



## **Ayotte Case Hinges on Procedural Question** U.S. Supreme Court could make it more difficult to challenge abortion restrictions

By Rebecca Gudeman

On November 30th, the United States Supreme Court will hear arguments in *Ayotte v. Planned Parenthood of Northern New England*.<sup>1</sup> The case involves a New Hampshire statute that requires parental notification before a minor can receive an abortion. The question in *Ayotte* is whether the law violates the federal constitution because it fails to provide an exception to the notification requirement when immediate abortion is necessary to protect a pregnant minor's health.

Before the Court can even consider the health exception, however, it must address a procedural question: What is the appropriate standard for review? As with most abortion cases, the petitioners challenged the New Hampshire statute's constitutionality based on speculation about the law's impact (a facial challenge) rather than on evidence of its actual impact (an as-applied challenge). Facial challenges to a statute usually must meet a stricter standard of review than as-applied challenges.

The Court's ruling on this issue does not threaten a woman's fundamental right to choose. However, it will strongly influence the ability of states to place restrictions on a woman's right to abort by making it more or less difficult to challenge abortion restrictions in court, even restrictions that are

clearly illegal. Therefore, *Ayotte* has the potential to change the landscape of abortion rights—including abortion rights for adolescents—across the United States.

### **Facial versus As-Applied Challenges**

The difference between facial and as-applied challenges is important. In facial challenges, the petitioner must prove that, by its language alone, a statute violates protected rights. Often, facial challenges are brought by an advocacy group on behalf of a particular population (there does not have to be a presently existing injured party) and are based on speculation about how a law's implementation might impact that population. Facial challenges do not require factual evidence of violations, and can be raised even before a law is implemented. Challengers present hypothetical worst-case scenarios.

If a statute is found facially unconstitutional, the court will strike the law in its entirety. Thus, facial challenges can be used to prevent a law from ever taking effect.

In contrast, as-applied challenges must show how a statute or particular provision of a statute violated a petitioner's protected rights. As-applied challenges cannot be raised until a law has taken effect and someone's rights have been violated. If a court finds provisions of a stat-

ute unconstitutional in an as-applied challenge, the court will attempt to strike *just* those provisions that violated the petitioner's rights.<sup>2</sup>

### **The New Hampshire Case**

The New Hampshire case was brought as a facial challenge. In June 2003, the New Hampshire legislature passed the "Parental Notification Prior to Abortion Act."<sup>3</sup> The Act requires health care providers to notify a parent at least 48 hours prior to performing an abortion upon an unemancipated minor or a minor for whom a guardian or conservator has been appointed.<sup>4</sup> The Act does provide some exceptions to this requirement. No notice is required if persons entitled to notice certify in writing that they have already been notified. Notice also is not required if the attending health care provider certifies that the abortion is necessary to prevent the minor's death, and there is not enough time to provide the required notice. The Act also includes a judicial bypass provision allowing a judge to authorize the abortion in lieu of notification.<sup>5</sup>

Just prior to the Act's implementation, three health care clinics and a physician filed a lawsuit asking the court to declare the Act unconstitutional on its face and to issue a preliminary injunction preventing its enforcement.<sup>6</sup> They argued that the Act was unconstitutional because its death exception was

<sup>1</sup> *Planned Parenthood of N. New England v. Heed*, 390 F.3d 53 (1<sup>st</sup> Cir. 2004), cert. granted sub nom. *Ayotte v. Planned Parenthood of N. New England* (U.S. May 23, 2005)(No. 04-1144).

<sup>2</sup> See *Ada v. Guam Soc'y of Obstetricians & Gynecologists*, 506 U.S. 1011 (1992)(Scalia, J. dissenting from denial of writ of certiorari)("The practical effect of holding a statute unconstitutional 'as applied' is to prevent its future application

in a similar context, but not to render it utterly inoperative. To achieve the latter result, the plaintiff must succeed in challenging the statute 'on its face'").

<sup>3</sup> *Planned Parenthood of N. New England*, 390 F.3d at 55.

<sup>4</sup> *Id.* (citing RSA 132:25).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 56.

too narrow and because the Act lacked an exception waiving notification when necessary to protect a minor's health. The District Court agreed and issued an injunction.<sup>7</sup> (The Supreme Court has ruled that any restrictions on abortion must include exceptions when necessary to preserve a woman's life or health.<sup>8</sup>)

On appeal, the First Circuit affirmed the District Court's decision. The Court of Appeals found the Act facially invalid for its lack of an explicit health exception and also found the death exception unconstitutional.<sup>9</sup> In reaching this decision, the court determined that the appropriate standard of review when assessing the facial validity of an abortion statute is whether the statute places an "undue burden" on, or a substantial obstacle in the path of, a woman seeking to exercise her protected right to choose. The state chose to appeal to the Supreme Court both the court's ruling on the health exception as well as its choice of the appropriate standard of review for facial challenges.

### Two Standards for Facial Challenges

Generally, courts do not like to rule on facial challenges. The U.S. Supreme Court has said: "[F]acial challenges are best when infrequent [citations omitted]. Although passing on the validity of a law wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught by the particular, to which common law method normally looks."<sup>10</sup> For this reason, the standard of review in facial challenges is often, but not always, more stringent than in as-applied cases.

The Supreme Court has made clear that the standard of review for an as-applied challenge to an abortion statute is whether the restrictions in the statute place an "undue burden" on a woman's ability to exercise her protected right to choose.<sup>11</sup> However, the Supreme Court has discussed and applied two different standards of review in facial challenges: the "no set of circumstances" test as well as the "undue burden" test. Circuit courts have subsequently split over which standard is appropriate.

### The "No Set of Circumstances" Standard

In 1987, the Supreme Court established a general standard for assessing facial challenges to the constitutionality of statutes. In *United States v. Salerno*, the majority held that before a statute can be found unconstitutional on its face, the challenger must demonstrate that "no set of circumstances exists under which the [law] would be valid."<sup>12</sup> The Court acknowledged that there was one exception to this rule but emphasized that the exception only applied to cases in which a petitioner's First Amendment rights were at stake.<sup>13</sup>

Prior to *Salerno*, the Court had not applied the "no set of circumstances" standard in abortion cases.<sup>14</sup> After *Salerno*, however, the Supreme Court used the *Salerno* standard to deny several facial challenges to the constitutionality of abortion statutes. In *Ohio v. Akron Center for Reproductive Health (Akron II)*, the Court reviewed a facial challenge to the constitutionality of an Ohio parental notification law.<sup>15</sup> Plaintiffs challenged various aspects of the statute's judicial bypass procedure as well as a requirement

that parental notice come directly from the physician performing the abortion. The Court applied the "no set of circumstances" test, stating that "because appellees are making a facial challenge to a statute, they must show that 'no set of circumstances exists under which the Act would be valid.'"<sup>16</sup> Under this scrutiny, the plaintiffs' challenge failed. In *Rust v. Sullivan*, the court also applied the *Salerno* standard, upholding regulations limiting abortion-related counseling by Title X funded agencies.<sup>17</sup>

### The "Undue Burden" Standard

In a 1992 abortion case, however, the Supreme Court took a different tack. While never dismissing or even directly addressing *Salerno*, a plurality of the Court applied a different standard in a facial challenge to the constitutionality of a Pennsylvania abortion statute.<sup>18</sup> In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court decided to revisit *Roe v. Wade* and clarify the "principles that define the rights of the woman and the legitimate authority of the State respecting the termination of pregnancies by abortion procedures."<sup>19</sup> In this context, the Court adopted the "undue burden" test for the first time.<sup>20</sup>

While the opinion does not explicitly state that this is the standard to apply when reviewing facial challenges, the plurality did apply the "undue burden" standard to the facts of the case. The Court found the Pennsylvania statute invalid because "in a large fraction of cases in which [the statute] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion."<sup>21</sup>

<sup>7</sup> *Id.*

<sup>8</sup> *Stenberg v. Carhart*, 530 U.S. 914 (2000) ("[T]he governing standard requires an exception 'where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother...'" (citing *Casey*, 505 U.S. 833 at 879)).

<sup>9</sup> *Id.* at 62.

<sup>10</sup> *Sabri v. U.S.*, 541 U.S. 600, 124 S.Ct. 1941, 1948 (quoting *U.S. v. Raines*, 362 U.S. 17, 22 (1960)).

<sup>11</sup> *Casey v. Planned Parenthood of S.E. Pennsylvania*, 505 U.S. 833, 878 (1992); see also *Stenberg v. Carhart*, 530 U.S. 914 (2000).

<sup>12</sup> *United States v. Salerno*, 481 U.S. 739, 745 (1987).

<sup>13</sup> *Id.*

<sup>14</sup> See, for example, *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *Bellotti v. Baird*, 443 U.S. 622 (1979).

<sup>15</sup> *Ohio v. Akron Cntr for Reproductive Health (Akron II)*, 497 U.S. 502 (1990).

<sup>16</sup> *Id.* at 514.

<sup>17</sup> *Rust v. Sullivan*, 500 U.S. 173, 183 (1991) ("Petitioners are challenging the facial validity of the regulations. Thus, we are concerned only with the question whether, on their face, the regulations are both authorized by the Act and can be construed in such a manner that they can be applied to a set of individuals without infringing upon constitutionally protected rights.")

<sup>18</sup> *Casey v. Planned Parenthood of S.E. Pennsylvania*, 505 U.S. 833 (1992).

<sup>19</sup> *Id.* at 845.

<sup>20</sup> *Id.* at 878 ("To protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis as explained in this opinion. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.")

<sup>21</sup> *Id.* at 879, 895.

## Circuit Court Split

After *Casey*, many circuit courts chose to apply the *Casey* “undue burden” standard rather than the *Salerno* “no set of circumstances” standard to facial challenges in abortion cases.<sup>22</sup> In *Jane L. v. Bangerter*, the Tenth Circuit held that “the proper test [in facial challenges] after *Casey* is the “undue burden” standard....”<sup>23</sup> In *Planned Parenthood Sioux Falls Clinic v. Miller*, the Eighth Circuit noted that the Supreme Court did not expressly reject *Salerno* in their *Casey* opinion. Nevertheless, the Court “ch[ose] to follow what the Supreme Court actually did—rather than what it failed to say—and apply the undue-burden test.”<sup>24</sup> Four other circuits also have chosen to apply the *Casey* rather than the *Salerno* standard in facial challenges.<sup>25</sup>

Two circuits, however, have chosen to apply the *Salerno* standard. In *Barnes v. Moore*, the Fifth Circuit applied the “no set of circumstances” test in a facial challenge to an abortion statute.<sup>26</sup> The court acknowledged that “[t]he *Casey* joint opinion may have applied a somewhat different standard...,” but went on to say “we do not interpret *Casey* as having overruled, *sub silentio*, longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes.”<sup>27</sup> The Fourth Circuit also has stated that the *Salerno* standard is the appropriate standard to apply in abortion cases.<sup>28</sup>

## Decisions after Casey

In 2000, the Supreme Court had the opportunity to resolve this conflict when it agreed to review a facial challenge to a Nebraska abortion statute in

*Stenberg v. Carhart*.<sup>29</sup> Unfortunately, the Court chose not to address the question in its decision. In their opinion, the majority did apply an “undue burden” test, finding the Nebraska “partial birth abortion” statute unconstitutional on its face because “it ‘imposes an undue burden on a woman’s ability’ to choose....”<sup>30</sup> However, the opinion never addressed the conflict between *Casey* and *Salerno*, nor did it expressly state that the “undue burden” test is the standard to apply in facial challenges in the abortion context.

In a 2004 case regarding a facial challenge to a federal bribery statute, the Court did say that abortion was one of the few circumstances in which an exception to the *Salerno* “no set of circumstances” standard for facial challenges has been found valid.<sup>31</sup> Nevertheless, this comment was made *in dicta*.

## Probable Impact of Ayotte

After refusing to address the question in several cases,<sup>32</sup> the Supreme Court finally appears ready with *Ayotte* to clarify which of these two standards should apply when determining the constitutionality of an abortion statute on its face. The choice of the appropriate standard for facial challenges does not threaten a woman’s core right to choose. However, the choice will impact whether statutes that violate a woman’s right to choose can be struck down via facial challenges. Should facial challenges no longer be available, advocates will be forced to turn to as-applied challenges. In practice, this will limit the extent to which women, and particularly adolescents, can be protected from illegal abortion restrictions.

Should the Supreme Court adopt the *Salerno* standard, it will become virtually impossible to win a facial challenge to an abortion statute. Under the *Salerno* standard, a facial challenge will fail as long as the statute in question can be applied legally in at least one circumstance, even if the statute’s application will violate the protected rights of the vast majority of women it impacts. For this reason, statutes containing even the most extreme abortion restrictions often will withstand a *Salerno* facial challenge. A previous case highlights how facial challenges to extreme laws can fail under *Salerno*’s stringent standard. In 1990, the territory of Guam passed a statute outlawing all abortions except those in cases of medical emergency. Women have a constitutionally protected right to choose abortion prior to fetal viability and a constitutionally protected right to choose abortion in the post-viability stage of pregnancy when the abortion is necessary for the preservation of the women’s lives or health.<sup>33</sup> Not surprisingly then, on review, the Ninth Circuit found Guam’s statute facially unconstitutional and inoperative because, upon implementation, the statute would have violated most pregnant women’s constitutional rights to choose. Guam requested review of the Ninth Circuit decision by the Supreme Court. Its request for review was denied, but in a dissent from the denial of writ of certiorari, Justice Antonin Scalia, joined by the late Chief Justice William Rehnquist and the late Justice Byron White, argued that the Circuit court should have applied the *Salerno* standard, and that under *Salerno*, Guam’s statute would have

22 See, e.g., *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127 (3d Cir. 2000); *Planned Parenthood of S. Ariz. v. Lawall*, 180 F.3d 1022, 1025-26 (9th Cir. 1999); *Women’s Med. Prof. Corp. v. Voinovich*, 130 F.3d 187, 193-96 (6th Cir. 1997); *Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir. 1996); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1456-58 (8th Cir. 1995).

23 *Jane L. v. Bangerter*, 102 F.3d at 1116 (10th Cir. 1996).

24 *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d at 1457, 1458 (8th Cir. 1995).

25 *A Woman’s Choice – E. Side Women’s Clinic v. Newman*, 305 F.3d 684 (7th Cir. 2002); *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127 (3rd Cir. 2000); *Planned Parenthood of S. Ariz. v. Lawall*, 180 F.3d 1022 (9th Cir. 1999); *Women’s Med. Prof. Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997).

26 *Barnes v. Moore*, 970 F.2d 12, 14 (5th Cir. 1992).

27 *Id.* at n. 2.

28 *Manning v. Hunt*, 119 F.3d 254, 268 n.4 (4th Cir. 1997) (“not[ing] in passing” that a court is bound to apply *Salerno* in abortion context until the Supreme Court explicitly overrules it); *Greenville Women’s*

*Clinic v. Bryant*, 222 F.3d 157, 164-65 (4th Cir. 2000) (noting that observation in *Manning* was not dicta and that *Salerno* must be applied to show deference to legislatures). *But see*, *Greenville Women’s Clinic v. Comm’r, S.C. Dept. of Health*, 317 F.3d 357, 359 (4th Cir. 2002) (on subsequent appeal, characterizing *Bryant* as holding, in part, that regulation in question “did not place an undue burden on a woman’s decision whether to seek an abortion”) (emphasis added).

29 *Stenberg v. Carhart*, 530 U.S. 914 (2000).

30 *Id.*, at 930 (2000) (quoting *Casey*, 505 U.S. at 879).

31 *Sabri v. U.S.*, 541 U.S. 600, 124 S.Ct. 1941, 1948 (2004) (“[W]e have recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term) in relatively few settings, and, generally, on the strength of specific reasons weighty enough to overcome our well-founded reticence. See, e.g., ... *Stenberg v. Carhart*, 530 U.S. 914, 938-946, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000) (abortion)”).

32 See, e.g., *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174 (1996) (denying writ of certiorari in case challenging facial validity of abortion statute); *Ada v. Guam Soc’y of Obstetricians & Gynecologists*, 506 U.S. 1011 (1992) (denying writ of certiorari in case challenging facial validity of abortion statute).

33 *Casey*, 505 U.S. at 878, 879 (1992).

survived. Scalia stated that under the *Salerno* standard, Guam's statute banning all but a few abortions would have withstood challenge because the statute can be applied constitutionally to a small group of women—those seeking abortion post viability with no health risks.<sup>34</sup> As Scalia's opinion highlights, quite extreme restrictions can withstand facial challenge under *Salerno* as long as the statute in question includes at least one constitutional application. Were *Salerno* adopted, it is not unlikely that state legislatures quickly would learn to include some "safe" language in any abortion legislation in order to limit the opportunity for facial challenge. For this reason, as a practical matter, if the Supreme Court adopts the *Salerno* standard, facial challenges to abortion statutes will no longer be a viable option in most cases.

With facial challenges no longer a real option, advocates will only be able to limit application of a suspect law via an as-applied challenge.

### Obstacles to As-Applied Challenges

As-applied challenges may be preferable in many contexts. Indeed, the Supreme Court has stated that as-applied challenges are a better way to adjudicate statutes as a general matter.<sup>35</sup> However, in the abortion arena, as-applied challenges are not as effective at protecting women from the harms of illegal laws. As-applied challenges, by definition, cannot be raised until after a statute is implemented. This means its illegal restrictions will be put into effect and

enforced until a case can be brought, likely causing injury to women, possibly irreparable injury, in the meantime. For example, if an as-applied challenge had been used to challenge Guam's statute instead of a facial challenge, the statute would have been implemented, criminalizing almost all abortions. Some women would have been refused abortions and others would have sought potentially dangerous alternatives before an as-applied challenge could have been filed and relief granted.

In some cases, advocates will be able to mount an as-applied challenge quickly, but even if a case is filed within days of a statute's implementation, the law will have detrimentally impacted at least some women in the intervening period.<sup>36</sup>

In more cases, though, it will be difficult to mount an as-applied challenge quickly, for several reasons. First, it is much harder to find petitioners for an as-applied challenge than it is for a facial challenge to an abortion statute. Most facial challenges are raised by clinics or health care providers asserting the rights of hypothetical women. By contrast, most as-applied challenges would require pregnant women to enter as petitioners. Few women will be both eligible and willing to bring such lawsuits. In order for a pregnant woman to have standing to sue, the statute's restrictions must impact her. Since most abortion restrictions impact women during a finite stage of pregnancy, it is difficult to raise a challenge to a restriction and bring it before the

court in a sufficiently timely manner.<sup>37</sup> Even if it were possible to find potential plaintiffs, few women considering an abortion in the short time it is available to them would choose to embark on a public, politically charged lawsuit.

Compounding this problem, most of the restrictions that states adopt tend to put obstacles in front of women who are already vulnerable, due to their socio-economic status, geographic location, status as victims of abuse, or age. The conditions that make them more vulnerable to restrictions also make these women more reluctant and less able to participate in litigation.<sup>38</sup> These problems mean challenges often will be delayed as advocates seek suitable petitioners, leaving all women subject to an unconstitutional law in the meanwhile.

In a few cases, finding a suitable petitioner may be so difficult that it makes bringing an as-applied challenge virtually impossible. For example, several cases have challenged the constitutionality of statutes that allow for emergency abortions but unduly restrict the definition of emergency.<sup>39</sup> In *Planned Parenthood of Idaho, Inc. v. Wasden*, advocates argued that an exception allowing immediate abortion without parental notification in an emergency was unconstitutional because the law defined emergency in such a way that it would have excluded some teens who were in medical jeopardy from the opportunity to immediately abort.<sup>40</sup> *Planned Parenthood* won its facial challenge based on expert testimony about medical conditions that did not fall within

<sup>34</sup> *Ada v. Guam Soc'y of Obstetricians & Gynecologists*, 506 U.S. 1011 (1992) (Scalia, J., joined by Rehnquist, C.J., and White, J., dissenting from denial of writ of certiorari) ("The Ninth Circuit held in this case that Guam Pub.L. 20-134, outlawing all abortions except in cases of medical emergency, is unconstitutional on its face. That seems to me wrong, since there are apparently some applications of the statute that are perfectly constitutional.... I see no reason why the Guam law would not be constitutional at least in its application to abortions conducted after the point at which the child may live outside the womb. If that is so, the Ninth Circuit should have dismissed the present, across-the-board challenge.")

<sup>35</sup> *Sabri v. United States*, 124 S.Ct. 1941, 1948 (2004) ("[F]acial challenges are best when infrequent. [citations omitted]. Although passing on the validity of a law wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught by the particular...").

<sup>36</sup> Even if no women are prevented from having an abortion before the statute is enjoined, the implementation of a statute restricting access to abortion alone probably will have a chilling effect on women's willingness to seek abortion in the future.

<sup>37</sup> For example, if a minor wishes to challenge a restriction that limits her ability to abort during the first trimester of her pregnancy, she must recognize she is pregnant, decide she wants an abortion, contact an attorney and get her papers in front of the court within those first 12 weeks. Pregnancy cannot even be detected

in a woman until its fourth week, leaving this teen very little time to ponder her choices, let alone litigation, before the twelfth week.

<sup>38</sup> For example, restrictions that require parental notification before a minor can abort will not unduly burden most minors considering abortion because most minors do discuss their pregnancies with their parents. (Henshaw. "Parental Involvement in Minors' Abortion Decisions," *Family Planning Perspectives* 24 (5) (1992).) However, minors who are victims of child abuse may find parental notification provisions a substantial barrier to abortion. This makes them ideal clients for an as-applied lawsuit but also makes them less able to participate in the litigation—precisely because they are at risk. Litigation is a very public and extended process and the likelihood that their parents would find out about the lawsuit, and in turn about the pregnancy, would be high. This would put the teens at even greater risk of being discovered, and of abuse, than the pregnancy alone would have.

<sup>39</sup> *E.g. Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908 (9th Cir. 2004); *Casey v. Planned Parenthood of S.E. Pennsylvania*, 505 U.S. 833, 878 (1992).

<sup>40</sup> *Wasden*, 376 F.3d at 915 ("The plaintiffs challenged [the statute's] definition of an emergency as "a sudden and unexpected physical condition which...is abnormal and so complicates the medical condition of the pregnant minor as to necessitate the immediate causing or performing of an abortion." They argued that the subsection unconstitutionally precludes invocation of the emergency exception by minors with conditions that, while medically necessitating an abortion, were not sudden, unexpected, and abnormal.").

the emergency definition in the statute but that would jeopardize a pregnant teen's health were immediate abortion not available. Finding petitioners to mount an as-applied challenge to this kind of provision would be extremely difficult. The petitioner either would have to be a physician willing to risk criminal liability and jeopardize his or her medical license by providing an illegal abortion, or a teen in a health emergency and in need of an abortion within hours or days. Neither would have been in ready supply.

Also making as-applied challenges difficult in the abortion context, the challenges often require multiple petitioners in order to strike a statute in its entirety. Frequently, statutes that restrict abortion include more than one questionable subsection. The statute at issue in *Wasden* is an example. Advocates challenged more than five provisions of an Idaho statute limiting adolescent access to abortion. Each provision that was challenged involved a very distinct issue and would have impacted a different subpopulation of teens.<sup>41</sup> An as-applied challenge to the Idaho statute would have required multiple petitioners, including at a minimum, one seeking a judicial bypass of parental notification, one seeking appeal of a denied bypass request, and one seeking an emergency abortion. Finding petitioners with standing to challenge each subsection and bringing them together in one lawsuit at the same time would have been difficult. More likely, in this situation, advocates would have had to mount as-applied challenges in multiple lawsuits over a number of months or years as petitioners became available. Meanwhile illegal restrictions would have remained in force.

This suggests yet another hurdle. When multiple lawsuits are necessary to invalidate all illegal portions of a statute, advocates may be discouraged

from pursuing those cases for resource reasons.

### Particular Impact on Adolescent Access to Abortion

All of the barriers to as-applied challenges in the abortion arena in general are particularly hard to overcome in the adolescent abortion context. Teens are even less likely to participate in litigation than adults.<sup>42</sup> Further, the nature of the restrictions placed on teens in recent years can make finding plaintiffs particularly challenging.<sup>43</sup> And often, statutes restricting teen access contain many disparate subprovisions.<sup>44</sup>

The impact of the *Ayotte* case also will affect teens in particular for a different reason. There has been a lot of legislation attempting to restrict teen access rights in recent years. In 2004, 15 states considered 43 proposals restricting adolescent access to abortion.<sup>45</sup> And the proposals being put forward and adopted often include quite suspect sections. Some states have even re-adopted statutes and provisions already deemed unconstitutional by the courts. In 2005, shortly after a court struck down an Idaho statute restricting teen access to abortion, the legislature re-enacted an almost identical law without correcting the provisions found unconstitutional in the original statute. A federal district court found the newest version unconstitutional in July.<sup>46</sup> This was Idaho's third attempt to adopt substantially the same legislation. With more legislation in the teen access arena, there is more likelihood that suspect provisions will be proposed and adopted, and that advocates will need to litigate to protect adolescent rights.

And while advocates have been effective at using facial challenges to prevent implementation of illegal restrictions on teen access to abor-

tion,<sup>47</sup> the advocates' ability to mount successful as-applied challenges in the same contexts probably would have been more limited.

The reality is that some of the current and past cases challenging abortion restrictions in state statutes probably would not have been raised, or been provable, if advocates had used as-applied challenges. For this reason, the Court's decision on this issue will have a substantial impact on the number and types of abortion cases that can be made in the future. Correspondingly, it will impact the number and extent of abortion restrictions that remain on the books, particularly in the area of adolescent access.

### Likely Outcome

Although the Supreme Court has yet to rule on the question, all of the current justices have taken positions, in past writings, on which standard should be applied to facial challenges. These writings make clear that the Court is divided. Even so, it appears that a six-vote majority of last term's Supreme Court at least supports application of the *Casey* standard. The question is how the recently appointed Chief Justice John Roberts, and the replacement for Justice Sandra Day O'Connor, will vote and whether any of the other justices will reconsider his or her opinion.

Of the justices seated last term, six have applied and seem to support using the "undue burden" test in facial challenges. Justices O'Connor, Anthony Kennedy, and David Souter wrote the plurality opinion in *Casey* that explicitly adopted the "undue burden" standard.<sup>48</sup> They reasserted their belief that "undue burden" is the appropriate standard by applying it in *Stenberg v. Carhart*.<sup>49</sup> Justices John Paul Stevens, Ruth Bader Ginsburg, and Stephen Breyer have also supported its application. In a memorandum concurring

41 *Wasden*, 376 F.3d at 914-915 (In the District Court, petitioners challenged: (1) the provision limiting venue for judicial bypass hearings; (2) the provision imposing a time limit on filing a judicial bypass appeal; (3) the mandatory reporting requirement placed on judges hearing judicial bypass petitions; (4) the provision defining health emergency; (5) the provision requiring parental notification after emergency abortion; and (5) provisions regarding criminal liability for providers.

42 See f. 39, *infra*.

43 See emergency example, *infra*.

44 See *Wasden* example, *infra*.

45 NARAL, "Restrictions on Young Women's Access to Abortion", [http://www.prochoiceamerica.org/yourstate/whodecides/trends/issues\\_young\\_women.cfm](http://www.prochoiceamerica.org/yourstate/whodecides/trends/issues_young_women.cfm) (last visited September 10, 2005).

46 *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.Supp.2d 1012 (Idaho D.C. 2005).

47 See e.g., *Wasden*, 376 F.Supp.2d 1012 (Idaho D.C. 2005); *Planned Parenthood of S. Ariz. v. Lawall*, 180 F.3d 1022 (9th Cir. 1999); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d at 1457, 1458 (8th Cir. 1995).

48 *Casey*, 505 U.S. at 878.

49 *Stenberg v. Carhart*, 530 U.S. at 930; *Id.* at 965 (Kennedy, J. dissenting).

in the denial of writ of certiorari in *Janklow v. Planned Parenthood, Sioux Falls Clinic*, Justice Stevens expressed clear disdain for *Salerno*, writing that “[w]hile a facial challenge may be more difficult to mount than an as-applied challenge, the dicta in *Salerno* ‘does not accurately characterize the standard for deciding facial challenges,’ and ‘neither accurately reflects the Court’s practice with respect to facial challenges...’”<sup>50</sup> Justices Ginsburg and Breyer each joined the majority in *Stenberg* applying the *Casey* standard, and Ginsburg also wrote a separate concurrence in that case in which she applied *Casey*.<sup>51</sup>

Three of the justices from last term’s Supreme Court, however, have expressed their belief that the “undue burden” test is not the appropriate standard. In *Casey*, Chief Justice Rehnquist wrote an opinion, concurring in part and dissenting in part with the plurality opinion, in which he applied the “no set of circumstances” standard.<sup>52</sup> Justices White, Scalia, and Clarence Thomas joined Rehnquist’s dissent. In a memorandum dissenting from the denial of writ of certiorari in *Ada v. Guam Society of Obstetricians & Gynecologists*, Justice Scalia, joined by Rehnquist and White, wrote that the only exception to the application of the *Salerno* standard in facial challenges is for First Amendment cases and that “[t]he Court did not purport to change this well-established rule...in [*Casey*].”<sup>53</sup> In *Stenberg*, while Rehnquist, Scalia, and Thomas all applied the *Casey* standard in their separate dissents, each expressed disdain for its use. In his *Stenberg* dissent, Scalia reiterated his distaste for the “undue burden” test first expressed in his dissent in *Casey*.<sup>54</sup> Justice Thomas, in his dissent, stated that the “standard set forth in the *Casey* plurality has no historical or doctrinal pedigree. The standard is a product of its authors’

own philosophical views about abortion, and it should go without saying that it has no origins in or relationship to the Constitution and is, consequently, as illegitimate as the standard it purported to replace.” Thomas went on to state that the “fabricated undue burden” standard does not “merit[] adherence.”<sup>55</sup>

### A Five-to-Four Majority: But Which Way?

Clearly, opinions diverge strongly on which standard should apply. Of last term’s Court, six justices are on record in support of *Casey* and only three are on record supporting *Salerno*. However, neither Rehnquist nor O’Connor will take part in the *Ayotte* decision. There will now be Roberts’ vote to consider, as well as that of O’Connor’s replacement, if he or she is sworn in by November 30<sup>th</sup>. It is not unlikely that at least one of the two new members of the Court will hold an opinion similar to that of the late Chief Justice. If both share Rehnquist’s opinion, the tally will move to only five-to-four in favor of *Casey*. The question then becomes whether any justice may be reconsidering his or her position. As we have seen, most of the positions expressed by the justices seem quite firm. Justice Thomas, for example, referred to the *Casey* standard as “illegitimate” and not “merit[ing] adherence,”<sup>56</sup> and Justice Stevens referred to the *Salerno* standard as “dicta” that does not reflect the standard for facial challenges.<sup>57</sup> Only Justice Kennedy has been notably silent on the issue in recent years. While he joined O’Connor and Souter in the *Casey* plurality, he did not join them in a later opinion explicitly supporting *Casey*’s application for facial challenges.<sup>58</sup> And while Kennedy did apply the *Casey* standard in *Stenberg*, he actually came to a different result than the majority, going so far as to write a separate dissent.<sup>59</sup>

If any of the current justices were to reconsider his or her position on the issue, Kennedy is the most likely candidate. If both Roberts, and O’Connor’s replacement believe the *Salerno* standard is appropriate, and Kennedy chooses to take a different stand, there is a chance the court will decide in favor of the *Salerno* standard.

### Conclusion

After remaining an open question for years, the Supreme Court finally will decide whether *Casey* or *Salerno* is the appropriate standard for review. If the Court adopts the *Salerno* standard, facial challenges to the constitutionality of abortion statutes will become virtually impossible. Because as-applied challenges are much more difficult to mount, particularly in the context of restrictions on adolescent access to abortion, selecting *Salerno* as the appropriate standard will make it much harder for advocates to bring legal challenges to suspect abortion statutes.

No matter what the Court decides, this decision will have a dramatic impact on the number and types of abortion cases that can be made in the future, and correspondingly the number and extent of abortion restrictions, even illegal ones, that remain on the books.

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<sup>50</sup> *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1175 (1996)(citing *Dorf, Facial Challenges to State and Federal Statutes*, 46 *Stan.L.Rev.* 235, 236, 238 (1994)).

<sup>51</sup> *Stenberg*, 530 U.S. at 930; *Id.* at 952 (Ginsburg, J. concurring).

<sup>52</sup> *Casey* at 972 (Rehnquist C.J., concurring in part and dissenting in part)(quoting *Salerno*, 481 U.S. 739, 745 (1987)).

<sup>53</sup> *Ada v. Guam Soc’y of Obstetricians & Gynecologists*, 506 U.S. 1011, 1013 (1992).

<sup>54</sup> *Stenberg*, 530 U.S. at 955(Scalia, J. dissenting) (“In my dissent in *Casey*, I wrote that the ‘undue burden’ test made law by the joint opinion created a standard that was ‘as doubtful in application as it is unprincipled in origin’”(citation omitted)).

<sup>55</sup> *Stenberg*, 530 U.S. at 982 (Thomas, J. dissenting).

<sup>56</sup> *Id.*

<sup>57</sup> *Janklow*, 517 U.S. at 1175.

<sup>58</sup> *Fargo Women’s Health Organization v. Schafer*, 507 U.S.1013 (1993)(denying application for stay and injunction pending appeal) (O’Connor, J. concurring, joined by Souter, J.) (“point[ing] out that denial of relief should not be viewed as signaling agreement with the lower courts’ reasoning” where lower courts applied *Salerno* rather than *Casey* standard in a facial challenge).

<sup>59</sup> *Stenberg*, 530 U.S. at 956.