

**Supplemental Materials for Brest, Levinson, Balkin, Amar and Siegel
Processes of Constitutional Decisionmaking
Ayotte v. Planned Parenthood of Northern New England**

AYOTTE v. PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND

126 S.Ct. 961 (2006)

Justice O'CONNOR delivered the opinion of the Court.

We do not revisit our abortion precedents today, but rather address a question of remedy: If enforcing a statute that regulates access to abortion would be unconstitutional in medical emergencies, what is the appropriate judicial response? We hold that invalidating the statute entirely is not always necessary or justified, for lower courts may be able to render narrower declaratory and injunctive relief.

I

A

In 2003, New Hampshire enacted the Parental Notification Prior to Abortion Act. N.H.Rev.Stat. Ann. §§ 132:24-132:28 (Supp.2004). The Act prohibits physicians from performing an abortion on a pregnant minor (or a woman for whom a guardian or conservator has been appointed) until 48 hours after written notice of the pending abortion is delivered to her parent or guardian. § 132:25(I). Notice may be delivered personally or by certified mail. §§ 132:25(II), (III). Violations of the Act are subject to criminal and civil penalties. § 132:27.

The Act allows for three circumstances in which a physician may perform an abortion without notifying the minor's parent. First, notice is not required if "[t]he attending abortion provider certifies in the pregnant minor's record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice." § 132:26(I)(a). Second, a person entitled to receive notice may certify that he or she has already been notified. § 132:26(I)(b). Finally, a minor may petition a judge to authorize her physician to perform an abortion without parental notification. The judge must so authorize if he or she finds that the minor is mature and capable of giving informed consent, or that an abortion without notification is in the minor's best interests. § 132:26(II). These judicial bypass proceedings "shall be confidential and shall be given precedence over other pending matters so that the court may reach a decision promptly and without delay," and access to the courts "shall be afforded [to the] pregnant minor 24 hours a day, 7 days a week." §§ 132:26(II)(b), (c). The trial and appellate courts must each rule on bypass petitions within seven days. *Ibid.*

The Act does not explicitly permit a physician to perform an abortion in a medical emergency without parental notification.

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B

Respondents are Dr. Wayne Goldner, an obstetrician and gynecologist who has a private practice in Manchester, and three clinics that offer reproductive health services. All provide abortions for pregnant minors, and each anticipates having to provide emergency abortions for minors in the future. Before the Act took effect, respondents brought suit under 42 U.S.C. § 1983, alleging that the Act is unconstitutional because it fails "to allow a physician to provide a prompt abortion to a minor whose health would be endangered" by delays inherent in the Act. Respondents also challenged the adequacy of the Act's life exception and of the judicial bypass' confidentiality provision.

The District Court declared the Act unconstitutional, see 28 U.S.C. § 2201(a), and permanently enjoined its enforcement. It held, first, that the Act was invalid for failure "on its face ... to comply with the constitutional requirement that laws restricting a woman's access to abortion must provide a health exception." *Planned Parenthood of Northern New Eng. v. Heed*, 296 F.Supp.2d 59, 65 (D.N.H.2003). It also found that the Act's judicial bypass would not operate expeditiously enough in medical emergencies. In the alternative, the District Court held the Act's life exception unconstitutional because it requires physicians to certify with impossible precision that an abortion is "necessary" to avoid death, and fails to protect their good faith medical judgment.

The Court of Appeals for the First Circuit affirmed. Citing our decisions in *Stenberg*, *Casey*, and *Roe v. Wade*, it observed: "Complementing the general undue burden standard [for reviewing abortion regulations], the Supreme Court has also identified a specific and independent constitutional requirement that an abortion regulation must contain an exception for the preservation of the pregnant woman's health." It went on to conclude that the Act is unconstitutional because it does not contain an explicit health exception, and its judicial bypass, along with other provisions of state law, is no substitute. The Court of Appeals further found the Act unconstitutional because, in its view, the life exception forces physicians to gamble with their patients' lives by prohibiting them from performing an abortion without notification until they are certain that death is imminent, and is intolerably vague. Because the district and appellate courts permanently enjoined the Act's enforcement on the basis of the above infirmities, neither reached respondents' objection to the judicial bypass' confidentiality provision.

We granted certiorari to decide whether the courts below erred in invalidating the Act in its entirety because it lacks an exception for the preservation of pregnant minors' health. We now vacate and remand for the Court of Appeals to reconsider its choice of remedy.

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II

As the case comes to us, three propositions--two legal and one factual--are established. First, States unquestionably have the right to require parental involvement when a minor considers terminating her pregnancy, because of their "strong and legitimate interest in the welfare of [their] young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely." *Hodgson v. Minnesota*, 497 U.S. 417 (1990).^a Accordingly, we have long upheld state parental involvement statutes like the Act before us, and we cast no doubt on those holdings today.^b

Second, New Hampshire does not dispute, and our precedents hold, that a State may not restrict access to abortions that are " 'necessary, in appropriate medical judgment, for preservation of the life or health of the mother.' " *Casey* (quoting *Roe*)

Third, New Hampshire has not taken real issue with the factual basis of this litigation: In some very small percentage of cases, pregnant minors, like adult women, need immediate abortions to avert serious and often irreversible damage to their health.

New Hampshire has maintained that in most if not all cases, the Act's judicial bypass and the State's "competing harms" statutes should protect both physician and patient when a minor needs an immediate abortion. See N.H.Rev.Stat. Ann. § 627:3(I) (1996) (for criminal liability, "[c]onduct which the actor believes to be necessary to avoid harm to ... another is justifiable if the desirability and urgency of avoiding such harm outweigh, according to

^a Forty-four States, including New Hampshire, have parental involvement (that is, consent or notification) laws. Thirty-eight of those laws have explicit exceptions for health or medical emergencies. Four, including New Hampshire, make no exception for minors' health in an emergency.

^bIt is the sad reality, however, that young women sometimes lack a loving and supportive parent capable of aiding them "to exercise their rights wisely." *Hodgson* (holding unconstitutional a statute requiring notification of both parents, and observing that "the most common reason" young women did not notify a second parent was that the second parent "was a child- or spouse-batterer, and notification would have provoked further abuse"). See also Department of Health and Human Services, Administration on Children, Youth and Families, *Child Maltreatment 2003*, p. 63 (2005) (parents were the perpetrators in 79.7% of cases of reported abuse or neglect).

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ordinary standards of reasonableness, the harm sought to be prevented by the statute defining the offense charged"); § 627:1 (similar for civil liability). But the District Court and Court of Appeals found neither of these provisions to protect minors' health reliably in all emergencies. And New Hampshire has conceded that, under our cases, it would be unconstitutional to apply the Act in a manner that subjects minors to significant health risks.

III

We turn to the question of remedy: When a statute restricting access to abortion may be applied in a manner that harms women's health, what is the appropriate relief? Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force, or to sever its problematic portions while leaving the remainder intact.

Three interrelated principles inform our approach to remedies. First, we try not to nullify more of a legislature's work than is necessary, for we know that "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people." It is axiomatic that a "statute may be invalid as applied to one state of facts and yet valid as applied to another." Accordingly, the "normal rule" is that "partial, rather than facial, invalidation is the required course," such that a "statute may ... be declared invalid to the extent that it reaches too far, but otherwise left intact."

Second, mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from "rewrit[ing] state law to conform it to constitutional requirements" even as we strive to salvage it. Our ability to devise a judicial remedy that does not entail quintessentially legislative work often depends on how clearly we have already articulated the background constitutional rules at issue and how easily we can articulate the remedy. In *United States v. Grace*, 461 U.S. 171 (1983), for example, we crafted a narrow remedy much like the one we contemplate today, striking down a statute banning expressive displays only as it applied to public sidewalks near the Supreme Court but not as it applied to the Supreme Court Building itself. We later explained that the remedy in *Grace* was a "relatively simple matter" because we had previously distinguished between sidewalks and buildings in our First Amendment jurisprudence. But making distinctions in a murky constitutional context, or where line-drawing is inherently complex, may call for a "far more serious invasion of the legislative domain" than we ought to undertake.

Third, the touchstone for any decision about remedy is legislative intent, for a court cannot

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"use its remedial powers to circumvent the intent of the legislature." After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all? All the while, we are wary of legislatures who would rely on our intervention, for "[i]t 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" to announce to whom the statute may be applied. "This would, to some extent, substitute the judicial for the legislative department of the government."

In this case, the courts below chose the most blunt remedy--permanently enjoining the enforcement of New Hampshire's parental notification law and thereby invalidating it entirely. That is understandable, for we, too, have previously invalidated an abortion statute in its entirety because of the same constitutional flaw. In *Stenberg*, we addressed a Nebraska law banning so-called "partial birth abortion" unless the procedure was necessary to save the pregnant woman's life. We held Nebraska's law unconstitutional because it lacked a health exception. But the parties in *Stenberg* did not ask for, and we did not contemplate, relief more finely drawn.

In the case that is before us, however, we agree with New Hampshire that the lower courts need not have invalidated the law wholesale. Respondents, too, recognize the possibility of a modest remedy: They pleaded for any relief "just and proper," and conceded at oral argument that carefully crafted injunctive relief may resolve this case. Only a few applications of New Hampshire's parental notification statute would present a constitutional problem. So long as they are faithful to legislative intent, then, in this case the lower courts can issue a declaratory judgment and an injunction prohibiting the statute's unconstitutional application.

There is some dispute as to whether New Hampshire's legislature intended the statute to be susceptible to such a remedy. New Hampshire notes that the Act contains a severability clause providing that "[i]f any provision of this subdivision or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect the provisions or applications of this subdivision which can be given effect without the invalid provisions or applications." § 132:28. Respondents, on the other hand, contend that New Hampshire legislators preferred no statute at all to a statute enjoined in the way we have described. Because this is an open question, we remand for the lower courts to determine legislative intent in the first instance.

IV

Either an injunction prohibiting unconstitutional applications or a holding that consistency

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with legislative intent requires invalidating the statute *in toto* should obviate any concern about the Act's life exception. We therefore need not pass on the lower courts' alternative holding. Finally, if the Act does survive in part on remand, the Court of Appeals should address respondents' separate objection to the judicial bypass' confidentiality provision. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.