04-1144

IN THE

Supreme Court of the United States

KELLY A. AYOTTE, Attorney General of the State of New Hampshire, in her Official Capacity,

Petitioner,

—v.—

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, CONCORD FEMINIST HEALTH CENTER, FEMINIST HEALTH CENTER OF PORTSMOUTH, and WAYNE GOLDNER, M.D.,

Respondents.

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

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Was the First Circuit Court of Appeals correct in holding that a law that requires minors to delay their abortions must contain a medical emergency exception for circumstances when the delay will undisputedly put minors' health in serious jeopardy?

2. Was the First Circuit Court of Appeals correct to strike New Hampshire's Parental Notification Prior to Abortion Act in its entirety where such relief is the only way to effectively remedy the constitutional violation without invading the province of the Legislature?

STATEMENT PURSUANT TO RULE 29.6

The disclosure required pursuant to Supreme Court Rule 29.6 is set forth in Respondents' Brief in Opposition to the Petition for Certiorari. There are no amendments.

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STATEMENT OF THE CASE

In 2003, the New Hampshire Legislature passed the Parental Notification Prior to Abortion Act (the "Act"). N.H. Rev. Stat. Ann. §§ 132:24-28 (2003) (Joint Appendix (hereinafter "J.A.") 15-20). On pain of criminal and civil penalties, the Act bans performance of an abortion for a minor unless the physician provides at least forty-eight hours advance notice to one of the minor's parents. Act § 132:25, I. The only circumstances in which the physician need not comply with this requirement are: 1) if the minor's parent has provided a written certification that he or she has been notified; 2) if the minor has gone to court and obtained a waiver of the notice requirement through the judicial bypass procedure; or 3) if the physician can "certif[y]" that an "abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice." Act § 132:26. The Act provides no exception for medical emergencies in which delaying an abortion will cause serious medical damage short of imminent death.

The undisputed record in this case, however, establishes that some pregnant minors experience medical emergencies that will not cause imminent death but that nonetheless require immediate abortions to prevent severe and permanent harm to their health. Respondent Dr. Wayne Goldner – a New Hampshire obstetrician and gynecologist – submitted an uncontested declaration providing examples of such conditions.[1] As set forth in his declaration, those emergency

[1] Dr. Goldner is board certified by the American Board of Obstetricians and Gynecologists, a fellow in the American College of Obstetricians and Gynecologists, and a past chair of the Department of Obstetrics and Gynecology at Elliot Hospital, where he continues his hospital-based

conditions include preeclampsia, which is "a form of pregnancy-induced hypertension"; chorioamnionitis, which is "a serious infection of the placental lining"; other pelvic infections; and heavy bleeding from the uterus. Goldner ¶¶ 8-14 (J.A. 23-26). As Dr. Goldner further explained, in many such emergencies the "teen needs an immediate abortion to prevent serious harm to her health." *Id.* ¶ 7. Dr. Goldner's declaration provides a catalogue of the serious medical harm that minors face if they do not receive the immediate medical attention that is clinically indicated, including permanent damage to major organ systems, particularly the liver and kidneys; fluid in the lungs; the spread of infection throughout the body; loss of vision; permanent loss of fertility; and chronic pain. *Id.* ¶¶ 8-15. In short, these pregnant teens face the "real risk of a lifetime of . . . permanent, significant health problems" as a result of the delays inherent in complying with the Act. *Id.* ¶ 12.

In addition, the Act's death exception fails even to protect those minors in need of life-saving abortions, for reasons also set forth in Dr. Goldner's declaration. While the Act permits a physician to provide immediate care to a pregnant teenager who will otherwise die within forty-eight hours, "that is just not the way medicine works: Whether and when a patient will die

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practice. Dr. Goldner graduated from the University of Pennsylvania School of Medicine and is licensed to practice medicine by the State of New Hampshire. Goldner ¶ 1 (J.A. 21). Dr. Goldner provides his patients with the full range of reproductive health services, including prenatal care, delivery of newborns, infertility treatment, and screening and treatment for sexually transmitted infections. *Id.* ¶ 2. He also provides abortions for adults and for minors, some of whom do not involve a parent before seeking his care. *Id.* ¶¶ 2-4.

cannot be predicted with such accuracy." *Id.* ¶17; *see also id.* ¶ 19. Moreover, Dr. Goldner explained that, because the death exception does not clearly permit him to rely on his good faith medical judgment, it "forces doctors to think about criminal prosecution at a time when we need to be concentrating on doing what is best for our patients, thus creating unnecessary risk to patients' health and lives." *Id.* ¶ 19.

Summarizing the impact of the Act on his patients, Dr. Goldner stated: "I fear enforcement of the Act for my patients' sake as well as my own. . . . [It] places me in fear of prosecution for fulfilling my duty as a physician, which is to proceed with my patient's safety as my paramount concern." *Id.* ¶ 20. The State did not challenge *any* of the assertions contained in Dr. Goldner's declaration, either by way of argumentation or submission of factual evidence or expert opinion.

Based on this undisputed record, both courts below held the Act unconstitutional because its lack of a medical emergency exception endangers young women's health. App. to Pet. for Writ of Cert. (hereinafter "Pet. App.") 11-17, 24, 30-35. Both courts also held the Act unconstitutional on the additional ground that its death exception is inadequate to protect minors facing even life-threatening emergencies. *Id.* at 17-21, 35-36.

SUMMARY OF ARGUMENT

The central issue in this case is simple but profound: Can the state omit a medical emergency exception from an otherwise permissible abortion regulation, even when it is undisputed that compliance with the regulation in emergencies will result in serious medical harm? Again and again over the last thirty years, this Court has held that the Constitution bars so

endangering women's health; again and again in its brief, the State of New Hampshire asks this Court to hold that it does not. This Court should decline that invitation, affirm the Court of Appeals, and thereby reaffirm this Court's own longstanding precedent prohibiting states from jeopardizing women's health when they regulate abortion.

The Act makes it a crime for a doctor to provide an abortion to a minor until at least forty-eight hours after notifying a parent. As the State now admits, this prohibition applies even in those circumstances in which it is undisputed that the delay will cause serious and permanent damage to a woman's health, including damage to major organ systems, body-wide infection, infertility, and vision loss. Under this Court's precedent, that should end the matter.

But the State instead asks this Court to accept two radical and dangerous propositions. First, it urges this Court to abandon its steadfast protection for women's health and hold that a law that causes serious harm in medical emergencies needs no exception if the women it harms are minors and the law at issue is one requiring parental involvement. But invoking the interests underlying parental involvement laws cannot give the State license to endanger minors' health. Recognizing any such license would eviscerate the core constitutional principle repeatedly reaffirmed by this Court: Regardless of the state interest served, "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." *Planned Parenthood v. Casey*, 505 U.S. 833, 880 (1992). Indeed, if this Court were to permit the interests put forth by New Hampshire to trump a

minor's interest in protecting her health, there would be little to stop states from requiring women of all ages to sacrifice their health in the name of advancing other governmental interests.

The State's second proposal – that teens in medical crises should wait to obtain treatment until they can secure a judicial bypass – is equally devastating to teens' health and therefore equally unconstitutional. In an emergency, a woman needs to go to the hospital not a courthouse. Requiring a minor to delay appropriate care until she can secure a court order – even when it is undisputed that in certain emergencies every minute the patient remains untreated puts her at risk of serious damage to her health – is not only unconstitutional, it is inhumane. The Act's indifference to young women's well-being is also manifest in the inadequacy of its death exception.

Once it has determined that the Act's lack of an emergency exception violates the Constitution, this Court must decide what relief will effectively and appropriately remedy the constitutional violation. Here, again, the State asks this Court to treat serious harm to minors' health as constitutionally irrelevant, and to abandon clear precedent mandating such relief as is necessary to remedy that harm. First, the State argues that the Court should grant no relief at all and instead should wait until presented with a "concrete case" of a teen in the midst of a medical crisis. But by that point, it is too late to prevent the harm and, thus, to remedy the violation.

The State's only other proposal is that the Court should grant "as-applied" relief by severing the unconstitutional applications and, in effect, writing a medical emergency exception into the Act. But allowing the judiciary to decide the parameters of the medical emergency exception and engraft it

on to the Act – where the New Hampshire Legislature purposefully chose not to include one – would undermine, not further, the institutional values underlying the principle articulated in *United States v. Salerno*, 481 U.S. 739 (1987), including limited judicial power, separation of powers, and federalism. Protection of those principles, and of women's health, requires this Court to facially invalidate the Act and thereby allow the Legislature, if it so chooses, to shape a parental notification law that abides by this Court's clearly articulated, longstanding precedent.[2]

ARGUMENT

I. WITHOUT A MEDICAL EMERGENCY EXCEPTION, THE ACT ENDANGERS MINORS AND VIOLATES THE CORE OF THE RIGHT PROTECTED IN *ROE* AND *CASEY*.

In an unbroken line of cases stretching back thirty years, this Court has left no doubt that the health of the pregnant woman is at the core of the right to reproductive privacy. This Court has steadfastly held that where the regulation of abortion threatens a woman's life *or health*, other state interests must yield to her medical well-being. The State and its *amici* now ask this Court to disregard those holdings and to sanction the Act's requirement that physicians delay a minor's abortion even in emergencies in which it is undisputed that such delay threatens the minor with serious medical harm. This Court should decline that invitation, and affirm. The medical well-

[2] If the Court rejects Respondents' medically-based claims, Respondents are entitled to remand of their claim that the judicial bypass does not adequately protect minors' confidentiality.

being of pregnant women has been an essential element of constitutional liberty for more than three decades and should not be sacrificed to a "jurisprudence of doubt." *Casey*, 505 U.S. at 844.

A. Laws that Delay Access to Abortion, Including Parental Involvement Laws, Must Contain a Medical Emergency Exception.

Starting with *Roe v. Wade*, this Court has repeatedly emphasized the state's obligation to protect pregnant women's health and has struck down any abortion regulation that failed to do so, regardless of the interests otherwise served by the regulation. Thus, in *Roe*, the Court recognized both a woman's constitutional right to end her pregnancy prior to fetal viability, 410 U.S. 113, 153, 163-63 (1973), and the state's authority to enact a post-viability abortion ban if, but only if, it contained an exception to protect women's health, *id.* at 164-65. Similarly, in *Thornburgh v. ACOG*, 476 U.S. 747 (1986), *overruled in part on other grounds by Casey*, 505 U.S. 833, this Court held that the "failure to provide a medical-emergency exception" was fatal to a requirement that a second physician be present for a post-viability abortion. *Id.* at 771. The exception was needed because "*delay* in the arrival of the second physician" would endanger the woman in an emergency. *Id.* at 770 (emphasis added). Even for post-viability abortions, therefore, where the state interest is at its most compelling, the government cannot regulate abortion in a way that "fail[s] to require that maternal health be the physician's paramount consideration." *Id.* at 768-69.

That is precisely the principle this Court affirmed and applied in *Casey*. As that case explicitly held, laws that require

parental involvement and that create delay must contain an exception for emergencies in which a prompt abortion is necessary to preserve a woman's health. 505 U.S. at 880. Under the Pennsylvania statute reviewed in *Casey*, all minors were required to obtain parental consent or a judicial waiver before obtaining an abortion and all women (including minors) were required to delay their abortions for twenty-four hours after receiving state-mandated information from their physicians. *Id.* at 844. Recognizing that adequate protection for women's health was a necessary precondition for the constitutional operation of these restrictions, the Court first analyzed the law's medical emergency exception. *Id.* at 879 ("Because it is central to the operation of the various other requirements, we begin with the statute's definition of medical emergency."). Unlike the Act at issue here, the Pennsylvania law included an emergency exception that covered not only women's lives, but their health as well. *Id.* The plaintiffs, however, claimed that the exception did not allow an immediate abortion in some situations in which delay threatened the woman's health. *Id.*

Addressing the plaintiffs' argument that the exception was so narrow that it "foreclose[d] the possibility of an immediate abortion despite some significant health risks," the Court unequivocally held: "If the contention were correct," the parental involvement and waiting period restrictions would violate "the essential holding of *Roe* [which] forbids a State from interfering with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." *Id.* at 880. The *Casey* Court went on to uphold the parental involvement and delay requirements only because the emergency exception – as construed by the Court of

Appeals in that case – "assure[d] that . . . [the] abortion regulations would not in any way pose a significant threat to the life or health of a woman." *Id.* (internal quotations and citation omitted).

Casey thus acknowledges that a state-mandated delay in receiving medical care imposes significant health risks for women in certain emergencies and reaffirms the principle that any regulation that imposes delay must include a medical emergency exception. Absent such an exception, it constitutes an undue burden.[3] *See id.* at 885.[4]

This Court most recently affirmed the constitutional import of women's health in *Stenberg v. Carhart*, 530 U.S. 914 (2000). *Stenberg* struck down a Nebraska law that prohibited certain abortions unless necessary to save a woman's life because the

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[3] Both New Hampshire and the United States attempt to sound alarm bells by claiming that Respondents' argument would somehow require emergency exceptions to record-keeping mandates. *See* Pet. Br. at 20; Brief for the United States as *Amicus Curiae* at 8. But their argument is specious. Respondents have never claimed that an abortion regulation must contain an emergency exception even if compliance would in no way delay an abortion or otherwise harm a woman's health.

[4] *Hodgson v. Minnesota*, 497 U.S. 417 (1990), is not to the contrary. As the State admits, the lack of a health exception was not raised as a ground for invalidation in that case. Pet. Br. at 15-16; *see also* Br. for the United States at 22. This Court has long adhered to the fundamental rule that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925); *see also Heck v. Humphrey*, 512 U.S. 477, 482 (1994) (explaining Court's prior decision on related issues not controlling where "that opinion had no cause to address, and did not carefully consider the . . . question before us today").

law "lack[ed] any exception for the preservation of the . . . health of the mother." *Id.* at 930 (internal quotations and citation omitted). As even two of the dissenting Justices agreed, under *Casey*, if a regulation creates "a 'significant threat to the life *or health* of the woman,' . . . its application would impose an undue burden." *Id.* at 967 (Kennedy, J., dissenting) (quoting *Casey*, 505 U.S. at 880) (emphasis added).

Applying this clear, consistent mandate, the courts below correctly held New Hampshire's Act impermissibly imposes delay even where delay imperils the minor's health.[5]

B. It Is Undisputed – and Indisputable – that Delay Imposes Significant Health Risks for Minors in Certain Emergencies.

To confirm that the Constitution requires a medical emergency exception in the Act, this Court need review no contested findings of fact, for there are none. The State did not – because it could not – dispute that in certain emergencies, an immediate abortion is necessary to avert the risk of severe and permanent damage to a minor's health. As Respondents' undisputed proofs demonstrate, "there are . . . conditions" in which a "teen needs an immediate abortion to prevent serious harm to her health." Goldner ¶ 7 (J.A. 23). For example, preeclampsia is "a form of pregnancy-induced hypertension, characterized by excessively high blood pressure" that puts a

[5] The United States refutes a phantom claim in insisting that "there is no justification for requiring" a "general health exception, . . . as opposed to a narrower exception for medical emergencies." Br. for the United States at 23. Throughout this case, Respondents have claimed that the Act is unconstitutional because it imposes delay, and yet lacks what *Casey* requires: an exception for *emergencies* in which delay imposes serious health risks.

minor "at risk for liver or kidney dysfunction or failure; severe bleeding; vision loss; and fluid in the lungs." *Id.* ¶ 8. Because "delay may well cause substantial harm . . . , the best medical course will often be to end the pregnancy immediately." *Id.* ¶ 9. Premature rupture of the amniotic membranes prior to fetal viability is similarly dangerous. It puts the minor "at risk of developing a serious infection of the placental lining, called chorioamnionitis." *Id.* ¶ 10. Chorioamnionitis puts the minor "at serious risk of severe and permanent harm to her health, including scarring of the reproductive organs which can cause total infertility, chronic pelvic pain, . . . [and] damag[e to] major organ systems, such as [her] kidneys or liver." *Id.* ¶¶ 10, 12. Moreover, "[t]he course of chorioamnionitis is unpredictable and it can spread quickly. Because every minute the woman remains infected, she is at risk of serious damage to her health, the best medical course is often to provide an immediate abortion." *Id.* ¶ 11; *see also id.* ¶ 13. In addition, "[a]n immediate abortion may also be needed when a woman experiences heavy bleeding from the uterus," which "places the teenager at risk of dangerously low blood pressure, permanent kidney and liver damage, and infertility. Such patients are also often at risk for infection, with all the dangers that entails." *Id.* ¶¶ 14-15; *see also* Brief of American College of Obstetricians and Gynecologists, *et al.* as *Amicus Curiae* (hereinafter Br. of ACOG).[6]

[6] The State and its *amici* harp on the fact that relatively few minors will be harmed by the lack of a medical emergency exception. If the prospect that Dr. Goldner will see a minor who will be seriously harmed by the Act were truly as "hypothetical" as the State and its *amici* claim, he would lack injury in fact, and therefore, standing. But tellingly, the State has never sought to dismiss the action on standing grounds. And indeed, such a motion would surely fail, as Dr. Goldner's uncontested declaration establishes that

Far from opposing these proofs, the State acknowledges that an immediate abortion is required in certain emergencies to avert the risk of serious damage to minors' health, *see* Pet. App. 5 n.2, 33 n.4 (noting undisputed evidence) – which is, indeed, the only plausible approach for the State to take. As this Court found in *Casey*, it is "undisputed" that, absent an immediate abortion, some cases of preeclampsia and premature ruptured membranes, for example, "could lead to an illness with substantial and irreversible consequences." 505 U.S. at 880. As elaborated in the ruling of the Court of Appeals that *Casey* affirmed:

> There is no dispute . . . that preeclampsia, inevitable abortion, and prematurely ruptured membranes *can lead to* a substantial and

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the Act's lack of a medical emergency exception will interfere with his ability to treat his patients. *See, e.g.*, Goldner ¶ 20 (J.A. 29) ("[B]ecause the Act will prevent me from caring for my patients according to accepted medical practice and my best medical judgment, I fear enforcement of the Act for my patients' sake as well as my own. . . . The Act thus places me in fear of prosecution for fufilling my duty as a physician . . . ."); *id.* ¶¶ 11-18 (describing Act's effects on his ability to provide his patients with appropriate medical care).

Once it is recognized that Dr. Goldner has standing, the question of how many minors will be harmed by the Act is irrelevant to the constitutional question. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring in part) (explaining that if plaintiff has standing, "it does not matter how many persons have been injured by the challenged action"). Indeed, as this Court has held, the state cannot prohibit a person from obtaining treatment simply by pointing out that most people do not need it. *Stenberg*, 530 U.S. at 934; *see also Casey*, 505 U.S. at 879-80 (insisting that waiting period and parental consent law contain a medical emergency exception without regard to the number of women who would be harmed without an exception).

> irreversible impairment of a major bodily function . . . [This can include] irreversible damage to the liver, kidneys and more . . . . In the case of all three conditions . . . the treatment uniformly prescribed by the medical profession . . . was an *immediate* abortion. . . . Th[ere was] medical consensus that the risk occasioned is sufficiently serious to call for an *immediate* abortion . . . .

Planned Parenthood v. Casey, 947 F.2d 682, 700-01 (3d Cir. 1991) (all but first emphasis added), *aff'd*, 505 U.S. 833.[7]

Having conceded these same facts in this case, *see* Pet. App. 5 n.2, 33 n.4,[8] the State nonetheless insists that these grave

[7] *See also Planned Parenthood v. Wasden*, 376 F.3d 908, 927 (9th Cir. 2004) (invalidating parental consent law for lack of adequate emergency exception, and noting that state's "experts did not . . . dispute any of the underlying medical facts, such as the . . . urgency of performing an abortion [for a minor] once the conditions are detected"), *cert. denied*, 125 S. Ct. 1694 (2005); *Planned Parenthood v. Owens*, 287 F.3d 910, 920 & n.8 (10th Cir. 2002) (invalidating parental notice law for lack of emergency exception because "there are a number of . . . pregnancy complications the parties agree could pose major risks to the health of the pregnant minor, treatment for which may require an abortion . . . and for which . . . any delay at all[] could endanger the health of the pregnant minor").

[8] The State has always argued this case purely as a matter of law. While it now simply asserts that the Constitution requires no medical emergency exception, in the lower courts, the State pressed its now-abandoned "argu[ment] that other provisions of New Hampshire law provided a functional equivalent." Pet. App. 14-15, 34 (rejecting argument); *see also United States v. Int'l Bus. Mach. Corp.*, 517 U.S. 843, 856 n.3 (1996) (holding that argument included in petition for *certiorari* but not in brief on the merits is abandoned). Hence, the State did "not dispute that

harms to minors' health are not constitutionally cognizable. The State's position is as callous as it is constitutionally unsound, and must be rejected.

C. Forcing a Minor in a Medical Emergency To Navigate the Judicial Bypass System Imposes Dangerous and Unconstitutional Delay.

Despite the undisputed serious risks of even brief delays in medical emergencies, the State insists that, in lieu of a medical emergency exception, minors in need of immediate abortions must postpone treatment while they navigate the Act's judicial bypass system. But even accepting that courts would endeavor to rule as quickly as possible, requiring minors to obtain a judicial bypass necessarily imposes delay, and therefore is no

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pregnant minors . . . could experience complications . . . that would endanger their health," requiring "immediate termination of the pregnancy." Pet. App. 33 n.4. Presumably because it viewed the case as raising only legal matters, the State "agreed that the [district] court may decide the plaintiffs' requests for . . . permanent injunctive relief . . . based on" the parties' initial filings, *id.* at 27, including Dr. Goldner's unopposed declaration.

As the State thus utterly failed to dispute Respondents' proofs, there is no merit to its eleventh-hour attempt to disparage the record. Only now, for example, in this Court, does the State complain that the record contains no evidence of harm to minors under Minnesota's law, which lacks an emergency exception. Pet. Br. at 6-7, 15-16. This absence, however, represents no defect because the State has never contested that the Act will prevent Dr. Goldner from providing appropriate treatment to minors who suffer medical crises in New Hampshire. Likewise, the State now asserts that Respondents neither offered "substantial medical authority" to support the need for an emergency exception nor proved that the harm to minors' health would be "significant." *Id.* at 19. But this argument is nothing but a distraction because, in this case, it is *undisputed* that delay in certain emergencies causes *significant* harm.

substitute for what the Constitution mandates: an exception allowing an immediate abortion in medical emergencies. Indeed, the New Hampshire Supreme Court has recognized as much and has expressly rejected the notion that doctors must await a judicial finding of an emergency before providing medical care because "such a finding would clearly be impractical because of the urgent need for treatment in emergency situations." *Opinion of the Justices*, 465 A.2d 484, 490 (N.H. 1983).

The State attempts to get around this common-sense conclusion by acting as if the delay caused by the Act begins at the point at which a judge is located and presented with a bypass petition, but the delay really begins much earlier: at the time a doctor determines that a medical emergency exists and urgent treatment is required. Starting from that point, rather than proceeding with medically-indicated care, the minor or perhaps her doctor must begin to learn about the bypass process and find either a lawyer or an open courthouse. Then, someone – perhaps a lawyer – would have to compile the necessary information; draft any requisite papers; and find a judge to hear the case. While finding a judge may not be terribly time consuming if the emergency occurs during business hours, the process may come to a standstill if the court is closed. *See infra*. Once the petition is before the court, the judge would need to understand the facts of the case at least well enough to "make in writing specific factual findings and legal conclusions supporting the decision," Act § 132:26, II(b). All the while, the minor remains untreated and at risk.

Moreover, despite the State's argument that access to a judge could be almost immediate, Pet. Br. at 22, the evidence

is to the contrary. Although the Act states that access to the courts "shall be afforded . . . 24 hours a day, 7 days a week," Act § 132:26, II(c), New Hampshire courts are, in fact, open only on weekdays from 8:00 a.m. until 4:30 p.m. While there may indeed be judges willing to act expeditiously if called on to do so at 3:00 a.m. or on a Sunday, neither the Act nor the Court's website provides any information about how to find and access such a judge. *See* Judicial Branch, State of N.H., http://www.nh.gov/judiciary/courtlocations/index.htm (last visited October 5, 2005); *see also* Brief *Amici Curiae* for the Center for Adolescent Health and the Law, *et al.* Other courts have found such twenty-four hour provisions "meaningless" where local court rules only required the courts to be open during regular business hours. *See, e.g., Planned Parenthood v. Lawall*, 180 F.3d 1022, 1031 (9th Cir. 1999), *amended on denial of reh'g*, 193 F.3d 1042 (9th Cir. 1999).

Far from advancing its position, the State's citation of other contexts in which judges are available outside business hours demonstrates the flaw in its arguments. Unlike those other contexts – domestic violence incidents, search orders, child protection orders, Pet. Br. at 22 – here there is no state actor with the ability to, and responsibility for, locating a judge at night or on weekends. Indeed, the State's only citation to New Hampshire law – a domestic violence law – demonstrates the State's recognition of the problem facing private litigants and, indeed, even state officials who need to locate a judge to obtain an emergency order. That law requires peace officers to provide victims of domestic violence with "immediate and written notice" of their right to have the officer request "an emergency telephonic order for protection" from a judge. N.H. Rev. Stat. Ann. § 173:B-10. "Law enforcement is provided

with the home telephone numbers of judges." N.H. District Court, Domestic Violence Protocols, Ch. 3, Protocol 3.1, http://www.courts.state.nh.us/district/protocols/dv/index.htm (last visited Oct. 7, 2005). But, even with those numbers, New Hampshire has recognized that an officer may well have difficulty finding a judge: Officers are instructed to "first try to reach a judge from the court . . . [where] the plaintiff resides," and then "if unable to reach any [such] judge" the officer should "try to reach a judge . . . in a city or town close to the town in which the plaintiff resides." *Id.* Here, however, there is no such state actor able and required to locate a judge for the minor when the courts are closed, and the Rolodexes of teens and their doctors are unlikely to be filled with the home phone numbers of multiple judges whom they can attempt to track down, with the minor's condition deteriorating all the while.[9]

Thus, as the Court of Appeals correctly held, even if the doctor, lawyer, and judge work frantically to preserve the patient's health, delay will ensue, and that delay will

[9] The State's reliance on *Application of the President & Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir. 1964), is misplaced. *See* Pet. Br. at 22 n.4. Far from validating the notion that the judicial bypass could stand in for an emergency exception, the case reveals its dangers. First, the case highlights the need for immediacy in emergencies, noting that the patient could have died "in a matter of minutes." 331 F.2d at 1009. Second, whereas the State claims that the judicial process there "occurred within a span of one hour and twenty minutes," *see id.*, only the appeal occurred in this time frame – and not the process of preparing, submitting, or resolving the original application before the trial judge. Third, these delays occurred even though the original application and the appeal were brought during business hours. *Id.* at 1001; *Application of the President & Dirs. of Georgetown Coll., Inc.*, 331 F.2d 1010, 1011 (D.C. Cir. 1964) (denial of rehearing en banc) (Miller, J., dissenting).

undisputedly endanger minors. "Even when the courts act as expeditiously as possible, those minors who need an immediate abortion to protect their health are at risk." Pet. App. 17.[10] As established by Dr. Goldner's uncontested declaration, when a patient faces a medical emergency such as chorioamnionitis, "every minute the woman remains infected, she is at risk of serious damage to her health"; accordingly, "the best medical course is often to provide an *immediate* abortion." Goldner ¶ 11 (J.A. 25) (emphasis added); *see also id.* ¶¶ 13-15 (describing other medical conditions arising in pregnancy that can require an "immediate abortion"); *see generally supra* Point I.B. The judicial bypass system is thus simply the wrong shape to fit the gaping hole left in the Act by the absence of a medical emergency exception. Even the United States appears to recognize as much. "[I]n the . . . context of emergency health risks, . . . the emergency character of the situation would not allow time for the notification or judicial-bypass options to run their course." Br. for the United States at 8.

Far from curing the Act's lack of an emergency exception, the bypass would necessarily impose the very delay that the Constitution forbids in medical crises. As elaborated *infra* Point I.D., no purpose justifies so endangering teens, and this Court should reject the State's suggestions to the contrary.

[10] The State's citation to *Akron II* is thus unavailing: Respondents' argument is in no way dependent on the assumption that judges will fail to "'follow mandated procedural requirements,'" Pet. Br. at 22 (quoting *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 515 (1990) (*Akron II*)).

D. The State Interests Served by the Act Do Not Excuse the Need for a Medical Emergency Exception To Protect Minors' Health.

Notwithstanding the State's lengthy explanation of both the permissibility of parental notification laws and the significance of the interests they serve, this case calls neither into question. Simply put, the state interests served by parental involvement laws in non-emergency contexts do not affect the constitutional requirement of an exception to protect minors from dangerous delays when emergencies arise. As this Court's precedents establish, no state interest justifies endangering adult or young women's health through the regulation of abortion.

In *Casey*, for example, this Court recognized that the state may regulate abortion to serve interests "in potential life," in "the health or safety of a woman seeking an abortion," and in ensuring that women make "a decision that is mature and informed." 505 U.S. at 878, 883. Affirming the "essential holding of *Roe*," the Court went on to clarify that whatever the state interests served, the Constitution requires an exception to "assure that . . . abortion regulations [do] not in any way pose a significant threat to the life or health of a woman." *Id.* at 880 (internal quotations and citation omitted); *see also id.* at 833 (reaffirming need for health exception even to post-viability ban, where state interest is at its zenith).

Similarly, the interests underlying parental involvement laws do not abrogate the Constitution's protection for teens' health. If anything, those interests reinforce the need for an emergency exception. The Court has noted "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance

of the parental role in child rearing." *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (*Bellotti II*). But in this constellation of interests, "[t]he welfare of the child has always been the central concern." *Hodgson*, 497 U.S. at 482 (Kennedy, J., concurring in the judgment in part and dissenting in part). This central concern with minors' welfare is, of course, disserved by imposing delay in emergencies in which delay indisputably causes serious harm. Accordingly, in *Casey*, this Court both acknowledged the interests generally served by parental involvement laws, *see* 505 U.S. at 899-90, and yet insisted that they contain adequate emergency exceptions, *id.* at 879-80, 899.[11]

[11] Just as in *Casey*, a medical emergency exception in the Act would in no way prohibit physicians from notifying parents that an immediate abortion was necessary to preserve their minor daughter's health – before the abortion if possible, or else after it. All an emergency exception would do is allow the physician to proceed when it is not possible to notify a parent, or not possible to obtain an immediate written certification waiving the Act's forty-eight hour waiting period.

The exception would also permit the physician to provide urgently needed care without notice or delay in those cases – recognized by this Court – in which the parent is abusive or neglectful or will obstruct the abortion by withholding the certification. *See, e.g.*, *Hodgson*, 497 U.S. at 439 & n.25; *id.* at 493 (Kennedy, J., concurring in the judgment in part and dissenting in part) (emphasizing abuse and neglect exception – one not contained in New Hampshire's Act – in voting to uphold Minnesota's law); *Bellotti II*, 443 U.S. at 647 (noting that some parents will obstruct abortions); *see also* Brief of *Amicus Curiae* National Coalition Against Domestic Violence, *et al.* The undisputed record in this case, which establishes that many abused and neglected minors will simply refuse even urgently needed treatment rather than allow parental notification, reinforces the need for an emergency exception. *See* Atkins ¶¶ 5-6 (J.A. 32-33); Sabino ¶¶ 12, 14 (J.A. 40).

Left with no justification for the Act's imposition of delay in medical emergencies, the State resorts to arguing that the medical exigency of emergencies *itself* justifies the lack of an emergency exception. "[W]hen a minor's health is at risk," the State asserts, "parental notification can help protect [her] . . . health" because parents can "ensur[e] that the physician has all the information needed[,] . . . . assist . . . in selecting . . . health care providers," Pet. Br. at 14-15, and, as one of the State's *amici* adds, obtain information on any potential complications, *see* Brief of New Hampshire Legislators in Support of Petitioner as *Amicus Curiae* (hereinafter Br. of N.H. Legislators) at 26-27. All this may be true, but it does not explain how these benefits of *notice* justify imposing *delay* in emergencies in which delay indisputably harms the minor.

Indeed, New Hampshire itself has recognized that these interests must yield when delay harms the minor. Except for abortion, New Hampshire, like other states, allows for immediate emergency treatment when necessary to protect a minor from serious harm.[12] In those emergencies where New Hampshire allows immediate emergency treatment – no less

[12] *See, e.g.*, Office of the Attorney General, State of New Hampshire, Opinion No. 85-134 (1985) (Opinion of New Hampshire Attorney General that whereas "generally, medical treatment may not be given to a minor without the consent of the child's parent or guardian. . . ., [t]here are exceptions, such as when . . . an emergency exists") (internal citations omitted); N.H. Rev. Stat. Ann. § 507-E:2, II(a) (in civil action claiming physician "failed . . . to obtain . . . informed consent, . . . [t]he plaintiff shall have the burden of proving . . . that the treatment, procedure or surgery was performed in other than an emergency situation"); 1-13 New Hampshire Civil Jury Instructions § 13.2 (Matthew Bender 2004) (stating that physician must obtain consent of patient or other person authorized to give consent "in a nonemergency situation").

than in the undisputed health-threatening emergencies that Respondents have detailed – the State has an interest in parents' helping choose a provider, offering medical history, and receiving information for any follow-up care.

The only difference between the two circumstances is that, in this case, the emergency treatment needed is abortion. But if that difference were enough to justify endangering teens' health, it would effectively demote the status of women's health in abortion jurisprudence, giving states free reign to impose serious medical harms on both adult and minor women through abortion regulations. This Court has repeatedly rejected that proposition, including in both *Roe* and *Casey*, and should reject it again here.

II. THE COURTS BELOW CORRECTLY HELD THAT THE NEW HAMPSHIRE ACT IS FACIALLY INVALID BECAUSE IT FAILS TO PROVIDE A MEDICAL EMERGENCY EXCEPTION.

As both lower courts recognized, the New Hampshire Act is unconstitutional in the absence of a medical emergency exception. The question, then, becomes one of remedy. Adopting the approach that this Court has long followed, the courts below facially invalidated the Act, leaving it to the New Hampshire Legislature to decide whether to reenact a parental notification law with a medical emergency exception and, if so, what the scope of the exception should be. *See, e.g.*, *Stenberg*, 530 U.S. at 929-30; *Thornburgh*, 476 U.S. at 769-71; *see also Casey*, 505 U.S. at 895; *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 482 (1983); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 426 (1983) (*Akron I*), *overruled in part on other grounds by Casey*, 505 U.S. 833; *Colautti v.*

Franklin, 439 U.S. 379, 401 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52, 69, 74-78, 82-84 (1976); *Doe v. Bolton*, 410 U.S. 179, 201-02 (1973) (all facially invalidating abortion restrictions). That approach is supported by constitutional principle as well as precedent: Facial invalidation is the only relief that effectively protects the health of New Hampshire teens, and thus remedies the constitutional violation that condemns the present Act, without violating the core institutional values of separation of powers and federalism.

The State offers two principal arguments for why the Court should now depart from its longstanding approach. Neither has merit. The State's initial position is that any judicial remedy should be deferred until a minor in a medical crisis comes forward to challenge the Act. Pet. Br. at 30-34. But waiting to grant relief until individuals in medical crises go to court would endanger minors' health, and thus do nothing to remedy the constitutional violation. In recognition of this fact, for thirty years this Court has permitted pre-enforcement challenges to ensure effective constitutional relief *before* women suffer medical harm or their physicians are prosecuted. This Court should not turn its back on women, or the Court's precedent, now. *See infra* Point II.A.

As a fallback position, the State argues that at most this Court should grant as-applied relief, either on a patient-by-patient basis or, alternatively, by creating a medical emergency exception to the Act that can be applied more categorically. *See* Pet. Br. at 37, 43-46. But limiting the relief to the particular minor before the court suffers from precisely the same flaw as the State's first argument: It requires minors needing emergency care to delay getting appropriate and urgently

needed medical treatment until they get a constitutional ruling permitting it. *See infra* Point II.B.1. The State's final argument is that this Court should "sever" the unconstitutional applications. But the constitutional violation in this case cannot be remedied by excising an unconstitutional provision from an otherwise constitutional law. Rather, severing the unconstitutional applications would require the Court to rewrite the Act to insert a medical emergency exception when the New Hampshire Legislature chose to omit one, and when other legislatures around the country that have included such exceptions have made varying legislative decisions reflected in varying legislative language. *See infra* Point II.B.2.

Facial invalidation thus serves two goals that no other remedy will achieve. It provides pregnant teens in New Hampshire with effective relief to safeguard their health, and it allows the political process to determine the shape of any future legislation within the constitutional parameters reaffirmed by this Court. It is only by facially invalidating the Act that this Court can remain faithful to the institutional values underlying the *Salerno* principle, including judicial restraint, separation of powers, and federalism. *See infra* Point II.C.

Facially invalidating the Act would forge no new frontiers. Where, as here, as-applied relief would both fail to protect women's health and require the Court to rewrite legislation, the Court has not hesitated to strike down unconstitutional abortion restrictions on their face. In *Thornburgh*, for example, this Court did not force individual women to suffer harm before they or their doctors could go to court to seek an exception to the law requiring the presence of a second doctor at any post-viability abortion. Nor did the Court write a medical

emergency exception into the law. Rather, this Court facially invalidated the provision. 476 U.S. at 769-71. Similarly, in *Casey*, this Court facially invalidated a requirement that married women notify their husbands before having abortions primarily because of the provision's impact on battered women. 505 U.S. at 893-95. The Court did not force battered women to come forward to seek relief. Nor did it write an exception into the law. And, indeed, doing so would have been both ineffective and inappropriate: ineffective because, as the Court found, battered women will not reveal the abuse, even to their physicians, and thus could not make use of such exceptions, *id.* at 889-90, and inappropriate because it would have required the Court to make legislative choices and rewrite the provision.[13]

[13] Of course, in *Casey*, this Court held that abortion restrictions are also facially invalid if they pose a substantial obstacle in a "large fraction of the cases" in which they are relevant, *see Casey*, 505 U.S. at 895, and several Members of the Court have noted the tension between the "large fraction test" and the "no set of circumstances test" articulated in *Salerno*. *See Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013 (1993) (O'Connor and Souter, JJ., concurring in the denial of stay and injunction pending appeal); *see also Sabri v. United States*, 541 U.S. 600, 124 S. Ct. 1941, 1948 (2004) (noting that the Court permits "overbreadth" facial challenges in the abortion context); *Janklow v. Planned Parenthood*, 517 U.S. 1174, 1175-76 & n.1 (1996) (Stevens, J., regarding the denial of cert.) (noting that no set of circumstances test has "been properly ignored").

This case, however, is not the vehicle to explore that tension. Respondents agree with the United States that "the dispute concerning whether to employ the 'no set of circumstances' *Salerno* standard or the 'large fraction' *Casey* standard is largely beside the point in this case," Br. for the United States at 7, because Respondents do not argue that the Act is unconstitutional in a large fraction of cases. For this reason, this Court could appropriately dismiss the First Question Presented – whether the case is governed by *Casey* or *Salerno* – as improvidently granted. The Court can dispose of the Second Question Presented – whether the judicial bypass is

Likewise here, this Court should affirm the lower courts' decision to facially invalidate the Act because no other remedy fulfills the Court's constitutional obligation to protect women's health while respecting the limits of the judicial role.

A. Pre-Enforcement Facial Challenges Are the Only Effective Mechanism for Protecting Minors' Health.

For over three decades, this Court has permitted challenges to abortion restrictions without requiring that women first endanger their health or that their doctors first subject themselves to prosecution. *See, e.g.*, *Stenberg*, 530 U.S. at 922; *Casey*, 505 U.S. at 845; *Thornburgh*, 476 U.S. at 752; *Colautti*, 439 U.S. at 383. Without so much as a nod to these cases, the State argues that this Court should grant *no relief* until faced with a "concrete case[]" of a teen needing an emergency abortion. *See* Pet. Br. at 30-34. In essence, the State argues that Dr. Goldner should have waited until he had a "concrete case" of a patient experiencing serious blood loss or, perhaps, a dangerous infection, and then brought an as-applied challenge on her behalf.

But this Court has never required women to wait until they were on the brink of disaster before granting relief. For example, in *Thornburgh*, this Court did not turn the physician-plaintiffs away and tell them to come back when they had a patient who was endangered by the delay inherent in waiting for a second physician to arrive. *See* 476 U.S. at 771. Nor did the *Casey* Court decline to consider the adequacy of the medical emergency exception until a woman with pre-eclampsia in need

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an adequate substitute for an emergency exception – in the same manner because it is a question about which there is no circuit split.

of an immediate abortion presented herself to the Court. *See* 505 U.S. at 879-80. The suggestion would have been woefully inadequate to protect women's well-being.

The same is true here. Leaving young women whose medical conditions are so urgent that they cannot comply with the Act with no recourse except the possibility of mounting an as-applied constitutional challenge effectively forecloses any relief at all. Indeed, the State's argument that this Court should wait to consider the constitutionality of the Act in an as-applied challenge brought by (or on behalf of) a woman in the throes of a medical emergency is an even more radical and dangerous version of its argument that the judicial bypass would suffice in emergencies. In this context, unlike in the bypass, there are no statutory guarantees of confidentiality and expedition; the proceedings are adversarial; and the minor must argue and the court must decide whether the Act is constitutional. It is thus for good reason that this Court has never relegated women to such a process for protecting their health.

Appearing to recognize that forcing a minor in a medical crisis to go to court before obtaining medical care is likely to give this Court pause, the United States attempts to assuage any concern by arguing that a woman or her doctor may seek "pre-enforcement relief" before actual injury has been suffered, *see* Br. for the United States at 15-16. But this confusing argument is disingenuous at best.

Perhaps the United States believes that the case at bar was properly brought, and that the only issue left to resolve is the appropriate scope of relief. If that is so, Respondents agree and explain more fully below why facial invalidation is appropriate in this case. *See infra* Point II.B.2. The only other way to allow

"relief . . . before irreparable injury has . . . been suffered," as the United States suggests, Br. for the United States at 15, would be to permit a healthy minor to bring suit. But a healthy minor would not have standing to challenge the Act's lack of a medical emergency exception.[14] *See, e.g.*, *Roe*, 410 U.S. at 127-29 (holding that a nonpregnant woman and her husband did not "present an actual case or controversy" as required to challenge Texas's abortion ban). If the United States takes neither of those positions, then its assertion that pre-enforcement relief is still available can only refer to an action brought by (or on behalf of) a woman in need of an emergency abortion before the law has been "enforced" against the doctor. But that argument is no less callous than the State's, for it would preclude courts from granting any relief at all until faced with a woman in crisis. As explained above, for the bleeding minor at risk of permanent kidney and liver damage or the seriously infected teen in danger of losing her ability to ever bear a child, that is too late.

Whether formulated explicitly by the State or implicitly by the United States, the argument that no relief is appropriate absent a "concrete" minor in a "concrete" crisis is radical and dangerous. Acceptance of this argument – no less than acceptance of the State's argument that no medical emergency exception is required – would necessarily reverse three decades

[14] The absence of standing, of course, cannot be "addressed" through the ripeness doctrine as the United States suggests, Br. for the United States at 15 n.6.

of precedent forbidding states to endanger women's health when they restrict abortion. This the Court should not do.[15]

B. Facial Invalidation Is the Only Remedy that Protects Minors Without Violating Core Separation of Powers and Federalism Principles.

The State's fallback position – that this Court should grant only as-applied relief – fares no better. Facial invalidation is the only remedy that is both effective in preventing the State from endangering minors' health, and institutionally proper.

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[15] In an effort to advance its claim that this Court should grant no relief in this case, the State at times appears to mount a covert attack on the ability of doctors to raise the constitutional claims of their patients. *See, e.g.*, Pet. Br. at 30 (arguing that under "the rule barring third party standing" "'a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court'" (quoting *New York v. Ferber*, 458 U.S. 747, 767 (1982)). But any such argument is defeated by this Court's unbroken chain of decisions over the last three decades holding that doctors have third-party standing to raise the rights of their patients. *See, e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 444 (1972); *Doe*, 410 U.S. at 188; *Danforth*, 428 U.S. at 62; *Singleton v. Wulff*, 428 U.S. 106, 114-18 (1976) (plurality opinion); *Casey*, 505 U.S. at 845; *Stenberg*, 530 U.S. at 922.

Contrary to the claims of some of the State's *amici*, nothing in *Kowalski v. Tesmer*, 543 U.S. 125, 125 S. Ct. 564 (2004), changes this. Indeed, in *Kowalski*, this Court specifically recognized reproductive health cases as an exception to the Court's general prohibition on third-party standing. *Id.* at 568 (citing, *inter alia*, *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Doe v. Bolton*). Moreover, the Court has repeatedly held that, unlike the plaintiffs in *Kowalski*, physicians and clinic personnel can raise the rights of their patients because they have a close relationship, *Griswold*, 381 U.S. at 481, and because women may be hindered from bringing their own claims, *Singleton*, 428 U.S. at 117.

1. Limiting minors to as-applied relief endangers their health.

In advancing its as-applied argument, the State first appears to suggest that federal courts should consider the situation of each individual minor on a patient-by-patient basis to determine whether the Act is unconstitutional as applied to that minor. *See* Pet. Br. at 42 ("[N]othing would prevent an abortion provider from bringing an expedited case to enjoin the application of a statute against a *particular* woman." (emphasis added)). But this is just a corollary of its argument that the Court should grant no relief at all until faced with a minor in a medical emergency, and must fail for the reasons explained in Point II.A *supra*.

Moreover, if the Court adopted the State's as-applied approach, the danger would not be limited to the first teen who needed an emergency abortion. Contrary to the State's half-hearted suggestion, Pet. Br. at 42 n.6 ("An as-applied challenge also has the impact of stare decisis."), a ruling that the Act is unconstitutional as applied to the first teen will do little, if anything, to aid the next teen with a medical emergency. Even if the factual scenarios of all teens facing medical emergencies were sufficiently similar, it simply is not the case that a ruling by a trial judge has *stare decisis* effect. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 430 n.10 (1996). In addition, as even the State appears to acknowledge, a ruling that the Act is unconstitutional as applied to teen A with preeclampsia and dangerously high blood pressure will not permit a physician to provide immediate care to teen B with a severe infection at risk of systemic sepsis. *See* Pet. Br. at 42 n.6 ("[W]omen who are *similarly situated* will not *necessarily* have

to bring their own challenge . . . ." (emphases added)). Indeed, it is doubtful that a ruling that the Act is unconstitutional as applied to teen A would even suffice to protect teen C whose blood pressure is also dangerously high but somewhat lower than teen A's.[16]

In addition, if the State's argument were accepted, the effects would not be limited to challenges to parental involvement laws lacking emergency exceptions. Rather, it would apply to all abortion restrictions, including abortion bans, spousal notification provisions, second-trimester hospital requirements, and so on. *See Ada v. Guam Soc'y of Obstetricians and Gynecologists*, 506 U.S. 1011 (1992) (Scalia, J., dissenting from denial of cert.) (arguing that lower courts "should have dismissed" facial challenge to across-the-board abortion ban because there were "apparently some applications of the statute that are perfectly constitutional"). As the article the State cites in support of its argument expressly acknowledges, if courts did not facially invalidate unconstitutional abortion restrictions, each individual woman would have to go to court for a "determination of whether enforcement [of any of a myriad of abortion restrictions] against [her] would constitute an undue burden." Kevin Martin,

[16] Nor is the United States's suggestion of a class action, *see* Br. for the United States at 15, a panacea. As an initial matter, it is not at all clear that such a class would meet the requirements of Rule 23(a). *See* Fed. R. Civ. P. 23(a) (permitting class actions only where class meets requirements of commonality, typicality, and numerosity). Moreover, the Government is either envisioning a class representative who is a healthy teen (in which case she lacks standing) or it is suggesting a scenario in which a minor (or perhaps multiple minors) must endanger her (or their) health by waiting to seek relief until facing a medical emergency. *See supra* Point II.A. Either way, the suggestion should be dismissed out of hand.

Stranger in a Strange Land: The Use of Overbreadth in Abortion Jurisprudence, 99 Colum. L. Rev. 173, 213 (1999); *see also id.* (arguing that if a state passed an abortion ban women could go – one by one – through a quasi-judicial bypass proceeding to have the statute held unconstitutional as to them). Far from providing "a readily administrable standard," *see* Br. for the United States at 11, limiting women to as-applied relief would force the federal courts to act as abortion committees to decide whether individual women are entitled to obtain an abortion. *See, e.g.*, *Doe*, 410 U.S. at 184-85, 195-98 (describing hospital abortion committees that some states required to approve individual requests for an abortion prior to *Roe*).

And, of course, many women with meritorious constitutional claims would not or could not come forward to seek vindication of their rights. For example, many, if not most, battered women would not go to court to seek an exemption from a spousal notification law. *See Casey*, 505 U.S. at 889-90. Thus, precluding facial invalidation would unconscionably force women to choose between risking their safety and foregoing their right to have an abortion. It is precisely because of this type of chilling effect on the exercise of constitutional rights that the Court has held that facial invalidation is appropriate.

2. Categorical as-applied relief would violate separation of powers and federalism principles.

In a last-ditch attempt to save the Act, the State suggests that this Court "sever" the unconstitutional applications. *See* Pet. Br. at 43-46. This suggestion is overly simplistic and creates serious institutional conflicts: As explained in Point II.A.1. *supra*, granting relief patient-by-patient or condition-by-

condition will leave doctors uncertain, indeed doubtful, about whether they can provide immediate treatment to the next critically ill patient.[17] In order to provide clear guidance to doctors so that they may act to protect their patients' health, this Court would have to craft relief that would be indistinguishable from drafting an emergency exception and engrafting it onto the Act. But the responsibility for such a task lies with the legislature, not the judiciary. Indeed, judicially re-writing the Act would impermissibly intrude on the legislative domain; contravene legislative intent; and encourage legislatures to abdicate their duty to pass constitutional laws. This Court should therefore reject the State's suggestion and leave to the New Hampshire Legislature the decision of whether and how to redraft the law to comply with this Court's well-established precedent.

As this Court has long recognized, "it is for [the Legislature], not this Court, to rewrite . . . statute[s]." *Blount v. Rizzi*, 400 U.S. 410, 419 (1971). Thus, "[i]n considering a facial challenge, this Court may impose a limiting construction on a statute only if it is 'reasonably susceptible' to such construction": federal courts may "'not rewrite a . . . law to conform it to constitutional requirements.'" *Reno v. ACLU*, 521

[17] Without clear guidance, the Act, with its criminal penalties, will have an impermissible chilling effect on physicians attempting to provide appropriate emergency care. *See Colautti*, 439 U.S. at 394 (holding that abortion regulation that imposes criminal liability based on ambiguous criteria creates "serious problems of notice, discriminatory application, and chilling effect on the exercise of constitutional rights"); *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 205 (6th Cir. 1997) (finding that "[i]n an area as controversial as abortion," "the determination of whether a medical emergency . . . exists . . . is . . . susceptible to being subsequently disputed by others").

U.S. 844, 884-85 (1997) ("*ACLU* ") (quoting *Virginia v. Am. Booksellers Ass'n Inc.*, 484 U.S. 383, 397 (1988)); *see also Stenberg*, 530 U.S. at 944 (holding that Court is "'without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent'" (quoting *Boos v. Barry*, 485 U.S. 312, 330 (1998))); *Thornburgh*, 476 U.S. at 769 (facially invalidating abortion restriction where "the language of the statute 'is not susceptible to a construction that does not require the mother to bear an increased medical risk'" (internal citations and quotations omitted)). Here, the State proffers no construction of the Act – reasonable or otherwise – that would allow this Court to interpret it to include an exception for medical emergencies.[18] Indeed, to the extent that there was any argument at all to be made on this score, the State has abandoned it. *See supra* n.8.

Ensuring that the task of writing statutes is left to the legislature is particularly important where, as here, drafting language to salvage the statute is not a "relatively simple matter." *See United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 479 n.26 (1995) ("*NTEU*") (refusing to limit relief where doing so would require Court to choose among different formulations to craft the remedy). Legislatures around the country have defined their emergency exceptions to parental

[18] New Hampshire law similarly requires facial invalidation where saving the law would require judicial rewriting. *See, e.g.*, *State v. Brobst*, 857 A.2d 1253, 1257 (N.H. 2004) (facially invalidating statute where State "has advanced no persuasive [limiting] construction, nor can we envision one, that would allow us to limit the scope of the statute without invading the province of the legislature").

involvement laws in numerous, very different ways.[19] And the New Hampshire Legislature itself, in considering abortion regulations, has weighed several quite varied emergency exceptions.[20] Choosing which, if any, of these formulations is used is a matter of critical importance to the legislators. Brief

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[19] *Compare, e.g.*, R.I. Gen. Laws § 23-4.7-4 (providing exception "[w]here there is an emergency requiring immediate action"), *with* Kan. Stat. Ann. § 65-6705 (providing exception "if in the best medical judgment of the attending physician based on the facts of the case, an emergency exists that threatens the health, safety or well-being of the minor as to require an abortion"), *and* La. Rev. Stat. Ann. § 40:1299.35.12 (providing exception where "a medical emergency compels the immediate performance of an abortion because the continuation of the pregnancy poses an immediate threat and grave risk to the life or permanent physical health of the pregnant woman"), *and* 18 Pa. Cons. Stat. Ann. § 3203 (providing exception when a "condition . . . , on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function").

[20] *Compare, e.g.*, S.B. 442, 1998 Session (N.H. 1998) (bill requiring women to delay their abortions following the provision of information, defining medical emergency as a condition "which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function"), *with* H.B. 1278, 2002 Session (N.H. 2002) (similar bill with exception for circumstances when "in the opinion of the health care practitioner, the health of the mother is endangered"), *and* H.B. 1380, 2002 Session (N.H. 2002) (parental consent bill with exception when "in the best medical judgment of the physician based on the facts of the case before such physician, a medical emergency exists that so complicates the pregnancy as to require an immediate termination of the pregnancy").

of *Amici Curiae* New Hampshire Representative and HB 763 Sponsor Kathleen Souza, *et al.*, in Support of Petitioner at 13 (hereinafter Br. of N.H. Rep. Souza) ("The [medical emergency] definition acts as a loophole to avoid parental notice; the precision or breadth of the definition defines the size of that loophole."). Yet nothing in the Act or any other source of legislative intent provides a guide to that decision.[21] Where, as here, the Court "cannot be sure that [its] attempt to redraft the statute . . . would correctly identify the [exception the legislature] would have adopted," the "[Court's] obligation to avoid judicial legislation" requires that the "task of drafting" a constitutional statute be left to the legislature.[22] *NTEU*, 513 U.S. at 479 & n.26; *see also ACLU*, 521 U.S. at 885 (upholding facial invalidation where neither "the text [n]or other source of [legislative] intent identified a clear line that [the] Court could

[21] Even if one assumes that the New Hampshire Legislature would prefer a parental notification law with the narrowest possible exception to no law at all – and there is no basis in the record for that assumption – there are sound reasons for this Court to decline to rewrite the Act. Determining the precise nature and scope of the minimally adequate exception itself raises serious constitutional questions that the parties have never briefed because the Act, as drafted by the New Hampshire Legislature, did not raise them. Where, as here, granting as-applied relief "would likely raise independent constitutional concerns whose adjudication is unnecessary to decide this case," facial invalidation is appropriate. *NTEU*, 513 U.S. at 479.

[22] This case is thus distinguishable from cases like *United States v. Grace*, 461 U.S. 171 (1983), and *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985). As this Court has recognized, in those cases, narrowing the text to exclude the unconstitutional applications was a "relatively simple matter," *NTEU*, 513 U.S. at 479 n.26 (distinguishing *Grace*), because the text of the law or some other source of legislative intent "identified a clear line that this Court could draw," *ACLU*, 521 U.S. at 884-85 (distinguishing *Grace* and *Brockett*).

draw"); *Claremont Sch. Dist. v. Governor*, 744 A.2d 1107, 1112 (N.H. 1999) (refusing to sever unconstitutional portions of statute because "the court cannot choose for the lawmakers; to [do so] . . . would be an act of legislation not of construction." (internal citation and quotations omitted)).[23]

The Act's severability clause does not alter this conclusion. As an initial matter, although the severability clause mentions unconstitutional applications of the statute three times, it declares only that the "*provisions*," not the applications, are severable. *Compare* Act § 132:28 (declaring that if "any provision of this subdivision or the application thereof to any person or circumstances is held invalid . . . *the provisions* of this subdivision are severable" (emphasis added)), *with* 21 U.S.C. § 901 ("If a provision of this Act is held invalid in one or more of its applications, the provision shall remain in effect in all its valid applications that are severable."). Moreover, even if meant to permit the severance of applications, the presence of such a generic severability clause is hardly dispositive of the issue. *See United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968) ("[T]he ultimate determination of severability will rarely turn on the presence or absence of such a clause."); *see also In re Petition of New Hampshire Bar*

[23] The suggestion by the State's *amici* that this Court simply carve out an additional exception from the Act's requirements in a manner that "conform[s] to the definition of medical emergency upheld in *Casey*," Brief *Amicus Curiae* of the Thomas More Society at 27 n.28, illustrates the problem. Accepting this suggestion would require the Court not only to engraft onto the Act a fifty-four word definition of medical emergency, *see Casey*, 505 U.S. at 902 (reprinting 18 Pa. Cons. Stat. Ann. § 3203), but also to choose Pennsylvania's definition over other possibilities without any indication that New Hampshire would have so chosen.

Ass'n, 855 A.2d 450, 457 (N.H. 2004) (invalidating entire statutory provision despite presence of severability clause); *Opinion of the Justices*, 208 A.2d 458, 462 (N.H. 1965) (same). Where, as here, severing the unconstitutional applications would require the Court to make choices appropriately made by the legislative branch or to rewrite the statute, severance is inappropriate. *See, e.g.*, *Marchetti v. United States*, 390 U.S. 39, 60 n.18 (1968) (refusing to sever unconstitutional provisions where the Court "would be required not merely to strike out words, but to insert words that are not now in the statute. . . . [,] substitut[ing] the judicial for the legislative department of the government'" (quoting *United States v. Reese*, 92 U.S. 214, 221 (1875))); *Claremont*, 744 A.2d at 1112 (refusing to apply presumption of severability where severance would require court to make legislative choices).

Furthermore, severing unconstitutional applications is inappropriate unless it is clear that doing so effectuates legislative intent. Here, the New Hampshire Legislature intentionally omitted a medical emergency exception, in blatant violation of three decades of this Court's precedents. *See* Br. of N.H. Rep. Souza at 13 (explaining purposeful exclusion of an exception for anything but "truly life-threatening emergenc[ies]" and objecting to any broader emergency exception because "the greater the emergency – short of a truly life threatening emergency – the greater the need for parental notice"); Pet. App. 16 ("The New Hampshire legislature's intent that abortions not in compliance with the Act's notification provisions be prohibited in [medical emergencies] is clear."). At the time it passed the Act, the Legislature had every reason to believe that the Act would be held facially unconstitutional based on this Court's precedents. *See, e.g.*,

Stenberg, 530 U.S. at 930-38; *Thornburgh*, 476 U.S. at 769, 770-71; *Roe*, 410 U.S. at 165; *see also Owens*, 287 F.3d 910 (facially invalidating parental notice law with medical emergency exception limited to imminent death). Where the constitutional rule is clear and the legislature has purposefully crafted a law in violation of that rule, this Court cannot be sure that the legislature would have wanted the law to be saved by inserting an emergency exception. *See* Brief of *Amicus Curiae* NARAL Pro-Choice America Foundation, *et al.* (hereinafter Br. of NARAL).[24] Indeed, the brief filed on behalf of a group of over 100 New Hampshire Legislators as *Amici Curiae* in Support of Respondents casts significant doubt on this score. *See* Brief for *Amici Curiae* New Hampshire State Rep. Terie Norelli and Over One Hundred Other State Legislators Supporting Respondents.[25] In such instances, facial invalidation is appropriate. *Carson v. Maurer*, 424 A.2d 825, 839 (N.H. 1980) (per curiam) (holding that despite presumption of severability, severance is inappropriate where the court is "not sure" that the legislature would have enacted the valid provisions of law without the invalid ones); *Heath v. Sears,*

[24] Because the Legislature had every reason to know that the Act was unconstitutional, this case is in marked contrast to *United States v. Booker*, where "a legislatively unforeseen constitutional problem" rendered the federal Sentencing Guidelines unconstitutional, 125 S. Ct. 738, 757 (2005).

[25] The State's *amici* demonstrate the unwavering opposition to medical emergency exceptions of many groups that advocate for abortion restrictions. *See, e.g.*, Brief *Amici Curiae* of the United States Conference of Catholic Bishops, *et al.* at 9-10 (arguing that for any "abortion regulation that falls short of an outright ban, requiring a medical emergency or health exception would be incoherent" and amount to "no regulation at all"); Brief of *Amicus Curiae* Eagle Forum at 13 (arguing that a medical emergency exception "defeats and cripples the statute").

Roebuck & Co., 464 A.2d 288, 299 (N.H. 1983) (same); *see also Thornburgh*, 476 U.S. at 770-71 (facially invalidating law after "conclud[ing] that the legislature's failure to provide a medical-emergency exception . . . was intentional"); *Akron I*, 462 U.S. at 452 n.45 (refusing to sever unconstitutional word from abortion restriction where there was "doubt as to whether the city would have enacted" the provision without the unconstitutional word); *Marchetti*, 390 U.S. at 59 (facially invalidating, despite severability clause, where Court "cannot know how Congress would assess" competing concerns because Court was "entirely certain that the Constitution has entrusted to Congress, and not to this Court, the task of striking an appropriate balance among such values").[26]

Finally, were the Court to draft a medical emergency exception for the Act, the invasion of the legislative province would not end with this case. Where, as here, a legislative body deliberately chooses to push beyond well-established constitutional limits, saving the law would invite legislatures to abdicate their responsibility to pass laws that conform with the

[26] The cases cited by the State are not to the contrary. *See* Pet. Br. at 44-45. Rather, those cases stand for the unremarkable proposition that if (as is not the case here) "[t]here is nothing in the act . . . indicating an intention to obstruct or impede the operation of the Constitution," the courts should "presume that [the legislature] intended to keep within the limits of the constitution" and so construe the law. *In re Opinion of the Justices*, 41 N.H. 553, 1861 WL 2006, at *1-2 (N.H. 1861) (upholding law where statute could reasonably be construed to render it constitutional). Indeed, the cases cited by the State explicitly acknowledge that this rule has its limits: It "is not to be applied if it gives the statute a meaning the Legislature did not intend, either by addition to or subtraction from its terms." *Woolf v. Fuller*, 174 A. 193, 196 (N.H. 1934); *see also In re Opinion of the Justices*, 190 A. 801, 806 (N.H. 1937) (noting limitation on presumption of severability).

Constitution, leaving this Court to rewrite law after law. *See, e.g.*, *Tennessee v. Lane*, 541 U.S. 509, 552 (2004) (Rehnquist, C.J., dissenting) (objecting to "as-applied approach" because it "eliminates any incentive for Congress to craft [constitutional] legislation . . . [as] Congress can now simply rely on the courts to sort out [which applications are constitutional]"). As this Court long ago explained:

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.

Reese, 92 U.S. at 221 (holding Court could not save act of Congress by limiting its application to constitutionally permissible circumstances). Judicial rewriting of statutes thus diminishes the legislature's "'incentive to draft a [constitutional] law in the first place,'" *ACLU*, 521 U.S. at 885 n.50 (quoting *Osborne v. Ohio*, 495 U.S. 103, 121 (1990)), and "significantly reduce[s the legislature's] incentive to stay within constitutional bounds," *Massachusetts v. Oakes*, 491 U.S. 576, 586 (1989) (Scalia, J., concurring in judgment in part on behalf of five Justices). In addition to the institutional concerns, such legislative abdication will have serious repercussions for citizens who count on legislators, not just courts, to respect and safeguard their constitutional rights. If legislatures can pass plainly unconstitutional laws, expecting no worse than a judicial fix, the onus then falls on individuals to defend their rights through costly and burdensome litigation. Citizen litigation,

however, should be a last resort – not the default rule for protecting constitutional liberties.

Where, as here, "severing" the unconstitutional applications of a statute would require the judiciary to usurp the legislature's policy-making prerogative and to draft statutes, as well as encourage legislative abdication, facial invalidation is the only appropriate remedy.

C. The Principles Underlying the *Salerno* Rule Counsel in Favor of Facial Invalidation.

Relying on *Salerno*, the State attempts to convince the Court that facial invalidation threatens core institutional values. But to the extent that those values are implicated by this case, they counsel in favor of, not against, facial invalidation.

The *Salerno* principle is animated by three sets of concerns: (1) concerns about making constitutional decisions absent adequate facts; (2) federalism and separation of powers concerns that counsel against invalidating a law where another branch of government might interpret it to avoid constitutional difficulties; and (3) a desire to minimize intrusion on the legislature's policy-making prerogative. *See, e.g., Sec'y of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 977 (1984) (Rehnquist, C.J., dissenting); *Ferber*, 458 U.S. at 768.

Protection of the first principle – ensuring that the Court has "'data relevant and adequate to an informed judgment,'" *see* Pet. Br. at 33 (quoting *Ferber*, 458 U.S. at 768) – is of no concern here. As explained above, the *undisputed* record in this case demonstrates that requiring minors in medical emergencies to delay their abortions to comply with the Act will seriously harm their health. *See supra* Point I.B. In such circumstances,

this Court need not await "a concrete case" of a woman in the midst of a medical emergency to assure itself that it is making a fully informed decision. Moreover, the need to adhere to this prudential rule is at its strongest where the Court is called upon to "adjudicat[e] difficult and novel constitutional questions," *see Ferber*, 458 U.S. at 781 (Stevens, J., concurring in judgment). Whether an abortion restriction that indisputably endangers minors must include an emergency exception is neither a "difficult" nor a "novel" constitutional question.

The second principle – permitting state courts and other branches of government the opportunity to construe a law to avoid constitutional infirmities – has no application here. Contrary to the position it took in the lower courts, the State no longer argues that there is an interpretation of the Act that would render it constitutional. *See supra* n.8. Nor has the Attorney General declared that the Act will not be enforced against physicians who perform immediate abortions for patients whose health would be seriously threatened by delay.[27]

Because the State has proffered no construction – saving or otherwise – this case differs markedly from *Rust v. Sullivan*, 500 U.S. 173 (1991), upon which the State relies, *see* Pet. Br. at 28, 34, 36. In *Rust*, the plaintiffs argued that the challenged regulations would not permit a family planning facility "to refer a woman whose pregnancy places her life in imminent peril to

[27] For these reasons, this case does not raise the concern held by some Members of the *Stenberg* Court that invalidating the Nebraska ban prior to enforcement "denied each branch of Nebraska's government any role in the interpretation or enforcement of the statute," 530 U.S. at 979 (Kennedy, J., dissenting). *See also* Br. of N.H. Rep. Souza at 13 (explaining that legislators did not intend for Act to include medical emergency exception).

a provider of abortions." 500 U.S. at 195. The Court rejected plaintiffs' facial challenge – not because of the lack of a "concrete case" of a woman whose life was in imminent peril or because the regulations would be entitled to stand if they only harmed the relatively small number of women whose pregnancies put their lives at risk. Rather, the Court rejected the challenge because it did "not read the regulations to bar abortion referral or counseling in such circumstances." *Id.* at 195.[28] Here, in contrast, the State has not argued that the Act should be read to permit an immediate abortion where the delay seriously endangers a minor's health.[29]

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[28] Notably, if the State were correct that the fact that only a relatively small number of New Hampshire minors may need an emergency exception were enough to defeat Respondents' claim here, there would have been no need for the *Rust* Court to interpret the regulations at issue there. The percentage of women seeking family planning services at Title X clinics whose pregnancies place their "li[ves] in imminent peril" is surely no greater than the percentage of minors who are in need of an emergency exception to the Act.

[29] For the same reasons, the State's citation of *Akron II* and *Webster* are inapposite. As in *Rust*, in those cases, this Court refused to invalidate the statutes based on the plaintiffs' claims that the statutes might be interpreted or applied in a manner not clearly contemplated by the statutes. *See Akron II*, 497 U.S. at 513-14 (refusing to facially invalidate parental consent law for failure to provide expeditious bypass where plaintiffs' argument that bypass could take 22 days was based on an unsupported interpretation of the law and ignored a provision that permitted a minor to request that the time frame be shortened); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 523-24 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (rejecting plaintiffs' argument that because "the State *could try* to enforce the ban [on the use of a '*public facility*' to perform or assist with an abortion] against *private* hospitals using public water and sewage lines, or *private* hospitals leasing state-owned equipment or state land," the ban should be

Third, as explained above, *see supra* Point II.B.2, preventing judicial usurpation of the legislature's right to make policy decisions counsels in favor of, not against, facial invalidation here. Moreover, unlike other instances where this Court has invoked *Salerno* and declined to invalidate a statute, facial invalidation of the Act will not impair a complex scheme[30] or have otherwise devastating consequences for minors' well-being.[31] For the past thirty years, New Hampshire minors have been able to consent to abortion, without mandatory parental involvement. Nothing in the record of this case and – as the brief filed by the American College of Obstreticians and Gynecologists, the American Medical Association, and the American Academy of Pediatrics explains – nothing in the history of minors' access to abortion care in the other states that do not mandate parental involvement suggests that affirming the injunction will result in any harm to minors. *See* Brief of ACOG, *et al.* Thus, facial invalidation will neither implicate long-established New Hampshire law, nor create disastrous or unforeseeable new consequences. On the contrary, maintaining the status quo will ensure that teens in

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facially invalidated, where "straightforward" applications of the ban were constitutional (emphases added)).

[30] *Cf. Booker*, 125 S. Ct. at 757-759 (declining to facially invalidate in the "context [of the] highly complex statute, [and] interrelated provisions"of federal sentencing scheme).

[31] *Cf. Califano v. Westcott*, 443 U.S. 76, 90 (1979) (declining to facially invalidate statute because "suspending the program's operation would impose hardship . . . upon innocent recipients of government largesse," some 300,000 impoverished children).

New Hampshire can continue to obtain immediate abortion care when necessary to prevent significant risks to their health.

Finally, facial invalidation will not leave New Hampshire powerless to pass a parental involvement law that complies with the federal Constitution if it so chooses. New Hampshire suffers no lack of models if it wants to do so.[32] Allowing the Legislature to decide among the available choices for a medical emergency exception demonstrates deference to, not disregard for, the legislature's role.

III. THE DEATH EXCEPTION ENDANGERS MINORS' LIVES AND IS CONSTITUTIONALLY INADEQUATE.

In addition to failing to protect minors' health, the Act fails to provide a meaningful exception even when a minor faces life-threatening circumstances. The Act permits a physician to perform a life-saving abortion without delay only if the physician can "certif[y]" that an "abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice." Act § 132:26, I(a). The First Circuit correctly held this provision constitutionally deficient on two independent grounds. "[I]ts time requirement is drawn too narrowly, and . . . it fails to safeguard a physician's good-faith medical judgment that a minor's life is at risk." Pet. App. 21;

[32] Given the combination of clear precedent from this Court and the success of other states in passing constitutionally sound parental involvement laws with adequate medical emergency exceptions, the complaint of some *amici* that facial invalidation of the Act would impose a "standard that requires virtually perfect legislation" rings hollow. *See* Br. of N.H. Legislators at 3; *see also* Brief of *Amici Curiae* James P. Weiers, Speaker of the Arizona House of Representatives, *et al.* at 3.

see also id. at 35-36.[33] The State has failed to respond meaningfully or consistently to these deficiencies. Indeed, its newest interpretation of the death exception (one not argued below) only reconfirms that this exception is inadequate to protect pregnant minors facing life-threatening emergencies.

As the Court of Appeals found, physicians cannot always determine when a critically ill patient will die. Pet. App. 18-19; *see also* Goldner ¶ 17 (J.A. 27). Thus, "the time component of the Act's death exception forces physicians either to gamble with their patients' lives in hopes of complying with the notice requirement before a minor's death becomes inevitable, or to risk criminal and civil liability by providing an abortion without parental notice." Pet. App. 18-19. The State does not dispute this. Rather, it argues that it is not constitutionally problematic because if the physician is unable to make the required determination, he can obtain a parent's written, certified waiver of the delay, or seek court authorization pursuant to the judicial bypass provision. Pet. Br. at 26-27. For the reasons discussed above, *see supra* Point I.C & n.11, the Constitution requires

[33] The courts below did not reach Respondents' claim that the death exception is also impermissibly narrow because it does not permit an abortion when it is the best, but not the only, option for saving a minor's life. *See Colautti*, 439 U.S. at 400 (holding that in context of abortion statute "the word 'necessary' suggests that a particular technique must be indispensable to the woman's life or health – not merely desirable – before it may be adopted"); *see also* Pet. App. 18 n.7. Because the restrictive language in the death exception requires Dr. Goldner to use less safe life-saving treatments while attempting to satisfy the Act's requirements, *see* Goldner ¶ 18 (J.A. 28) (describing serious risks that alternative treatments pose), it is unconstitutional. *See Stenberg*, 530 U.S. at 931, 936-37; *Thornburgh*, 476 U.S. at 768-69; *Danforth*, 428 U.S. at 76-79.

more when a woman's life is at stake. *See Stenberg*, 530 U.S. at 930-31; *Casey*, 505 U.S. at 880.

Additionally, the court below correctly held that the Act's uncertain scienter standard and the attendant threat of "*post hoc* second guessing" through an objective standard of "negligence" would "impermissibly chill physicians' willingness and ability to provide lifesaving abortions." Pet. App. 20; *see Colautti*, 439 U.S. at 390-91 (holding where "it is unclear whether the statute imports a purely subjective standard, or whether it imposes a mixed subjective and objective standard," abortion restriction has impermissible chilling effect). This holding was based on the State's own proposed reading of the Act – which incorporated both good faith *and* objective reasonableness standards – and on the fact that a construction precluding the possibility of an objective standard was not reasonable and readily apparent under New Hampshire law. Pet. App. 20; *see also* Def. Objection to Request for Decl. & Inj. Relief at 8 (arguing that to comply with the Act, physician's good faith medical judgment must *also* be "objectively reasonable"); Br. of Def.-Appellant at 20 (arguing that it is not unconstitutional or vague for the Act to "prescrib[e] a standard including components of good faith and reasonableness"). In this Court, however, the State abandons its argument that the Act does, or can, include a reasonableness requirement, simply asserting, "there is no reason to believe that New Hampshire courts would not interpret [the Act] to protect the good faith judgment of abortion providers." Pet. Br. at 25. Given the State's own vacillation and confusion about the Act's scienter standard (or standards), it is hard to imagine how doctors faced with the prospect of criminal liability can know which standard will apply or take comfort that, after having provided a life-saving

abortion, the State will not later hold them to an objective standard. The chilling effect of this uncertainty endangers minors in the most dire circumstances, and renders the Act unconstitutional.

IV. RESPONDENTS ARE ENTITLED TO A REMAND OF THEIR REMAINING CLAIM SHOULD THE COURT REVERSE THE DECISION BELOW.

Finally, should this Court reverse the Court of Appeals, the case should be remanded so that the lower courts may reach Respondents' remaining, independent claim that the Act is unconstitutional because its judicial bypass provision fails to "assure that a resolution of the [minor's petition for a waiver], and any appeals that may follow, will be completed with anonymity," *Bellotti II*, 443 U.S. at 644. Although the courts below recognized that this claim presented serious constitutional concerns, neither reached the merits. Pet. App. 21-22, 37-38. Where, as here, a distinct claim was neither "passed upon by [the courts below] nor adequately presented here" it is "appropriate to remand the case" for consideration. *Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 468 (1947) (citing *United States v. Ballard*, 322 U.S. 78, 88 (1944)).

CONCLUSION

For these reasons, this Court should affirm.

Respectfully submitted, October 12, 2005

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AFFIDAVIT OF SERVICE

Howard Daniels, being duly sworn, deposes and says that deponent is not party to the action, and is over 18 years of age.

That on the 12, day of October 2005 deponent served 3 copy(s) of the within

BRIEF FOR RESPONDENTS

upon the attorneys at the addresses below, and by the following method:

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October 12, 2005

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Commission Expires November 10, 2007

Case Name: Ayotte v. Planned Parenthood

Docket/Case No. 04-1144