that are valid to go
9 forward.

10 JUSTICE SCALIA: We're talking about a
11 lawsuit which asks for declaration, not that the
12 entire statute is invalid. But that, when faced with
13 an emergency of the sort that this discussion has
14 addressed, the physician can go ahead and perform the
15 abortion?

16 MS. AYOTTE: That's correct, Justice
17 Scalia.

18 JUSTICE SCALIA: Quite a different lawsuit
19 from this one.

20 MS. AYOTTE: That's quite a different
21 lawsuit and a lawsuit that would be certainly, from
22 the State's perspective, would allow the overwhelming
23 number of applications of this statute where there is
24 no dispute that it works well, to go forward.

25 JUSTICE STEVENS: But in Justice Scalia's

1 case, would not the reason for that relief have to be
2 a finding that the statute is unconstitutional? You
3 can't just grant the relief because you think it's a
4 good idea.

5 MS. AYOTTE: Justice Stevens, it would
6 be only in the context of that one particular
7 application as applied to that physician, which would
8 have stare decisis --

9 CHIEF JUSTICE ROBERTS: It would be a
10 finding that the bypass procedure is inadequate which
11 doesn't necessarily implicate the general
12 notification provisions.

13 MS. AYOTTE: Mr. Chief Justice, that
14 would be the case. And certainly if that one
15 application, in that one potential rare case was
16 found not to be valid, then the remainder of the
17 applications can go forward. And that is how most
18 cases work with respect to as-applied relief.

19 JUSTICE GINSBURG: Then I think what you're
20 saying essentially is that the First Circuit was concerned
21 with this category, wanted to give pre-enforcement relief
22 to the physician, so what they did was write except that
23 they should have said this statute is not
24 enforceable where there is a risk to the woman's health
25 and it cannot be applied in any such cases. Where there

1 is a risk to the health, then the statute is okay.

2 MS. AYOTTE: Justice Ginsburg, the
3 First Circuit went well beyond because it focused on
4 a general health exception, they've now focusing it on an
5 emergency exception. But certainly the relief should
6 have been as-applied. If I may reserve the rest of
7 my time for rebuttal?

8 JUSTICE O'CONNOR: Did you ask that the
9 relief ordered below be more restrictive? Was that
10 challenged after the judgment was entered?

11 MS. AYOTTE: Justice --

12 JUSTICE O'CONNOR: Did the Court below
13 have a chance to consider tailoring it more narrowly,
14 as you suggest today?

15 MS. AYOTTE: Justice O'Connor, we did
16 raise the application of the severance clause below,
17 although the court, both at the district court level and
18 the First Circuit appeared to look at the -- the lack
19 of a general health exception as a per se
20 constitutional problem that rendered the statute as a
21 whole invalid.

22 JUSTICE O'CONNOR: I just am not clear to
23 what extent you really raised the possibility with
24 the court below of carrying its judgment more
25 narrowly as you're suggesting today should be done.

1 MS. AYOTTE: Your Honor, we certainly
2 raised the severance issue in the district court.

3 JUSTICE GINSBURG: You've used this word
4 severance now twice. Severance is I excised a clause
5 from the statute, but you're not asking for that. It's
6 not severance. There is no provision to be severed
7 here. It's putting a caret mark and adding something to
8 it. Not taking out any provision, but putting in an
9 additional provision.

10 MS. AYOTTE: Your Honor, you're
11 correct. What our position is is that they did not
12 meet the standard that they should have been able to
13 meet for a facial challenge, which would grant
14 as-applied relief which would only be invalid in that
15 one potential application. If I may reserve the rest
16 of my time, with all due respect.

17 JUSTICE ROBERTS: Thank you, General.
18 General Clement, we'll hear now from you.

19 ORAL ARGUMENT OF PAUL D. CLEMENT
20 AS AMICUS CURIAE, SUPPORTING PETITIONER

21 GENERAL CLEMENT: Mr. Chief Justice and
22 may it please the Court:

23 Respondents elected to bring a facial
24 challenge to New Hampshire's statute and succeeded in
25 their goal in enjoining the statute in all its

1 applications. Despite the facial nature of their
2 challenge, however, they do not contend that the
3 statute is invalid in all or even a large fraction of
4 its applications.

5 JUSTICE SOUTER: Well, that was true in
6 Casey.

7 GENERAL CLEMENT: No, I don't think it
8 was, with respect, Justice Souter. This Court found
9 as to the spousal notification critically, that there
10 was a large fraction of the applications of the
11 statute that would give rise to the constitutional
12 problem.

13 JUSTICE SOUTER: Well, we may argue about
14 what the fraction may be and we may argue about what
15 substantiality means. But one thing I don't think we
16 can argue about is that Casey was applying the
17 Salerno standard.

18 GENERAL CLEMENT: Well, two things,
19 Justice Souter. I think, first of all, this case has
20 come up postured as being about a choice between
21 Salerno and the large fraction test. And I think in
22 some points, based on the way respondents have
23 approached the case, that's become largely beside the
24 point.

25 At footnote 13 of their brief, they could

1 not be more clear, that they are not here contending
2 that the statute is invalid in a large fraction of
3 their applications. They instead are embracing a per
4 se rule that if the statute does not have a health
5 exception or an emergency exception clear on its face,
6 it is void in its entirety.

7 JUSTICE SOUTER: Once again, that may be,
8 but after Casey, I don't think one can plausibly
9 argue that the Salerno standard is the correct
10 standard. Whatever their position may be, whatever
11 fractions of substantiality may mean.

12 GENERAL CLEMENT: Well, I understand
13 that's your position, Justice Souter, given that you
14 joined Justice O'Connor's separate separate writing in
15 the Fargo case. I think, however, that I read the
16 opinion in Casey and I see the large fraction
17 analysis only in the spousal notification context.

18 JUSTICE SOUTER: But why would we have a
19 separate rule on facial challenges merely for spousal
20 notification?

21 GENERAL CLEMENT: Well, I can think of
22 two reasons, Justice Souter. First of all,
23 because this Court applied the no set of
24 circumstances test in Akron II to a parental
25 notification statute, this Court in Casey may not

1 have wanted to overrule Akron II to that extent.

2 Second of all, I think this Court, in that
3 very passage about the large fraction test,
4 specifically distinguished spousal notification
5 provisions from parental notification provisions.

6 JUSTICE KENNEDY: Suppose I were to
7 conclude that under Casey, this fraction test applies
8 to this case. Suppose I were to say that Salerno
9 should not be applicable in this case. How should I
10 rule in this case?

11 GENERAL CLEMENT: You should clearly rule
12 in the State's favor. And the respondents have
13 really given you no choice because they aren't even
14 arguing that a large fraction of the applications of
15 the statute are invalid.

16 What you have before you is really a case
17 where it's literally a one in a thousand possibility
18 that there is going to be an emergency where the statute
19 will operate. And the real question for you is
20 faced with that kind of case. Do you invalidate 1,000
21 applications of this statute noting that 999 of
22 them are constitutional?

23 JUSTICE KENNEDY: Could the plaintiffs have
24 filed a narrower action attacking the adequacy of the
25 bypass procedure?

1 GENERAL CLEMENT: Absolutely. And they
2 also could have -- what I think I would envision
3 them filling is an even narrower provision that
4 seeks a pre-enforcement declaration, kind of like
5 Steffel against Thompson would be the model, that say
6 that this statute can apply in an emergency situation.

7 JUSTICE BREYER: Now, that's exactly --
8 I'm leaving aside your fraction test, your 100
9 percent test, because I don't think they capture all
10 the considerations that are relevant. Focus on what
11 you just said. What you've done is you've tried to
12 create an injunction that will separate out the sheep
13 from the goats, all right? The goats are only
14 1 percent and the sheep -- But what does it say? I
15 don't think you can say enjoin the bypass procedure,
16 because if you enjoin the bypass procedure, there goes
17 down the drain your whole parental notification because
18 you can't have parental notification without a bypass
19 procedure.

20 I don't think you can say enjoin
21 emergencies because to do that, you're going to have
22 to get into the greatest difficult issue there is in
23 this area, which is what does that health exception
24 mean. And we've said throughout that that health
25 exception has to be defined first by a legislature.

1 So if you tell me how to write that
2 injunction, then I'll be able to decide whether it's
3 possible for a court just to say, okay, we only
4 enjoin the goats as opposed to saying, legislature,
5 this is basically up to you, the whole area.

6 GENERAL CLEMENT: And Justice Breyer, I
7 would say the court has some discretion in how it
8 formulates that order. It would basically say that
9 this statute is not constitutional as applied to
10 those emergency situations.

11 JUSTICE BREYER: Well, but that's --
12 And if I could just say, it's no
13 different than Steffel against Thompson. There is a
14 case where there is a challenge against a broad
15 criminal trespass statute. The theory in Steffel
16 was not that the whole criminal trespass statute was
17 unconstitutional. It was it's unconstitutional if you
18 apply it to leafletting. And Justice Brennan for a
19 unanimous Court said, yes, that's exactly the kind of
20 challenge you can bring. And you can get declaratory
21 judgment that says you can't do that, you can't apply
22 the statute as to leafletting. But you don't strike
23 down the entirety of the criminal trespassing statute.

24 JUSTICE BREYER: The word leafletting is
25 not as fuzzy around the edges as health exception,

1 given the fact that lots of people think health
2 exception is a way of getting abortion on demand.

3 JUSTICE SCALIA: Do you agree with Justice
4 Breyer that the legislature can draw this with more
5 precision than a court could?

6 GENERAL CLEMENT: No, I don't Justice Scalia.

7 JUSTICE SCALIA: I mean, that seems to be
8 a solution, that the legislature can make it precise,
9 although a court could not.

10 GENERAL CLEMENT: I think the court could
11 issue any order a legislature could issue. And I
12 think the fact that the court would have some
13 discretion is an answer to the argument that, oh,
14 well, if you leave this to the courts, you're cutting
15 the legislature out of this. I think that --

16 JUSTICE SOUTER: Why wouldn't it be an
17 abuse of discretion in this case? Because there
18 seems to be an ample record here that the
19 legislature, or a majority of the legislature made a
20 conscious choice that they would rather have no
21 statute than a statute with a health exception in it.
22 They deliberately said the only statute we want is
23 one without a health exception.

24 Therefore, even if you touch all the bases
25 that Justice Breyer has laid out, don't you end up

1 with a position that if we were to craft such a
2 limitation, we would be flying quite precisely in the
3 face of the expressed legislative intent.

4 GENERAL CLEMENT: I don't think that's
5 right, Justice Souter and I think it's because you
6 have to be careful. I think it's easy to use loose
7 language about a health exception. And I think if
8 you looked at the First Circuit opinion, they seem to
9 suggest there needs to be a health exception. And I
10 think in the context of a parental notification
11 statute, a health exception as opposed to a narrow
12 exception for emergencies is a non --

13 JUSTICE SOUTER: Whatever you call it,
14 call it a health exception, call it an XYZ exception.
15 They knew what they were getting at, they knew what
16 they were worried about and they said, we will have a
17 statute without it or we will have no statute.

18 GENERAL CLEMENT: With respect, Justice Souter,
19 I think they were --

20 JUSTICE SCALIA: I thought there was a separate
21 severability. Didn't it have a severability provision?

22 GENERAL CLEMENT: They did and it's extreme
23 severability.

24 JUSTICE SCALIA: And so it said just the
25 opposite. It said just the opposite, that if the

1 health exception is no good, the rest of the statute
2 would survive. Isn't that basically --

3 GENERAL CLEMENT: I think that's right Justice
4 Souter -- Justice Scalia --

5 JUSTICE SOUTER: I don't know how you
6 would sever a health exception that is not there.
7 They're saying if something is in here, you can sever
8 it and we'll be satisfied with what's left. In
9 effect, if we were to enjoin certain applications, we
10 would be injecting an exception that they've
11 rejected. And whatever that may be, it does not seem
12 to be severance.

13 GENERAL CLEMENT: Two answers, Justice
14 Souter. First of all, I think that if you look at what
15 the New Hampshire legislators were concerned about,
16 they were concerned about a broad health exception
17 that would undermine the statute, not an emergency
18 exception.

19 As to the severability point, I think in
20 some respects, severability is the wrong way of
21 looking at it. In the context of as-applied
22 challenges, this Court has not rigorously said that
23 you look at the applications and see whether they're
24 severable. The idea is that a statute is not
25 constitutional in certain applications.

1 But the New Hampshire legislature I think
2 was -- even had the belt and suspenders to worry about
3 that if you had a different view of that, it's the view
4 that actually Justice Thomas embraced in his Booker
5 opinion, that actually you do look at severance when you
6 do applications. The New Hampshire legislature
7 couldn't have been clearer, because they said not
8 only do you sever the provisions, but sever the
9 applications. We want to save as much of this statute
10 as we can.

11 JUSTICE GINSBURG: The end of the statute
12 doesn't say that. The end of that provision says
13 sever a provision.

14 GENERAL CLEMENT: You're right, Justice
15 Ginsburg, but I don't think you look only at the end
16 of the statute. It clearly says, if any provision of
17 this subdivision or the application thereof to any
18 person or circumstance is held invalid, such
19 invalidity shall not affect the provision or
20 applications of this subdivision which can be given
21 effect without invalide - sorry -- provisions or
22 applications.

23 It seems like they had this case in mind,
24 that there were circumstances in which perhaps some
25 court would say it was unconstitutional to apply it

1 and that's not a basis to strike down the whole
2 statute.

3 JUSTICE GINSBURG: General Clement, there
4 is usually great caution on the part of the Court
5 from tampering with the statute. So excision is one
6 thing. You just drop a provision. That's not possible
7 here. The Court has been extremely reluctant about caret
8 marks, which is what -- there is no problem with what the
9 legislature did. It just didn't do enough. So the court
10 would have to add a provision. Not subtract. There is
11 nothing to subtract. There's an addition and courts have
12 been reluctant to do that. They feel much more
13 comfortable cutting something out than putting
14 something in.

15 GENERAL CLEMENT: With respect, Justice
16 Ginsburg, I don't think that accurately describes the
17 way the courts have approached as-applied cases.
18 They often hold statutes unconstitutional as applied.
19 Think of Wisconsin against Yoder. This Court said that
20 a general compulsory education statute didn't apply
21 to the Amish. It's just unconstitutional as applied.
22 They didn't think, boy, you know, the Wisconsin
23 legislature didn't expressly put in an exception --

24 JUSTICE GINSBURG: Nobody asked them to do
25 anything other than that.

1 GENERAL CLEMENT: Well, I think that's
2 true, Justice Ginsburg, but it just shows that that's
3 the way that this Court approaches as-applied cases.
4 It's not a matter of reading something in. its saying
5 the statute doesn't apply. Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 General. Ms. Dalven, we'll hear now from you.

8 ORAL ARGUMENT OF JENNIFER DALVEN

9 ON BEHALF OF RESPONDENTS

10 MS. DALVEN: Mr. Chief Justice and may it
11 please the Court:

12 The unfortunate reality is that some
13 pregnant teens experience medical emergencies for
14 which the appropriate care is an immediate abortion.
15 As the nation's leading medical authorities have
16 explained, delaying appropriate care for even a very
17 short period can be catastrophic and puts the teen at
18 risk for liver damage, kidney damage, stroke and
19 infertility.

20 JUSTICE KENNEDY: Suppose I am concerned
21 that the record doesn't explain to me one way or the
22 other whether or not your and the medical
23 profession's definition of immediate allows time to
24 make one telephone call to a judge.

25 MS. DALVEN: Your Honor, several

1 responses. First, the undisputed evidence here is
2 that women in some emergencies, every minute is
3 critical. Every minute puts them at risk of losing
4 their future fertility and of major organ damage.
5 That is confirmed by the nation's leading medical
6 authorities which say that there is - that even very
7 short delays --

8 JUSTICE KENNEDY: Well, there can be
9 nurses or attendants that can get the judge on the
10 line.

11 MS. DALVEN: Yes, Your Honor. Two
12 responses. First, the procedures that we submitted
13 in our supplemental brief that were approved by the
14 New Hampshire Supreme Court made quite clear that
15 there is no procedure for getting the judge on the
16 phone. And in addition, any delay --

17 JUSTICE KENNEDY: Well, I've looked at
18 those procedures and it seems to me that those are
19 interpreted as what should happen in the ordinary
20 case. They certainly don't preclude making a phone
21 call and there can be phone calls for warrants in
22 criminal cases in New Hampshire. That's specifically
23 provided.

24 MS. DALVEN: Yes, Your Honor, but I
25 believe that as Justice Breyer pointed out, if this

1 emergency happens on a Saturday, there is no
2 provision whatsoever for the minor. In addition --

3 JUSTICE KENNEDY: The problem was, it
4 seems to me, that the bypass procedure can go a long
5 way toward saving this statute, but this was not
6 litigated in the trial courts. We don't know what
7 New Hampshire's position is going to be. We don't
8 know what the facts are.

9 MS. DALVEN: Your Honor, I think what is
10 quite clear from all the briefs is that once a minor
11 arrives in the emergency room, it is too late for her
12 to go to court. There is, as we said, every minute
13 is critical and any delay from the time that the
14 doctor faces a pregnant teen, determines that she
15 must have an immediate abortion, any delay from that
16 point forward puts the minor's health at risk.

17 JUSTICE SCALIA: Counsel, Surely not the delay
18 for a quick phone call. Let's assume New Hampshire sets
19 up a special office open 24 hours a day and this is
20 the abortion judge, and he can be reached any time
21 anywhere. It takes 30 seconds to place a phone call.

22 MS. DALVEN: Yes, Your Honor.

23 JUSTICE SCALIA: This is really an emergency
24 situation? I guess if that's the case, the doctor better
25 not put on his gloves.

1 MS. DALVEN: No, Your Honor, I think then that
2 the question would be what would be the purpose in
3 such a statute if all you had to do was literally
4 call a number and the judge would say, okay. If the
5 judge had no time -- the nurse had no time to
6 relay the facts, the judge had no time to ask any
7 questions, the judge had no time to consider the
8 evidence or look at the law, there is a real question
9 about what potential purpose there could be of
10 requiring even that small delay before a minor gets
11 the immediate treatment she needs.

12 JUSTICE KENNEDY: The purpose is to save
13 the statute which has thousands of applications that
14 are valid.

15 MS. DALVEN: But Your Honor, I don't think
16 that putting a teen's health at risk, respectfully,
17 is -- I don't think saving a statute is worth putting
18 a teen's health at risk.

19 CHIEF JUSTICE ROBERTS: Counsel, if your
20 objection goes to the adequacy of the bypass
21 procedure, what is wrong with a pre-enforcement
22 challenge by physicians, presumably with standing,
23 challenging the bypass procedure? Why should you be
24 able to challenge the act as a whole if your
25 objection is so narrowly focused?

1 MS. DALVEN: Two points, Chief Justice
2 Roberts. First is that our objection isn't to the
3 bypass process. We believe that there would be --
4 regardless of how good the procedures the New
5 Hampshire Supreme Court set up, there would still be
6 inherent delay between the time a doctor diagnoses
7 a patient and the time they get to court and get
8 the order. So it's not a problem with the judicial
9 bypass.

10 The second question --

11 CHIEF JUSTICE ROBERTS: But it's a problem
12 that arises only in the emergency situations.

13 MS. DALVEN: That's correct.

14 CHIEF JUSTICE ROBERTS: So bring in a
15 pre-enforcement challenge concerning compliance with
16 the act in emergency situations. Why does that even
17 implicate the vast majority of the cases that don't
18 create emergency situations?

19 MS. DALVEN: As Justice Ginsburg pointed
20 out, we believe that is this case. There is nothing
21 between this case -- different between this
22 case --

23 CHIEF JUSTICE ROBERTS: This case doesn't
24 involve an emergency situation. This is a facial
25 challenge. There is no case at issue at all.

1 MS. DALVEN: Your Honor, the State
2 conceded a pre-enforcement challenge brought by a
3 doctor before any particular patient was at risk
4 would be proper.

5 JUSTICE O'CONNOR: Well, but what resulted
6 here, it was the invalidation of the entire statute and
7 all of its applications? Is that how it now stands?

8 MS. DALVEN: That believe is how --

9 JUSTICE O'CONNOR: Okay, so the question
10 you're being asked is, how can that be narrowed in some
11 fashion to focus on the problem? The statute may
12 well have a majority of valid applications. So how
13 can we narrow the application? And what of our
14 doctrines allow a narrower application? So you need
15 to focus on that. Obviously, it's a matter of
16 concern.

17 MS. DALVEN: Sure. I think this
18 Court in Casey addressed that consideration. And
19 Casey was essentially this case, a pre-enforcement
20 challenge brought to the adequacy of the medical
21 emergency exception. And this Court held that if the
22 law prohibited an immediate abortion for some of the
23 very same conditions we outline here, it would have
24 been unconstitutional.

25 CHIEF JUSTICE ROBERTS: That's because the

1 Court explained the inadequacies it identified were
2 present in the large fraction of cases. We don't know
3 if that's true here.

4 MS. DALVEN: Respectfully, Your Honor, not
5 with respect to the medical emergency exception. I
6 think that was true with respect to the spousal
7 notice provision, but not at all with respect to the
8 medical emergency exception.

9 In this case, it was -- we're talking about
10 the same conditions that were in Casey and here as well.
11 And actually here there were additional considerations
12 because in Casey, there was a medical emergency
13 definition that extended to some health threatening
14 circumstances and here there is none.

15 JUSTICE GINSBURG: So why wouldn't it be
16 entirely adequate to protect what you're concerned
17 about to say this New Hampshire statute is
18 unconstitutional to the extent that it fails to
19 provide an exception for situations where there is
20 imminent danger to health, and then all those
21 immediate dangers to health situations would be left
22 unregulated. The statute doesn't reach them.

23 But nonemergency cases would continue to
24 be governed by the statute. Why couldn't -- in other
25 words, why wasn't that the appropriate judgment for

1 the First Circuit to have entered in this case, to
2 say statutes fine for nonemergency cases, but for
3 emergency cases, there is effectively no law?

4 MS. DALVEN: Your Honor, that would solve
5 the constitutional problem in this case, but I
6 believe it is not the best course for three reasons.
7 First, as this Court has already discussed, the States
8 around the country have adopted at least 10 different
9 medical emergency definitions. And this Court has no
10 way to know which if any of those formulations --

11 JUSTICE GINSBURG: But you wouldn't
12 have -- it would be that the emergency is not
13 regulated. The private doctors can act in a medical
14 emergency. They are not controlled by any
15 legislation.

16 MS. DALVEN: Yes, Your Honor. But many of
17 the States -- a few States have chosen to have
18 special exceptions that just say medical emergency.
19 Most of them define --

20 JUSTICE O'CONNOR: But we're dealing with
21 New Hampshire. We have a specific case that
22 challenged New Hampshire's law. So can you focus on
23 this one?

24 MS. DALVEN: Yes, Your Honor. I think we
25 still don't know which definition New Hampshire

1 would use.

2 JUSTICE BREYER: Well, suppose it were from
3 your point of view.

4 I don't know from the other side's point of view, I
5 guess it would satisfy you to say that this statute can
6 not be enforced in any circumstance in which a
7 physician certifies in good faith that he believes an
8 immediate abortion is necessary for the health of the
9 mother. All you're looking to is the state of mind
10 of the physician.

11 Now, the problem that I think we would see
12 with that is you would then be writing into the law
13 the broadest possible definition of what that health
14 exception means. So I'm not sure the New
15 Hampshire legislator would have wanted to do it and
16 I'm not sure the other side would like to do it. But
17 looking at it from your point of view, do you have
18 any objection to it?

19 MS. DALVEN: No, that's correct, Your Honor.
20 That would solve the constitutional problem here, but
21 Your Honor is right, I think there is a significant
22 concern about whether that's what New Hampshire would
23 have done --

24 CHIEF JUSTICE ROBERTS: Well, but that
25 would be litigated in a pre-enforcement, as-applied

1 challenge. I mean, you don't assume -- the fact that
2 this narrower focused proceeding is going to be --
3 could be brought doesn't mean -- doesn't answer the
4 question of how it's going to come out.

5 But presumably the litigation would be
6 very similar to what we've seen in this case, in
7 which a doctor is saying, well, you do need an
8 immediate medical exception. Others are saying the
9 judicial bypass adequately addresses the concerns.
10 But it would be focused on the provision that is
11 causing you concern rather than the statute as a
12 whole.

13 MS. DALVEN: Your Honor, I believe that
14 that really is this case. There is nothing in the
15 complaint that says this is a facial challenge, and
16 we only want a declaration that the statute is
17 unconstitutional and enjoin it in its entirety, and
18 if we can't have that, we want nothing else. We expect
19 --

20 JUSTICE KENNEDY: But that's what happened
21 and you're here defending that judgment.

22 MS. DALVEN: Yes, Your Honor, and we believe
23 it was the proper course, but there is nothing in the
24 complaint that says that we only want a total
25 invalidation.

1 JUSTICE O'CONNOR: Then is there any
2 objection by you to remanding this thing to let it be
3 more narrowly focused?

4 MS. DALVEN: I believe it is not the
5 better course for three reasons. One is we can't
6 tell what exception the New Hampshire legislature
7 would have chosen. In addition, I think there is
8 real cause for concern about rewriting this law for
9 New Hampshire. If this Court says that that's the
10 proper course, I believe that the federal judiciary
11 will be faced with rewriting abortion law after
12 abortion law after abortion law.

13 CHIEF JUSTICE ROBERTS: Your complaint
14 asked for a preliminary and permanent injunction
15 against the act.

16 MS. DALVEN: Yes, that's right, Your
17 Honor. Also two points, though. We asked for any
18 other relief that is just and proper and we had other
19 claims that could not be solved by a more narrow --
20 by more narrow relief, we claimed that the act's
21 judicial bypass doesn't -- isn't sufficient under
22 this Court's case -- this Court's decision in Bellotti
23 II, it doesn't provide for confidentiality and then
24 there is no way to remedy that without facial
25 invalidation.

1 JUSTICE BREYER: I don't want you to agree
2 to this unless you've focused on it and think it
3 really is your position. I take it, as I'm
4 listening, that you would not object to an injunction
5 that says that this statute cannot be applied in any
6 circumstance where a doctor, in good faith, himself
7 or herself, believes that there is a health
8 emergency, period.

9 Now, I take it as soon as we get more
10 narrow than that, you might object on the ground
11 that that will leave ambiguous cases where there
12 really is a health emergency, but the doctor doesn't
13 know what to do and would have to go to court, by
14 which time it will be too late.

15 MS. DALVEN: That's right.

16 JUSTICE BREYER: Have I stated it
17 correctly? You've focused on it, thought about it,
18 stated it?

19 MS. DALVEN: I appreciate that and yes,
20 Your Honor, I have.

21 JUSTICE BREYER: Okay. Thank you.

22 JUSTICE SCALIA: What about in good faith
23 and with substantial support in sound medicine.

24 MS. DALVEN: Your Honor --

25 JUSTICE SCALIA: I mean, why should the

1 doctor who is very negligent and doesn't know what
2 he's doing, why should he be protected?

3 MS. DALVEN: Your Honor, I believe your
4 question focuses on exactly why this Court should
5 facially invalidate. It requires this Court to
6 decide additional constitutional questions --

7 JUSTICE SCALIA: It's just one more
8 condition, good faith is not enough. You can have a
9 good faith quack.

10 MS. DALVEN: Your Honor, we believe that
11 would be unconstitutional, and because it would
12 subject a doctor to going to jail for providing care
13 that he honestly believed was necessary to save a
14 patient's organs, to save a patient's future
15 fertility, to save a patient's vision. We believe
16 particularly in an area as controversial as abortion,
17 that that is inappropriate. But again, after --

18 JUSTICE SCALIA: I'm sure that's the case
19 with regard to other medical procedures, if you're
20 grossly negligent, it's a criminal offense, I'm sure,
21 in most States.

22 MS. DALVEN: I believe it's generally a
23 medical malpractice and not a ciminal liability. But
24 in any event, this is a question for the Court. And
25 in National Treasury Employees Union, this Court said

1 that we're writing more narrow relief requires the
2 Court to answer additional constitutional questions
3 not directly presented by the case, the appropriate
4 course is to facially invalidate and let the
5 legislature decide how to write the exception. We
6 believe that's the appropriate course here as well.

7 In addition, going back to the legislative
8 abdication point, we believe that facially
9 invalidating -- rewriting the law here would
10 eliminate any incentive for legislatures to pass
11 constitutional laws in the first instance.

12 This was a clear requirement. This Court
13 has said for 30 years you cannot endanger women's
14 health, you must have an exception for health
15 threatening emergencies. New Hampshire did not
16 include such an exception. And if this Court
17 rewrites it, it will in essence give a green
18 light to legislatures around the country to pass
19 broad restrictions and leave it women and their
20 doctors to go to the courts and be the full
21 defenders of the right --

22 JUSTICE GINSBURG: If the model of this
23 case, is doctors come to court, doesn't have to have
24 an actual patient class action and the court says the
25 statute cannot be applied to a medical necessity,

1 period. No fancy frills of adding another things which
2 courts generally don't do. But then there would be no
3 regulation of medical emergencies. Why isn't that what
4 -- doesn't that fit the pattern of the case you've
5 brought and couldn't the First Circuit have done that
6 and then you would have no complaint about the rest of
7 the statute?

8 MS. DALVEN: The First Circuit could have
9 done that. We did have additional claims like
10 confidentiality.

11 JUSTICE GINSBURG: Yes, I know that.

12 MS. DALVEN: But the First Circuit could
13 have done it. We believe the First Circuit was
14 correct in not doing that for the two reasons I
15 discussed and an additional reason as well.

16 As Justice Souter pointed out, we don't
17 know at all that the legislature would have passed
18 this law with a broader exception. Indeed, 153 New
19 Hampshire legislators have told this Court that there
20 is significant doubt about whether they would. And I
21 know that might be surprising to some people, but I
22 would like to explain why, in the world of abortion
23 politics, it's not at all surprising.

24 Some folks with good faith believe that any
25 exception beyond one for a life-saving emergency

1 renders a ban -- a abortion restriction meaningless.
2 And they refuse on principle to vote for any broader
3 exception, any ban, any restriction that has a
4 broader exception.

5 JUSTICE SCALIA: Then they shouldn't have
6 voted for the severability provision which clearly
7 says if, in one of its applications, it's invalid,
8 the rest can be given effect without the invalid
9 provisions. I mean, the severability provision
10 really just flatly contradicts your assertion that
11 the New Hampshire legislature wouldn't want this to
12 happen.

13 MS. DALVEN: Your Honor, a few things.
14 First, we don't believe that the severability clause
15 directs the court to sever applications. Second,
16 neither this Court nor New Hampshire courts treat
17 severability clauses as mandates. The question is
18 still whether, if there is significant doubt about
19 whether the legislature would have wanted it, they do
20 not sever, and as particularly whereas here, this
21 Court would have to make decisions for the legislature
22 about what that exception should look like.

23 JUSTICE STEVENS: May I ask this
24 historical information? Since the decision of the
25 district court and the decision of the court of

1 appeals, has the legislature considered enacting a
2 different statute that would solve the problems?

3 MS. DALVEN: They have not, Your Honor.
4 There has been no bill put forward, to my knowledge.

5 JUSTICE STEVENS: It seems to be that it
6 wouldn't have been all that hard to do. I don't know.

7 MS. DALVEN: That's right, Your Honor.
8 They could have enacted a law with a medical
9 emergency exception and we could have all gone home.

10 CHIEF JUSTICE ROBERTS: Well, maybe they
11 assumed that the medical health exception of the sort
12 you're arguing for is not constitutionally required
13 and that's what would be litigated in a narrow
14 focused challenge on the adequacy or inadequacy of a
15 bypass procedure. Maybe they assumed it would follow
16 the Salerno precedent, and they didn't have to worry
17 about severing in light of particular
18 unconstitutional applications.

19 MS. DALVEN: Perhaps that is true, Your
20 Honor, but I still believe that that is this case,
21 that there really is no different -- I mean, in
22 Casey, the plaintiffs brought a facial challenge
23 before the law took effect to the adequate --
24 challenging the adequacy of a medical emergency
25 exception.

1 And this Court indicated that if the law
2 prohibited an immediate abortion for women with the
3 conditions Dr. Goldner described in his declaration
4 here, it would have been unconstitutional and some
5 relief would have been appropriate, even though that
6 was a facial challenge and even though the alleged
7 inadequacies of the medical emergency would harm
8 relatively few women. So I don't think that there is
9 any bar to this Court if they --

10 CHIEF JUSTICE ROBERTS: Do you think the
11 statute, putting aside the medical emergency issue
12 under our precedence, is the parental notification
13 aspect of the statute constitutional?

14 MS. DALVEN: No, Your Honor. We had
15 additional claims --

16 CHIEF JUSTICE ROBERTS: Other than the
17 confidentiality?

18 MS. DALVEN: We believe we had three
19 claims, the health exception, the medical emergency
20 exception for health threatening emergencies. The
21 death exception we believe is also inadequate and the
22 confidentiality. In addition, the procedures that the
23 court issued -- the New Hampshire Supreme Court
24 approved raise an additional problem as well. So
25 there are claims in addition to the health threatening

1 emergency.

2 If there are no further questions from the
3 Court. Thank You.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 Counsel. The case is submitted.

6 (Whereupon, at 11:53 a.m., the
7 above-entitled case was submitted.)

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