No. 04-1144

In The
Supreme Court of the United States

KELLY AYOTTE, ATTORNEY GENERAL 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 OF THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, AND JOHN M. THORP, JR., M.D. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Association of American Physicians & Surgeons, Inc. ("AAPS") is a nonprofit organization dedicated to defending the practice of private and ethical medicine. Founded in 1943, AAPS has thousands of members nationwide in all specialties. AAPS frequently participates in litigation in defense of the practice of medicine, in accordance with the Oath of Hippocrates. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914 (2000) (frequently citing AAPS submission). The mission of AAPS includes ensuring that patient consent to medical procedures is voluntary and fully informed, and that the legal standard for judicial review of legislation applies in a consistent manner to all medical procedures.

John M. Thorp, Jr., M.D. is the Mcallister Distinguished Professor of Obstetrics and Gynecology at the University of North Carolina, Chapel Hill School of Medicine. He has an active practice in obstetrics and gynecology with over 4000 patients, both women and minor patients. Dr. Thorp serves as Co-Director of the North Carolina Program for Women's Health Research. In that capacity, he has conducted research on the health effects of induced abortion on women's health, and served as lead author of the peer-reviewed study that forms the basis of this brief: J.M. Thorp, Jr., M.D., K.E. Hartmann, M.D.,

[1] Pursuant to Sup. Ct. R. 37.6, *amici* state that none of the counsel for the parties authored this brief in whole or in part. Monetary contribution to the preparation of this brief provided in part by the Alliance Defense Fund. Pursuant to Sup. Ct. R. 37.3(a), the parties have consented to the filing of this brief. Letters of consent are being filed with the Clerk.

Ph.D., and E.M. Shadigian, M.D., *Long-Term Physical & Psychological Health Consequences of Induced Abortion: Review of the Evidence*, 58(1) OB/GYN SURVEY 67 (2003).

Dr. Thorp has an extensive research history including key roles in more than 45 major funded studies, including a prospective cohort of pregnancy outcomes that is in its third cycle of federal funding. Dr. Thorp is a productive author with more than 100 peer-reviewed publications, 20 commentaries, and 12 book chapters to his credit. Of note, he is an experienced editor and peer reviewer, who reviews for journals ranging from the *New England Journal of Medicine* to *Pediatric and Perinatal Epidemiology*, with a special interest in advancing the quality of the literature in women's health. He was recently honored by the editors of *Obstetrics and Gynecology* as among their most valued reviewers.

In the interest of protecting the long-term health of minors seeking abortion who would benefit from parental guidance regarding medical history and follow-up preventative care, *Amici Curiae*, the AAPS and John M. Thorp, Jr., M.D., seek to inform this Court of the serious long-term health risks that minors are subject to following induced abortion.

SUMMARY OF THE ARGUMENT

Amici offer this brief for the limited purpose of establishing the medical realities surrounding the long-term impact on the health of minors obtaining abortion, especially absent the parental guidance that the New Hampshire Parental Notice Prior to Abortion Act encourages. *Amici* therefore present this Honorable Court with a

summary of long-term health risks of induced abortion that impact both minors and adult women as presented in a 2003 peer-reviewed systematic review article co-authored by *Amicus Curiae* Professor John M. Thorp, Jr., M.D.[2] The review article found that induced abortion is associated with an increased long-term risk of:

1) suicide and self-harm;
2) placenta previa;
3) preterm birth; and
4) breast cancer due to loss of protective effect of first full-term pregnancy.

The opportunity of parents to be notified of their minor daughter's future abortion serves the important medical interests of helping the minor assess her medical history in relation to abortion health risks; seeking preventative measures due to increased post-abortion health risks if the decision is made to have the abortion; or completely avoiding the increased post-abortion health risks if parental guidance results in a decision to continue the pregnancy to term.

The district court's sweeping, wholesale invalidation of the New Hampshire Parental Notice Prior to Abortion Act[3] ("the New Hampshire Act") could have devastating consequences on the long-term health of minor girls who undergo abortion, especially without the preventative

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[2] J.M. Thorp, Jr., M.D., K.E. Hartmann, M.D., Ph.D., and E.M. Shadigian, M.D., *Long-Term Physical & Psychological Health Consequences of Induced Abortion: Review of the Evidence*, 58(1) OB/GYN SURVEY 67 (2003) ("the OGS Review") (*see* Appendix).

[3] Parental Notification Prior to Abortion Act, N.H. Rev. Stat. Ann. § 132:24-28 (2004).

health measures following abortion that parental notice encourages.

Even assuming *arguendo* that a health exception is constitutionally required, the lower courts' overbroad relief in striking the New Hampshire Act even in the vast majority of its constitutional applications has the effect of endangering the long-term health of minor girls who obtain abortions without parental guidance regarding medical history and follow-up preventative medical care.

ARGUMENT

I. UPHOLDING NEW HAMPSHIRE'S PARENTAL NOTICE ACT WILL PROTECT MINORS SEEKING ABORTION FROM SERIOUS LONG-TERM PHYSICAL AND PSYCHOLOGICAL HEALTH CONSEQUENCES

Concern for women's health has been a significant and constant theme in this Court's abortion jurisprudence.[4] This concern is no less important for minors than for adult women. Statutes designed to encourage parent-daughter communication, such as the New Hampshire Act, promote the health of minors seeking abortions because the opportunity of parents to be notified of their minor daughter's future abortion serves important medical interests, such as:

- helping the minor assess her medical history in relation to abortion health risks,

[4] *Roe v. Wade*, 410 U.S. 113, 162 (1973); *Doe v. Bolton*, 410 U.S. 179, 192 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833, 837 (1992); *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000).

- providing follow-up preventative medical care in relation to increased health risks if the minor undergoes the abortion, or
- avoiding the minor's post-abortion health risks if parental guidance results in a decision to continue the pregnancy to term.

Because of the importance of accurate medical history before a possible abortion, as well as preventative health measures following an abortion, parental guidance for minors seeking abortion can be critical to a minor's future health. Thus, upholding parental notice statutes serves to protect minors' health at least as much as striking down such statutes for alleged defects related to minors' health.

A. The Overbroad Relief of Invalidating the New Hampshire Act Rather than Severing Purported Unconstitutional Applications Endangers the Health of Minors Seeking Abortion

The lower courts erred by granting the overbroad remedy of striking down the entire parental notice statute. The error is blatant even assuming *arguendo* that a maternal health exception is necessary because the lower courts' decisions afforded respondents more relief than they are entitled to.

By striking down the New Hampshire Act, rather than simply severing the purported unconstitutional *application* of the rare circumstance in which the statute

requires notice during medical emergencies,[5] the courts' rulings make it more likely that minors' health will suffer.

The district court's sweeping, wholesale invalidation of the New Hampshire Act may have devastating consequences on the long-term health of minor girls who undergo abortion, due to the lack of preventative health measures following abortion that parental notice encourages.[6] It is these medical risks that *amici* wish to bring to this Court's attention as it decides the fate of the New Hampshire Act.

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[5] While the district court briefly addressed and rejected severability of *provisions* of the statute, neither the district court nor the appeals court followed the legislative intent to sever unconstitutional *applications* as expressed in N.H. Rev. Stat. § 132:28 (Supp. 2004). For a complete analysis of the "severability of application" argument, see *Brief Amicus Curiae of the Thomas More Society in Support of Petitioner*, at Argument II.

[6] "Certain decisions are considered by the State to be outside the scope of a minor's ability to act in his own best interest or in the interest of the public, citing statutes proscribing the sale of firearms and deadly weapons to minors without parental consent, and other statutes relating to minors' exposure to certain types of literature, the purchase by pawnbrokers of property from minors, and the sale of cigarettes and alcoholic beverages to minors. It is pointed out that the record contains testimony to the effect that children of tender years (even ages 10 and 11) have sought abortions. Thus, a State's permitting a child to obtain an abortion without the counsel of an adult 'who has the responsibility or concern for the child would constitute an irresponsible abdication of the State's duty to protect the welfare of minors.' " *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 72-73 (1976) (citation omitted).

B. A Major Medical Review Article Finds Serious Long-Term Health Consequences of Induced Abortion

The following information is based on a 2003 peer-reviewed abstract of abortion-related health studies over the first thirty years of legalized abortion entitled *Long-Term Physical & Psychological Health Consequences of Induced Abortion: Review of the Evidence*, by J.M. Thorp, Jr., M.D., K.E. Hartmann, M.D., Ph.D., and E.M. Shadigian, M.D., 58(1) OB/GYN SURVEY 67 (2003) ("the OGS Review") (*see* Appendix).[7]

The OGS Review evaluated over sixty international studies that included more than one million women. The study's authors are:

John M. Thorp, Jr., M.D., Mcallister Distinguished Professor of Obstetrics and Gynecology, Department of Epidemiology, School of Public Health, and Department of Obstetrics and Gynecology, School of Medicine, University of North Carolina, Chapel Hill; Co-Director of the North Carolina Program for Women's Health Research.

Katherine E. Hartmann, M.D., Ph.D., Assistant Professor, Department of Epidemiology, School of Public Health, and Department of Obstetrics and Gynecology, School of Medicine, University of North Carolina, Chapel Hill; Co-Director of the North Carolina Program for Women's Health Research.

Elizabeth Shadigian, M.D., Clinical Associate Professor, Department of Obstetrics and Gynecology, School of Medicine, University of Michigan, Ann Arbor.

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[7] OGS Review, *supra* note 2, at 67-79.

The OGS Review is a systematic review article that evaluated long-term risks of induced abortion. The study concluded that induced abortion is associated with increased risks of the following long-term physical and psychological health conditions: serious mental health disorders/suicide, placenta previa, preterm birth and breast cancer due to loss of protective effect of first full-term pregnancy.[8]

i. Suicide and Self-Harm

One of the most dramatic and disturbing tabulations of the OGS Review is the increased risk of death by suicide. In addition to a variety of mental health disorders including depression, two studies, one from the United States and the other from Finland, have shown startling increased rates of suicide following abortion.[9] This phenomena is not seen after miscarriage.[10]

The United States study showed that women who had abortions were **2.5 times** more likely to die from suicide.[11] The Finland study showed that women who had abortions

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[8] *Id.* The OGS Review also concluded that induced abortion did *not* result in increased risk of the following: infertility, miscarriage, tubal or ectopic pregnancy. OGS Review, *supra* note 2.

[9] *Id.* at 74. *See also, Reviewing the Medical Evidence: Long-Term Physical and Psychological Health Consequences of Induced Abortion*, U.S. Senate Subcomm. on Sci., Tech. and Space, Statement of Elizabeth M. Shadigian, M.D. (March 3, 2004) ("Shadigian Senate Testimony").

[10] OGS Review, *supra* note 2, at 74 (miscarriage referred to medically as "spontaneous abortion").

[11] *Id.* at 73, n. 96 (Table 7, ref. n. 96, citing David C. Reardon et al., *Deaths Associated With Pregnancy Outcome: A Linkage Based Study of Low Income Women*, 95 SOUTH. MED J. 834, 841 (2002).

were **3.1 times** more likely to die from suicide than non-pregnant women and **6.5 times** more likely to die from suicide than women who completed their pregnancy.[12]

Of particular significance to the case at issue, the Finland study showed that *teenagers* who have abortions are **two to four times** more likely to commit suicide compared to women who have abortions in adulthood.[13]

In addition, self-harm is more common in women who have undergone induced abortion.[14] In England, psychiatric hospital admissions because of suicide attempts are three times more likely for women after induced abortion, but not before.[15]

The OGS Review concluded that regardless of whether there is a causal link, the observation of the association "suggests careful screening and follow-up for depression and anticipatory guidance/precautions for women who choose elective abortion."[16] The need for parental involvement for minors takes on paramount importance in light

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[12] *Id.* at 73, n. 90 (Table 7, ref. n. 90, citing Gissler, *Suicides after pregnancy in Finland, 1987-94: Register Linkage Study,* 313 BMJ 1431 (1996).

[13] Amy R. Sobie & David C. Reardon, *Detrimental Effects of Adolescent Abortion*, THE POST ABORTION REVIEW Vol. 9(1), Jan.-Mar. 2001, *at* http://www.afterabortion.info/PAR/V9/n1/teens_vs_older.htm (last visited Jul. 29, 2005).

[14] Shadigian Senate Testimony, *supra* note 9 (citing the OGS Review at 74, n. 97 (A. Gilchrist et al., *Termination of Pregnancy and Psychiatric Morbidity*, 167 BR. J. PSYCHIATRY 243 (1995))).

[15] *Id.* (citing the OGS Review, *supra* note 2, at 74, n. 93 (C. Morgan et al., *Suicides After Pregnancy*, (letter) 314 BMJ 902 (1997))).

[16] OGS Review, *supra* note 2, at 76.

of these real life dangers to the mental well-being of minors considering or undergoing abortion.

ii. Placenta Previa

The medical condition where the placenta covers the cervix, making a cesarean section necessary to deliver the baby, is called "placenta previa."

When pregnancies are complicated by placenta previa, the result is high rates of preterm birth, low birth weight babies, and infant death.[17] Women who develop this condition are also at an increased risk for blood loss, subsequent blood transfusions, and hysterectomies (loss of the uterus) which thus require more extensive surgery.[18]

All of the three studies that have been done with over 100 subjects and one meta-analysis found a positive association between induced abortion and placenta previa. The OGS Review concluded that induced abortion increases the risk of placenta previa in subsequent pregnancy by **approximately 50%**.[19]

iii. Preterm Birth

The major cause of "perinatal [infant] mortality and neurological long-term morbidity" in industrialized nations

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[17] *Id.* at 70, n. 27 (citing C. Ananth et al., *The association of placenta previa with history of cesarean section and abortion: A meta-analysis*, 177 AM. J. OBSTET. GYNECOL. 1071 (1997).

[18] Shadigian Senate Testimony, *supra* note 9; OGS Review, *supra* note 2, at 70.

[19] OGS Review, *supra* note 2, at 70, 75.

is preterm birth.[20] The OGS Review found twenty-four studies that explored the connections between induced abortion and preterm birth or low birth weight.[21] "Twelve studies found an association which almost **doubled** the risk of preterm birth. Moreover, seven of the twelve identified a higher risk for preterm birth for women who have had more abortions."[22]

A pregnancy resulting in preterm birth for a woman who had an abortion as a minor can result in tragic medical conditions for her subsequently born infant. The elevated risk of preterm birth can result in newborns suffering from a variety of health problems and disabilities including, among other things, cerebral palsy,[23] incomplete lung development, and sight or hearing problems for the infant due to underdeveloped eyes or ears.[24]

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[20] *Id.* at 70, n. 70 (citing Joachim A. Martius et al., *Risk Factors Associated with preterm (<37 + 0 Weeks) and Early Preterm Birth (<32 + 0 Weeks)*: *Univariate and Multivariate Analysis of 106, 345 Singleton Births from the 1994 Statewide Perinatal Survey of Bavaria,* 80 EUROPEAN JOURNAL OF OBSTETRICS AND GYNECOLOGY AND REPRODUCTIVE BIOLOGY 183 (1998)).

[21] OGS Review, *supra* note 2, at 70; Shadigian Senate Testimony, *supra* note 9.

[22] OGS Review, *supra* note 2, at 70.

[23] Brent Rooney and Byron C. Calhoun, M.D., *Induced Abortion and Risk of Later Premature Births*, 8 J. AM. PHYSICIANS & SURGEONS 46, 47 (Summer 2003).

[24] March of Dimes, *Complications of Premature Birth*, at http://www.marchofdimes.com/prematurity/5512.asp (last visited Jul. 29, 2005).

iv. Breast Cancer: Loss of Protective Effect of First Full-Term Pregnancy

Since the 1970's, medical literature has shown that there is a "protective effect of a first full-term pregnancy" early in one's reproductive life.[25] "Protective effect" means that when a pregnancy is brought to term, a woman's risk of breast cancer is reduced as compared to women who have not given birth. When a minor undergoes an induced abortion, she is losing this protective effect and this decision can almost **double her lifetime risk of breast cancer**.[26]

The OGS Review thus concluded that "it is clear that a decision to abort and delay pregnancy culminates in a loss of protection with the net effect being an increased risk."[27] The OGS Review further concluded that women should be given informed consent about the increased risk of breast cancer related to the "**undisputed** protective effect of a full-term delivery early in one's reproductive life."[28]

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[25] Shadigian Senate Testimony, *supra* note 9 (citing M. McMahon et al., *Age at First Birth and Breast Cancer Risk*, 43 BULL. WORLD HEALTH ORGAN. 209 (1970) (as cited in OGS Review, *supra* note 2, at 75 n. 101)); *See also* W. Chie et al., *Age at Any Full-Term Pregnancy and Breast Cancer Risk*, 151 AM. J. EPIDEMIOLOGY 715 (2000) (cited in the OGS Review, *supra* note 2, at 75 n. 98).

[26] OGS Review, *supra* note 2, at 76.

[27] *Id.* at 68 (abstract).

[28] *Id.* at 75 (emphasis added). Note that the "loss of protective effect of first full-term pregnancy" risk factor is separate and distinct from studies that assess whether induced abortion is an "independent risk factor" for breast cancer. "Loss of protective effect" compares the increased risk of women who have undergone abortion to women who have given birth. By contrast, the "independent risk factor" compares women who have undergone abortion with women who have not been pregnant at all. This brief focuses on the risk of breast cancer due to

(Continued on following page)

The OGS Review concluded that "a young woman facing an unwanted pregnancy can and should be informed of the loss of that protection that would derive from a decision to terminate her pregnancy and delay having a baby."[29] The authors demonstrated that a decision of an 18 year old pregnant woman to terminate her pregnancy "can almost double her 5-year and lifetime risk of breast neoplasia at age 50."[30]

The review article stated that "the 'loss of protection' effect is **most pronounced in women under 20 years of age who elect to undergo abortion** rather than continue their pregnancy."[31] The OGS Review authors thus concluded "that clinicians are obliged to inform pregnant women that a decision to abort her first pregnancy may almost double her lifetime risk of breast cancer through loss of the protective effect of a completed first full-term pregnancy earlier in life."[32]

CONCLUSION

The long-term increased risks of minors undergoing abortion are real and hazardous. Understanding the increased risk for mental health problems, placenta previa, preterm birth and breast cancer due to loss of protective effect requires a level of understanding and

"loss of protective effect" that results when a minor aborts her first pregnancy because that significant increased risk is "undisputed." *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* at 76 (emphasis added).

[32] *Id.*

sophistication that most minors lack.[33] Parental involvement is needed in order to help make this important decision. If it is decided that the minor undergo an abortion, continued parental involvement and monitoring is necessary in order to best address possible long-term risks.

By law, a New Hampshire patient undergoing a medical procedure must provide informed consent to that procedure.[34] If a minor cannot fully understand or appreciate the possible long-term consequences of an induced abortion, then one can logically conclude that absent parental involvement fostered by the New Hampshire Act, the minor can never truly consent to the procedure.

Minors need help in understanding health consequences when making such a serious and irrevocable decision. The New Hampshire Act is a significant step in aiding pregnant minors in this process.

For the foregoing reasons, *Amici Curiae*, the Association of American Physicians and Surgeons and Professor

[33] *See* note 6, *supra*.

[34] N.H. Rev. Stat. Ann. § 332-1:2 (2004).

John M. Thorp, Jr., M.D., respectfully request this Honorable Court to reverse the judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX

The following is the official abstract of the OGS Review. A .pdf version of the entire article is posted for the Court's review at the following internet address, with the permission of John M. Thorp, Jr., MD: ***www.BDFund.org/OGS Review.pdf***

Long-Term Physical and Psychological Health Consequences of Induced Abortion: Review of the Evidence

Obstetrical & Gynecological Survey. 58(1):67-79, January 2003. *Thorp, John M. Jr., MD; Hartmann, Katherine E. MD, PhD; Shadigian, Elizabeth MD*

Abstract:
Induced abortion is a prevalent response to an unintended pregnancy. The long-term health consequences are poorly investigated and conclusions must be drawn from observational studies. Using strict inclusion criteria (study population >100 subjects, follow up >60 days) we reviewed an array of conditions in women's health. Induced abortion was not associated with changes in the prevalence of subsequent subfertility, spontaneous abortion, or ectopic pregnancy. Previous abortion was a risk factor for placenta previa. Moreover, induced abortion increased the risks for both a subsequent preterm delivery and mood disorders substantial enough to provoke attempts of self-harm. Preterm delivery and depression are important conditions in women's health and avoidance of induced abortion has potential as a strategy to reduce their prevalence. Only review articles including the single published meta-analysis exploring linkages between abortion and breast cancer were relied upon to draw conclusions. Reviewers were mixed on whether subsequent breast neoplasia can be linked to induced abortion, although the sole meta-analysis found a

summary odds ratio of 1.2. Whatever the effect of induced abortion on breast cancer risk, a young woman with an unintended pregnancy clearly sacrifices the protective effect of a term delivery should she decide to abort and delay childbearing. That increase in risk can be quantified using the Gail Model. Thus, we conclude that informed consent before induced abortion should include information about the subsequent risk of preterm delivery and depression. Although it remains uncertain whether elective abortion increases subsequent breast cancer, it is clear that a decision to abort and delay pregnancy culminates in a loss of protection with the net effect being an increased risk.