

Supreme Court Returns New Hampshire Law to Lower Court

BY Dave Andrusko

When the United States Supreme Court unanimously returned New Hampshire's parental notice law back to a lower court, there were two common interpretations of its January 18 decision.

The first understanding was that the justices were in a kind of holding pattern, waiting until retiring justice Sandra Day O'Connor was replaced by Judge Samuel Alito.

The second was that a High Court in transition may be less willing to throw out an entire law the instant pro-abortionists cry wolf.

To take the later consideration first, writing on Scotusblog.com Lyle Denniston observed, "Read most broadly, though, the opinion could be understood as laying down a new limit on lower court judges' authority to issue sweeping decisions that nullify new abortion laws, end to end." He added, "It quite clearly calls for a much more discrete, refined review of the ways in which a law might be enforced validly."

Ayotte v. Planned Parenthood of Northern New England represented the last opinion written by Justice O'Connor, a member of the High Court since 1981. At issue was a New Hampshire parental notice law passed in 2003 after a knock-down, drag-out legislative fight.

O'Connor's initial paragraph suggests where she is going in a very short (10-page) opinion. "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."

O'Connor lays out what are, for her, certain givens. She writes, first, "States unquestionably have the right to require parental involvement when a minor considers terminating her pregnancy."

Second, the state of 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.'"

Third, O'Connor writes, "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." (More about these latter two points below.)

Thus, the issue is "remedy." O'Connor writes, "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."

She then makes a distinction between *Ayotte* and the Nebraska partial-birth abortion law at issue in *Stenberg v. Carhart*, a statute the Court gutted for (among other reasons) the absence of a health

exception. “[T]he parties in *Stenberg* did not ask for, and we did not contemplate, relief more finely drawn,” O’Connor writes. “In the case that is before us, however, we agree with New Hampshire that the lower courts need not have invalidated the law wholesale.”

She adds, “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.”

How that works out in practice will not be known for some time. To begin with, the Court of Appeals could address a separate challenge to the confidentiality provision of the judicial bypass, which plaintiffs went after as well.

What, if any, possible wider applications are there?

In a footnote, O’Connor observes that 38 of the 44 states with some form of parental involvement law have “explicit exceptions for health or medical emergencies.” In the same footnote, she writes, “Two States give physicians sufficient discretion to perform an abortion to protect minors’ health.”

(A better description of these latter two is “abortionist’s consent” laws. All the abortionist need do is get the approval of another abortionist not involved in taking the unborn child’s life.)

Together, this would seem to suggest (in O’Connor’s mind at least) that all parental involvement laws would require a health exception encompassing enough for emergency situations. O’Connor argues that the effect of this exception would be very limited (“In some very small percentage of cases”) and seems to be signaling the language she would okay (immediate abortions “to avert serious and often irreversible damage to their health”).

But there are two considerations to keep in mind. First, Justice O’Connor is now gone. Second, because the Supreme Court declined to rule, the door is still open to closing a broad medical emergency loophole in the parental involvement laws that are in effect in other states.

Medical Emergencies

The issue of “medical emergencies” is much, much more complex than a quick glance at the Court’s decision or most newspaper accounts would indicate. This is brought home in a very illuminating *amicus curiae* (“friend of the court”) brief submitted to the justices in *Ayotte* by a group of pro-life medical and religious organizations.

“In imposing a constitutional standard for parental notice statutes that mandates a broadly interpreted ‘health’ exception the Circuit Court of Appeals has relied precipitously upon the testimony of one physician-Plaintiff in the case. The Court’s Amici [the authors of this brief] seek to bring to the Court’s attention supplemental medical authority that suggests that none of the acute medical complications of pregnancy cited by the Court of Appeals for Respondents and their amici necessarily mandates immediate termination of pregnancy by abortion as the accepted standard of practice. Moreover, Respondents’ assertion that abortion is a relatively ‘safe’ medical procedure relies upon maternal mortality data that is unintended for that purpose and unsuitable to it.”

The brief astutely observes, “All of the potentially catastrophic medical conditions cited by opponents would also mandate care in an advanced medical facility. ... Such care would, of necessity go beyond the immediate abortion procedure and would likely involved complex decision-making. Prudent medical

care and planning would therefore consistently involve parental involvement and consultation, if not outright consent. Encouraging parental knowledge and involvement at the earliest opportunity would serve to protect the adolescent in difficult circumstances, particularly when the adolescent cannot advocate for herself.”

In other words, in such situations an immediate abortion is NOT in the pregnant teenager’s medical best interests, and her parents’ involvement is more important than ever! This is knowledge that needs to get much wider distribution.