



To win a facial attack on New Hampshire's parental notification law, abortion advocates must show more than hypothetical wrongs.

BY MATHEW D. STAVER

The minimal requirement that minors talk to their parents before obtaining an abortion is a well-trod constitutional battlefield. This Wednesday the Supreme Court will hear oral arguments in *Ayotte v. Planned Parenthood of Northern New England*, the latest challenge to parental notification, this time to a New Hampshire law.

Anybody Hurt?

The Court may choose to rule on the merits of the state statute, including whether its lack of an explicit exception to the notification rule for reasons of the minor's health is constitutionally permissible. But the broader, perhaps more significant issue raised by the case is the proper standard of review for all abortion statutes. The Court should use *Ayotte* to clarify that where plaintiffs bring a challenge to strike down an abortion law on its very face, they must show that "no set of circumstances" exist in which the law could be constitutionally valid.

Planned Parenthood argues that a pre-enforcement facial attack is appropriate, even without the specific facts of a minor plaintiff seeking an abortion and claiming need of a health exception. But it makes no sense to create an abortion exception to the "no set of circumstances" rule for facial challenges established in *United States v. Salerno* (1987). And under *Salerno*, Planned Parenthood can win its facial claim in this case only if it can prove that New Hampshire's Parental Notification Prior to Abortion Act cannot be constitutionally applied under any set of circumstances.

This "no set of circumstances" test is the culmination of years of precedents that balance the relative constitutional duties of the judiciary and legislature, as well as the rights of litigants to be judged under a constitutional statute. It derives from the constitutional limitation that Article III courts decide only concrete cases. Limiting facial challenges also respects federalism: If a state statute is capable of constitutional application, then federal courts should delay judgment until state courts have a chance to construe the statute in a way that avoids the potential federal problem.

The *Salerno* Court summarized the no-set-of-circumstances test as follows: "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [an act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment."

The Supreme Court has used the *Salerno* test to reject facial challenges to abortion laws, notably in *Rust v. Sullivan* (1991) and *Webster v. Reproductive Health Services* (1989). More directly, the Court also has rejected facial challenges to parental notification laws in other cases, including *Ohio v. Akron Center for Reproductive Health* (1990), *Hodgson v. Minnesota* (1990), and *H.L. v. Matheson* (1981).

ACCEPTABLE FOR SPEECH

The Supreme Court has made a limited exception for facial challenges to a speech regulation that is arguably overbroad. But the Court should not expand this exception to the *Salerno* test beyond overbreadth challenges under the First Amendment, particularly not to a case like *Ayotte* that involves not free speech but the state's traditional power to regulate medical procedures.

An exception to laws that are overbroad in the speech context is a logical exception to *Salerno*. Overbroad speech restrictions have the potential to chill speech. Even though such regulation may be constitutional in narrow circumstances, when the breadth of the regulation effectively impinges on the freedom of speech, the law is properly subject to a facial challenge.

Even in the First Amendment context, however, more than mere overbreadth is required to permit a facial challenge. The regulation must be "substantially" overbroad, as the Court noted in *Broadrick v. Oklahoma* (1973). For a facial challenge to succeed, there must be "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court," as the Court stated in *Members of the City Council of Los Angeles v. Taxpayers for Vincent* (1984).

In other words, the plaintiff has a heavy burden. A few hypothetical applications that might be unconstitutional are not enough to strike down a speech regulation. The overbreadth of the challenged law must be so substantial that it will chill a broad range of speech by third parties.

The special nature of free speech in our constitutional system, readily distinguishable from abortion, is also apparent in the way the Court has defined the overbreadth doctrine. Unlike abortion, the right to engage in expressive activity lies at the core of a free society and a democratic government.

Thus, when a speech regulation "sweeps within its ambit other activities that constitute an exercise of First Amendment rights," then the regulation may be subject to an overbreadth challenge. For example, when the government bans "hand-billing" in an effort to limit noise or litter, such a restriction probably "suppresses a great quantity of speech that does not cause the evils that it seeks to eliminate," as the Court stated in *Ward v. Rock Against Racism* (1989).

Because of this special fear of chilling protected speech, the Supreme Court has never required in the First Amendment context that the speaker first run the risk of arrest before mounting a facial challenge to an overbroad regulation.

In the First Amendment context, we prefer to punish speech, if at all, after the fact. This is the same reason that strong presumptions exist against the constitutionality of speech regulations that restrain speech before its utterance or publication. When speech is chilled beforehand to such an extent that the very existence of the law prevents a broad range of speech, the Court correctly permits facial challenges.

BUT ABORTION IS DIFFERENT

Abortion is different, however.

In *Planned Parenthood of Southeast Pennsylvania v. Casey* (1992), the Court recognized this fact: "Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family and society which must confront the knowl-

edge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted."

Abortion is not central to our democratic system. Nor is mere chilling of the act of abortion a threat to our constitutional freedoms. Thus, facial challenges to abortion laws should not receive the special treatment afforded to speech under the First Amendment.

Some argue that *Casey* implicitly applied to an abortion statute an exception to the no-set-of-circumstances rule for facial challenges. Yet, *Casey* did not mention, let alone overrule, *Salerno*. And Justice Sandra Day O'Connor, the author of *Casey*, never carved out an explicit abortion exception to the *Salerno* test.

Indeed, three years earlier, in *Webster v. Reproductive Health Services*, O'Connor had concurred in the Court's upholding of various provisions of Missouri's ban on public funding of abortion. In doing so, she stated: "There may be conceivable applications of the ban on the use of public facilities that would be unconstitutional, but some quite straightforward applications of the Missouri ban would be constitutional and that is enough to defeat appellees' assertion that the ban is facially unconstitutional."

Here the facts of the Ayotte case illustrate the absurdity of facial challenges to abortion regulations. The New Hampshire law requires that no abortion be performed on an unemancipated minor until at least 48 hours after notice has been delivered to at least one parent or guardian. The physician (or an agent of the physician) must deliver the notice personally or by certified mail with return receipt requested.

The notification act has three exceptions. Notification is not required if the physician certifies that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice, or if the persons entitled to notification certify that they have been notified. Alternatively, a judge can authorize an abortion without notice if the judge finds that the

minor is mature enough to make the decision or that an abortion without notification would be in the minor's best interest.

In striking down the law, the U.S. District Court relied upon a declaration of a physician who described medical complications that can occur during pregnancy that might require an immediate abortion. The doctor never stated whether he had encountered such complications in his many years of practice.

Another declaration before the District Court indicated that of the 16,000 judicial bypass hearings in the nearby state of Massachusetts, only 15 requests for abortions were not granted. This would suggest that even if there were a medical complication, the chances of a judicial bypass not being granted are almost nonexistent.

Nevertheless, the District Court permitted a facial challenge under remote hypothetical applications, and the U.S. Court of Appeals for the 1st Circuit agreed. In essence, the courts have ruled on law-school-type hypotheticals that may never actually arise in a genuine controversy.

Allowing facial challenges to abortion regulations under fanciful possibilities turns the courts into superlegislative bodies, as they pass judgment on statutes cut loose from the sound restraints in Article III.

Instead of carving out an abortion exception to the *Salerno* test, the Supreme Court should reserve issuing a likely divisive abortion decision until it faces an actual controversy. So long as the abortion regulation in *Ayotte* can be applied constitutionally, hypothetical applications that might be arguably unconstitutional should not permit a facial challenge to the statute. Such cases can always be addressed when—and if—they ever arise in reality.

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