The day before the Supreme Court heard oral argument in *Ayotte v. Planned Parenthood of Northern New England*, the Pew Forum, together with the Federalist Society and the American Constitution Society, held an event to discuss the case and its significance. The *Ayotte* case involves a challenge by a number of abortion providers to a New Hampshire parental notification law, which requires that a parent or guardian be notified at least 48 hours before a minor obtains an abortion. The challenge hinges in part on the fact that the law does not include a so-called "health exception," an explicit waiver to the notification requirement that would allow an abortion to be performed to protect the health of the minor.

DAVID MASCI: Good morning, and thank you all for coming today. My name is David Masci and I'm a senior fellow at the Pew Forum on Religion & Public Life. On behalf of the Pew Forum, the Federalist Society and the American Constitution Society, our co-sponsors for this event, it is my great pleasure to welcome you all to a discussion on the Supreme Court's upcoming abortion case — *Ayotte v. Planned Parenthood of Northern New England.*

I'm not sure whether you had trouble with the name Ayotte, but I certainly did, in pronouncing it. I actually called the office of Attorney General Kelly Ayotte, obviously one of the parties in the case, and was told to think of a large pleasure boat, a yacht — which was actually very helpful because I was calling her a variety of other things.

I'd like to talk a little about the issues at hand in the case. But before I do that, let me just take a minute to tell you about the three groups that are sponsoring today's discussion. The Pew Forum, the organization I work for, is part of the Pew Research Center, which is a nonpartisan fact tank that provides information on issues, attitudes and trends shaping America and the world. As for the Pew Forum, its mission is to provide timely information on important issues at the intersection of religion and public affairs. We are nonpartisan in nature, and that means we do not take positions on any topics, including the ones we are going to be discussing today.

The Federalist Society is a group of conservatives and libertarians interested in law and public policy. It is founded on the principles that the state exists to preserve freedom and that it is the province and duty of the judiciary to say what the law is, not what it should be. The society seeks to promote an awareness of these principles and to further them through its activities.

The American Constitution Society is one of the nation's leading progressive legal organizations. Founded in 2001, ACS comprises law students, lawyers, scholars, judges and other concerned individuals who are working to ensure that the fundamental principles of human dignity, individual rights and liberties, equality and access to justice are given their rightful, central place in American law.

While I'm on the subject of our partners, I'd like to thank Dean Reuter and David Ray of the Federalist Society, and Bill Yeomans of the American Constitution Society for their outstanding efforts and hard work in helping us to organize this event.

Today we are here to talk about the *Ayotte* case, which will be argued before the Supreme Court tomorrow. *Ayotte* is significant in part because it is the first abortion case the Supreme Court has taken up in five years, and the first such case that the new chief justice, John Roberts, will hear. It is also the last abortion case Sandra Day O'Connor is likely to hear, and if it is re-argued, which is entirely possible, it could also be the first case to come before her replacement. *Ayotte* involves a challenge by a number of abortion providers to a New Hampshire parental notification law, which requires that a parent or guardian be notified at least 48 hours before a minor obtains an abortion. The challenge hinges in part on the fact that the law does not include a so-called "health exception," an explicit waiver to the notification requirement that would allow an abortion to be performed to protect the health of the minor.

When the Supreme Court last looked at this issue five years ago in *Stenberg v. Carhart,* it invalidated Nebraska's Partial Birth Abortion Statute because it lacked a health exception. *Ayotte* gives the high court another opportunity to weigh in on this issue, this time with a less restrictive statute in question. *Ayotte* also focuses on a rather complicated question of standard of review, notably, whether lower courts were correct in considering a challenge to the New Hampshire law before the statute was even enforced, as opposed to after it has been applied to particular individuals. High court rulings in previous abortion cases have allowed such challenges, known as "facial challenges." But, again, this case gives the justices another opportunity to consider the issue.

How the court comes down on *Ayotte* is important on a number of levels. It would, for instance, be very significant if the court were to uphold the statute, in spite of the lack of a health exception. Such a ruling would have an impact on some of the 42 states that currently have parental notification or consent laws. It could also impact an existing case involving the Federal Partial Birth Abortion Ban statute, which has been struck down by lower federal courts and may be taken up by the Supreme Court next year.

Finally, *Ayotte* and cases like it are important because abortion is probably the largest battle in the nation's culture war. A recent Pew Research Center poll found that 62 percent of Americans believe that Supreme Court decisions on abortion are very important to them personally, a much larger proportion than the 36 percent who say the same thing about court decisions related to homosexuality, or the 38 percent who feel that way about cases involving affirmative action. Not surprisingly, the issue is already dominating the pre-hearing maneuvering in the fight over Judge Samuel Alito's nomination to replace Justice O'Connor on the Supreme Court.

Here with us to examine all of these and other issues we have two distinguished experts. We've provided relatively detailed biographies of each of the speakers for you, but let me briefly introduce both of them. First up today will be Nancy Northup, who is the president of the Center for Reproductive Rights. Before coming to the Center in 2002, Nancy served as director of the Democracy Program at the Brennan Center for Justice at the New York University School of Law where she also taught constitutional law. She

has been a consulting attorney with the American Civil Liberty Union's Reproductive Freedom Project and is a graduate of The Columbia Law School.

Next is William Saunders, who is Senior Fellow at the Family Research Council, where he is also the director of the Center for Human Life and Bioethics. In that capacity, Bill has frequently spoken and written on topics such as stem cell research and cloning. He was appointed by President George W. Bush to serve on the United States Delegation to the United Nations' Special Session on Children in 2001. In 1999, Bill founded Sudan Relief and Rescue, Inc. to aid persecuted Christians in Sudan. He is a graduate of Harvard Law School.

If you have not already done so, please take a copy of the new legal backgrounder on the *Ayotte* case that the Pew Forum has issued today. The backgrounder gives the reader a brief overview of the important abortion cases, from *Roe* through *Stenberg*, and then discusses in detail the issues before the court in *Ayotte*. I'd also like to direct your attention to a brief fact sheet that the Forum has issued today that analyzes recent Pew polling on abortion.

Thanks very much, and without further ado, let me hand it over to Nancy.

NANCY NORTHUP: Thank you, David, and good morning. It was clear from David's opening remarks, but it's not clear from many of the briefs that you'll read in this case — and in addition to the parties' briefs, there were 25 friend-of-the-court, or amicus, briefs filed in tomorrow's case — that what is not at issue in this case is whether or not New Hampshire can require minors to notify their parents they have made a decision they'd like to have an abortion. New Hampshire can do that.

Indeed, as David said, there are 35 states now — some of the state statutes have been enjoined — where such laws, either requiring minors to get their parent's consent or to notify a parent about an abortion, are in effect. So that has been true since *Roe v. Wade* was decided and states started passing laws requiring either parental consent or notification. The court has been looking at these cases since 1976. It has looked at them one way or the other about 10 times. So New Hampshire had guideposts on how to set up a constitutional parental notification law.

What is at issue tomorrow is the fact that New Hampshire did not do that. While New Hampshire can require that minors wait after they notify their parents — 48 hours in this case — and can also, indeed is required to have some way that minors who feel that they can't tell their parent or parents about their abortion have another alternative. And that alternative is also in the New Hampshire law, as it is in all these other laws. They can go to court and talk to a judge about it, show that they're mature, and that they can make this decision, or that otherwise the decision to terminate their pregnancy is in their best interests. But what New Hampshire did not do in setting up its law, and what it needs to do to be both constitutional and to be humane is to have a medical emergency exception — not a sort of vague health exception, but one for a medical emergency when the minor cannot wait to get a lawyer and go to court and tell the court why she has made a decision

for herself about an abortion, but a health exception that allows the doctor to immediately address her medical needs.

And in this case, it's undisputed in the record that teenagers, like women in general, have medical emergencies that come up in connection with pregnancies, and some of those are emergencies that could cause permanent and severe harm to their health. Just a few: preeclampsia; a type of pregnancy-induced hypertension that can be very dangerous to a pregnant woman; severe infection of the placental lining, pelvic infections related to pregnancy; heavy bleeding from the uterus. If these types of conditions do not receive immediate medical attention — not the time to get a lawyer and go to court and talk to the judge, but immediate medical attention — they can cause damage to major organs, particularly the liver and the kidneys. They can cause, at times, the spread of infection, loss of vision, permanent loss of fertility and chronic pain.

What New Hampshire failed to do here is make sure that minors who are in such emergencies — and are they going to be most minors in the state of New Hampshire? No. Most minors in New Hampshire are going to be able to comply with what the law says. They are going to tell their mom or dad, or they are going to go to court and talk to a judge about why, in their family situation, that's not appropriate for them, but that they are mature enough to make this decision. In an emergency situation, however, a woman needs to go to a doctor, not to the courthouse.

This case reminds us, and I think it's important for that reason too, that pregnancy is a major physical and medical event in a woman's life. Sometimes, with all this debate around the constitutionality of abortion and questions about abortion rights and the religious debates about abortion, we forget that it is a major medical event. Indeed, even with access to prenatal care, pregnancy still presents for women, health, and even, in some extreme circumstances major risks to their life. And the promise of women's health in the question of the termination of pregnancies has always been at the center of the court's jurisprudence on abortion. And that has been true for more than three decades. It has been true since *Roe v. Wade*.

The court has required that if there are abortion restrictions that cause delay, or otherwise ban procedures or ban abortion, there must be exceptions for women's health. That was true in *Roe*; it was true in *Planned Parenthood v. Casey*; it was true in the court's most recent case five years ago in *Stenberg v. Carhart* — that anything in which a woman is either banned or has to wait must contain an exception. In *Planned Parenthood v. Casey*, at issue was a parental consent law. And the first thing they did was look at the fact that if there was any waiting involved, there was a medical emergency exception. And the court reasoned, and I'm quoting here from that case, "… that the essential holding of *Roe* forbids a state from interfering with a woman's choice to undergo an abortion procedure if continuing the pregnancy would constitute a threat to her health." If there is a delay, there must be a medical emergency exception.

So, applying these longstanding (three decades) and constitutional principles, the First Circuit, in looking at New Hampshire law, said it is unconstitutional; you need that

medical emergency exception. New Hampshire and the Bush administration, and other amici who filed briefs in this case, are arguing for a radical change in this core constitutional commitment from *Roe v. Wade* onward. And this case, therefore, is a prime example. What's also not at issue tomorrow is, will *Roe v. Wade* be overturned. But it is a prime example of the way there has been a push-back to chip away at the right to privacy and the right to abortion ever since *Planned Parenthood v. Casey*. If the court were to agree with the state of New Hampshire and the position of the Bush administration, then we're not talking about just chipping away at this core value, this constitutional commitment to women's health. It would be taking an axe to the trunk of the tree of the constitutional protection and cutting it down.

The second issue, which we've also talked about, is this standard of review that the court is also going to be looking at. And as David said, throughout the 30 years of history on abortion jurisprudence, the court has allowed pre-enforcement (before the law goes into effect) injunctions against laws that are unconstitutional on their face. By reading them — like reading New Hampshire's law — you can read that there is no medical emergency exception, it does not comport with the Constitution. And in those cases, what the court has said is, you can enjoin that law. They did it in *Planned Parenthood v. Casey* with the requirement in Pennsylvania's law that a woman must notify her husband. They didn't say this is only unconstitutional for those women in difficult domestic circumstance who cannot tell their husbands. They invalidated that provision on its face. And what New Hampshire (Department of Justice) would like to do is enact a radical change of that provision and say, no, we're going to have to wait until someone is on the brink of disaster to go to court. But again, what a woman needs when she's on the brink of disaster is not to go to the courthouse, but to go to the emergency room in a hospital.

Leaving young women whose medical conditions are so urgent to have to wait to file a court as-applied challenge gives them no recourse to the possibility of getting effective relief and being able to exercise their constitutional rights. The Supreme Court has never required, nor should it, that women be on the brink of disaster before blocking an unconstitutional law. And so, we are hopeful that the court, in looking at its precedence, and in respecting its core commitment to women's health, will stick by its core commitments to the constitutional law and the protection of women's health and lives.

MR. MASCI: Thank you, Nancy.

WILLIAM SAUNDERS: Let me read you some provisions from the law that is under challenge in this case. Section one: No abortions shall be performed upon an unemancipated minor until at least 48 hours after written notice of the pending abortion has been delivered to the parent at the usual place of abode. Why the parent? Because this is an unemancipated minor, which means the minor is living with at least one parent. There are some exceptions for delivery if you cannot make it, but generally it provides for delivery, and then a 48-hour wait after the parents have been notified. Now, if we stop

right there, I think that most people would find that to be a reasonable statute on its face. An unemancipated minor, a girl who has not come of age, who is living with her parent (at least one parent) the parents have to be notified and the abortion cannot be performed for 48 hours after that notice.

Even so, the statute goes on to provide exceptions. One exception is that if the abortion provider certifies in the minor's record that abortion is necessary to prevent the minor's death, then you do not need to make notice. The statute goes further. The minor herself can elect to challenge this presumption of notice to her parent or guardian and she can go to court and ask the judge to determine either that she's mature enough to make her own decision, or even if she's not mature enough to make her own decision, that it's in her best interests for her to go ahead and have the abortion. The statute expressly provides that the courts are open for this purpose 24 hours a day, seven days a week, and if the judge issues an order that authorizes an abortion, it is not subject to appeal.

That is the statute. Here is the person who is covered by the statute. These statements that I'm going to make come out of the brief — the amicus brief we filed in the case. You can check the sources for yourself. First — and I'll call the girl Jane — she's close to her 16th birthday. She is beginning her sophomore year in high school. She is most likely to live with her two parents at home. She is probably a low achiever in school and is a serious dropout risk. Due to the downturn in the teenage job market, she is unlikely to be employed during the school year, or even to be able to find a summer job. If she's luckily enough to find employment, her earning potential as a high school student will be very low. Even with full-time employment, she will be unlikely to bring in more than $1,300 a month, or $15,600 a year. Finally, she is likely to believe that she does not have the ability to change her circumstances and will fail to understand how her personal choices affect her quality of life.

Jane is a minor girl who lives with at least one parent. The statute provides that the parent must be notified before she obtains an abortion. I've just given you a picture of who this girl is. She is not an emancipated minor. She is not a married girl. If she were married, under the statute, she is emancipated; you don't have to make notice to the parents. She is not a woman. She is a girl. She is a child. She is under the age of consent. She is under the age of majority. That is as determined by the laws of both New Hampshire and of most of the states in the Union. Now, the question in the case becomes: Is anything else required in this statute, in this circumstance, to protect Jane?

It is specifically asserted that there has to be a health exception. If you think back again to the statute I just went over with you, she can get a judge to decide she is mature enough to make her own decisions. She can get a judge who decides she is not mature enough to make her own decisions or whether it is in her best interests. If her life is at risk, the abortion provider can go ahead and do the abortion. The question is, does she have a right to something called a health exception that prevents her parent, with whom she lives, who takes care of her, who is her custodian legally, from knowing that she is going to have an abortion.

That would be an unreasonable requirement, and nothing the Supreme Court has said requires it. The Supreme Court has considered cases before, like *Hodgson v. Minnesota* in which there was no health exception in the parental notification statute, and it didn't strike down the statute for that reason. *Stenberg v. Carhart* does not require this. That was the partial birth abortion case. *Stenberg* talks about the health exception vis-à-vis an emancipated woman, not a minor girl, but a woman of age. She can make her decisions and the law treats those decisions with a great deal — almost overwhelming deference. There are few if any state interests that can interfere with that. But, as the Supreme Court said in *Planned Parenthood v. Casey*, the court and the states do have an interest in unborn human life.

So, in the context of a minor, of a girl underage, is a health exception necessary? Again, there is nothing in *Stenberg* that requires it. *Planned Parenthood v. Casey* seems to indicate that it should not be required. And we have to keep in mind this fundamental distinction between an emancipated minor or woman who has attained her majority, and an underage girl. We notice the laws always treat a minor girl differently than an emancipated minor or woman. She cannot go on school trips without a parent's written consent. She cannot take aspirin without her parent's consent. She cannot get a tattoo without her parent's consent. She is prevented under law from marrying the person who got her pregnant without her parent's consent. She can't put the child up for adoption without her parent's consent. She can't have any kind of surgery at all without her parent's consent. Why in the world would we call out an exception here in the context of abortion?

This case is not about the right to abortion. It is about whether an unemancipated minor girl, made pregnant by some older man, which is statutory rape — whether that girl is going to have the input of her parents or parent into the decision that can be one of the most important in her life — all kinds of ramifications for her psychologically and otherwise, a very important decision. Is she going to make that decision without her parent's involvement? We do not treat minor girls like women. Their decision-making is not as good. That is why we have a difference between minors and majors in the law. We've made a distinction that, at certain ages, your decision-making is not as good.

And think about the abortion context again for this girl. She's become pregnant by an older man almost always. She does not live by herself. She's not married. She has nobody really to talk to about this, and her parents are being walled off until the outcome, which is being set up to wall her parents off during maybe the most difficult period of her entire life. So I think that the Supreme Court will find the New Hampshire statute to be constitutional.

There is the question of standard of review, which was mentioned. There are two different cases. There is a *Salerno* case, which says if you are going to make a facial challenge to a statute, you have to show that in no circumstances would it survive constitutional scrutiny. Or does *Planned Parenthood v. Casey* establish a new standard or a different standard? I would say, if *Planned Parenthood v. Casey's* undue burden standard changes the overall standard for a facial challenge to a statute, it changes it only

in the context of the spousal consent provision that was at issue in *Planned Parenthood v. Casey*. So I don't think a facial challenge before the statute has been applied is appropriate here, nor do I think the Supreme Court will find it to be.

MR. MASCI: Nancy, do you want to take a couple of minutes and respond to some of the things Bill said?

MS. NORTHUP: Sure. As Bill said, minors are not just like adults. Any of us who have teenage children know that. And the law, as Bill says, doesn't treat minors like adults. But all of the descriptions that Bill has given about a minor — or his prototypical minor — the circumstances she might be in, go to the overall jurisprudence around the fact that the Supreme Court has read the Constitution to allow states to have parental consent and notification laws. And the argument of the plaintiffs here is not that New Hampshire cannot do that. To suggest that somehow by merely requiring that there be an exception for medical emergency is somehow taking away the general principle that minors in the state of New Hampshire are going to tell Mom or Dad when they decide to have an abortion is not really what's at issue.

What I found so surprising about the argument is that yes, although minors are different than adult women in some of the ways that were talked about, they aren't different regarding the medical risks that come with pregnancy. In that way, they are the same; or the younger they are, the higher the risks are with pregnancy. The preeclampsia, the infections, can lead to very dangerous medical circumstances. All the plaintiffs are asking here is that New Hampshire put in its law an exception to this waiting time and this requirement to go to court if a minor is in a medical emergency. The New York and the New Hampshire legislature consciously did not put it into the statute because they want to test and see if they can take away this core principle, this core commitment to women's health that is in the Constitution.

New Hampshire did not want to do it. They should just do it. I feel a little bit when you read these briefs and the fighting over it, a little like when I'm talking to my kids about cleaning up their rooms, you know? Just do it. Put in a medical emergency exception. What is the harm of doing that? And it will prevent harm to teenagers.

MR. MASCI: Bill, what is the harm?

MR. SAUNDERS: Well, it is really a question of — what is the appropriate way to treat different kinds of people? An emancipated minor who is married, therefore has her husband's input, or a woman who has come of age is perfectly free to get an abortion with almost negligible, if any, obstacle or anything that affects that decision from the state's interest. Here we have somebody who, by law, is treated differently than anybody in this room is, in every state, because she's a minor. Why is that? Because we know she is not capable of making the kinds of decisions necessary. She needs her parent's involvement. If a girl's health is at risk, an underage girl, isn't that the most important moment to have parental input?

Do you want a girl whose health is at risk not to have parental input? That is what is being argued here, that the parents could be cut out of that. And remember, the statute provides that she can get a judicial bypass if she's mature enough to make her own decision, or if the judge determines it's in her best interests.

I want to say a couple of other things. I assume all this will come up in questions and answers. But we had said that we were going to discuss the issues of the case, the ramifications of the case, and the effective personnel changes on the Supreme Court on this potential decision in the case. If this New Hampshire statute is held to be unconstitutional by the Supreme Court, the ramifications are, I believe, this girl is left to the tender mercies of the older man who got her pregnant. It deprives her of parental help and involvement, which she needs in every other aspect of her life. It treats the pregnant minor different from any other minor who cannot act without parental notice, and it treats a situation that does not have to do with whether it is legal to get an abortion (this is only a notice statute; the girl can still get an abortion) as if it has to do with a limitation on the question of obtaining abortion itself.

I think if the Supreme Court invalidates the statute, it would show, in my opinion, an almost unbelievably extreme abortion license in this country that is not affected or regulated in any way, even when it comes to minor girls and even when we are not talking about whether they can get an abortion but whether their parent is notified. One ramification of the case, I hope, is that the American public is going to realize that, unlike any other country in the world, the United States has the most broad abortion laws, and even if you think that it's appropriate for emancipated women, women who have come of age, it is certainly not for a minor.

MR. MASCI: You mentioned a second ago that we were going to talk a little about the way new members of the court might approach this case. If one of you could, for just a second, walk us through the circumstances that might lead to a re-hearing of this case, and if it is Judge Alito who is part of the court that re-hears this case, what does the recently released 1985 abortion memo, his 1992 dissent in *Casey*, and anything we know about his views on abortion, tell us about how he might rule in this case?

Nancy, do you want to start?

MS. NORTHUP: Well, your first question was just a technical one of how could it be that it gets re-argued? Obviously if Justice O'Connor's replacement, should it be Judge Alito or someone else, gets appointed before the decision comes down, then the case can be re-argued or the other justice can come in otherwise.

The question about what is going to happen if it is Justice Alito who replaces Justice O'Connor, I'm always, even with a record, loathe to speculate because there are sometimes surprises on the court. But in terms of what we know from the record already, the two things that you mentioned — one was his application to work in a political position in the Department of Justice, in which he talked about his own personal

agreement with the arguments that he had made, asking for the reversal of *Roe versus Wade*. He was therefore indicating that his view 20 years ago was that there is not constitutional protection for the right to abortion.

What we have seen in his cases since he was on the bench is the 1992 case of *Planned Parenthood versus Casey,* when it was in the lower court. There, Judge Alito dissented from the decision of the Third Circuit, which was ultimately the same decision the Supreme Court took. He said he would uphold Pennsylvania's law requiring women to tell their husbands when they were going to get an abortion. And what's interesting about that decision is that this was where he had some room, because the Supreme Court at that time was talking about the undue burden standard. He was head counting and seeing that there were enough people on the court that were going to go that way, that *Roe*'s three-trimester test no longer had a majority of the court, so he had some room to interpret it. You couldn't totally prejudge what the court was going to do, but he chose to interpret it in the strictest way possible. And part of that strictness was what is at issue in this case, which is the question about the standard of review.

After reviewing the District Court record and majority opinion findings, which were full of instances about the way battered women cannot tell their husbands and are really put at risk — and how pregnancy can be a trigger for abuse in an abusive home. But What Judge Alito keeps saying is, well, we don't know how many, we don't know how many.

Ultimately, what the Supreme Court said, (which is the law here and which is why you strike things down on its face) is, "We are concerned. Of course most women can notify their husbands; that's the kind of relationship most people have, but where our analysis begins," the Supreme Court said, "is with that small percentage that can't do that because they are in harm's way. That's what we're concerned about."

So the concern coming out of *Planned Parenthood versus Casey* in 1992 was that Judge Alito is not open to the concerns and the real-life problems that arise with leaving laws on the books like a notification law for a husband's consent, like a law without an exception in New Hampshire that can really put women in difficult circumstances in harm's way.

MR. MASCI: Bill, what does your crystal ball tell you about Judge Alito?

MR. SAUNDERS: I'm reluctant to speculate as well. You need to keep in mind that his decision in the *Casey* litigation occurred before the Supreme Court rendered its decision. In his opinion in the lower court, he tried to apply, as carefully as he could, the standard that had been staked out by Sandra Day O'Connor. Simply because he got that, as was ultimately decided, not quite right, doesn't matter. He's an Appellate Court judge; he's supposed to try to apply the precedent from the Supreme Court, and I think he did.

I think he's a very careful judge, a judge who tries to apply the law. One thing that will arise at some point is that in *Stenberg v. Carhart*, O'Connor took a position on

the health exception that was seen by Justice Kennedy as being out of line with the direction the court intended to go in after *Planned Parenthood v. Casey*. So the question of the health exception in the case of emancipated women may be addressed in some sense subsequently, although I do not know for sure where Alito would come out. It is just that O'Connor's vote was the key vote. *Stenberg v. Carhart* was a 5-4 decision, and Justice Kennedy, who joined her in *Planned Parenthood v. Casey*, found that she had gone too far.

Now I'd like to open up the discussion to the audience. I'd like to start by giving members of the press an opportunity to ask questions first and then we'll open it up to the rest of the audience after they've had an opportunity.

JEFF JOHNSON, CYBERCAST NEWS SERVICE, CNSNEWS.COM: This is for Ms. Northup.

The medical conditions that you describe, preeclampsia and the others — could you tell me which of those conditions could not be treated or remedied by performing a C-section as opposed to an abortion?

MS. NORTHUP: First of all, I am not a doctor, I am a lawyer, and so what I'm referring to here is the record in the case, which is uncontested. and there are also amicus briefs in this case from the American Medical Association, the group of obstetricians, all major sort of medical groups. I can't answer that question, but I would say I do know that a C-section is a major surgery operation, and obviously, depending on when you are talking about in the course of a pregnancy, of course, a C-section is not something that would save the life of the fetus.

What's important here is that the record really is uncontested about whether there are these medical emergencies. And as I said before, we're not talking about what's going to affect most minors, but, again, like in *Planned Parenthood versus Casey*, the concern is with that small percentage that could be in that situation. Why not make sure that their health comes first?

As a parent, of course, I too would very much want my teenage daughter to come and talk to me if she were pregnant and if she were considering an abortion. I certainly would want to be part of that conversation about her medical history. But the reason that we have, in these statutes, the exceptions that allow minors to go to court, is that all families are not always ones in which minors can talk to their parents. There may be abuse within the family. There may be issues about violence. There may be issues about sexual abuse. To have every minor have to notify their parent is not a circumstance that can be good. And in those circumstances, even with my own teenager, if she is in a doctor's office and he or she is saying, "I need to perform an abortion, which you've said you would like to have, because you could have permanent damage to your health." I would want that doctor and my daughter to go forward rather than have them wait and have her health be damaged.

MR. SAUNDERS: The only thing that I would say is that with any other medical condition, even if the girl wants it, you've got to get parental consent. In New Jersey, if it's an emergency you can proceed. There are statutory provisions for emergency medical procedures, which would apply here too. I do not think we want to treat the pregnancy differently than we do all other medical conditions, all other health conditions, all other situations the underage girl finds herself in.

KEN JOST, CQ PRESS: Continuing on the medical exception issue, my understanding is that the New Hampshire legislators who didn't include it were concerned that the exception would become the rule, that it would allow too many teenagers to be given permission by too many doctors to avoid the parental notification. I note that Mr. Saunders didn't make that argument, didn't make that note, and so I wonder whether you agree with it, and if so, on what basis? And I would like to find out whether Ms. Northup agrees with it or disputes that prediction and on what basis.

MR. SAUNDERS: Well, the health exception as such in the federal courts is very broad and covers any familial, psychological and other issues. So it would be so broad with a statute where you already have — again, remember it's a minor girl and we already have an opportunity for her to go to court and say to a judge, I'm in fact more mature than my chronological age, or, it's in my best interests. She can waive the notification.

So it would just add a huge loophole in a statute that already is very broad because of health exception being so widely defined to include any condition. It is not just physical but psychological, familial, et cetera.

MS. NORTHUP: I think you are right about the history in New Hampshire to the extent that there was opposition to it. But I'm not so sure it was only about the loophole, but that they also actually wanted to test and try to cut back on the constitutional laws and protections.

I think what is important to note is that this excuse is always used — that health exceptions are broad and that they lead to doctors okaying everything. A couple of things here: One, the plaintiffs in New Hampshire are not talking about some generic health exception; they're talking about a medical emergency exception. The doctor has to say that this is a condition which requires immediate abortion or there will be some kind of permanent health damage.

This is not, I'm nauseous, I'm not feeling well; this is a serious medical condition. You have these waivers around the country as exceptions to parental consent and notification laws, and there is no evidence that I know of that doctors and their patients are abusing them. It's a little like the arguments used about even post-viability, meaning in the later months of pregnancy, in which the Supreme Court has said that states can ban abortion altogether as long as there are health exceptions. Again, the argument is always made: This is an enormous loophole. Well, it's not used or is used in

very rare circumstances. I think that argument is really a red herring, and that what is really at play here is an attempt to drastically cut back on the protections of the constitutional law for women's health in general.

MR. MASCI: Do we have any data — this is for either panelist — in a case where you have a parental consent or parental notification statute, what percentage of those cases ultimately come under the health exception waiver?

MS. NORTHUP: I donot have that data but I do know, just from our relationships with our clients, that even the option to go to court in some states is rarely accessed. Now, that can partly be because it is very burdensome, but even that varies. The concern that this is going to somehow undermine the basic premise of the law that a teenager will talk to her mom or dad is — there's no evidence out there of that.

MR. SAUNDERS: I think you have to keep in mind, again, the person we are talking about here is an underage girl who, in all other aspects of her life — any other health condition, almost any other condition of life — she cannot sign contracts, she is not able to make legally binding agreements without parental involvement. Why would we treat this any differently? I think that is what you must keep the focus on.

JERRY ZREMSKI, BUFFALO NEWS: I'd like both of the panelists to comment on the possible ramifications of this case beyond this case, in terms of the future of the undue burden standard.

MR. SAUNDERS: It's just guessing because it all depends on how the opinion is written by the court, obviously. I think that the Supreme Court's decisions have distinguished between parental involvement situations and emancipated minors, or women who have obtained their majority. So I would not expect, with the court as constituted, with or without Alito, to go beyond that. I think it will be decided narrowly in that context.

MS. NORTHUP: I obviously agree with Bill that it depends how the court goes about talking about this. I don't think it would be logical to say that if they're going to apply the *Salerno* standard to this case, that it's because it's a parental notification case, for the reasons that we have talked about.

Were they to do that, I think it would be quite radical, but it would also, therefore spill over into other cases. The justices that have been like Scalia, Thomas and the late Chief Justice Rehnquist, who have been asking for years to have the *Salerno* test applied, in which there must be unconstitutional circumstances, would apply it to things like — for example, Scalia would have applied it to Guam's complete ban of abortion and would have upheld that against a facial challenge because it would be constitutional in circumstances when it is late in pregnancy and there are no health reasons for the woman. I think if it's the sort of Scalia-Thomas of this, it would be enormous, and even a ban on

abortion would be able to stand and you'd have to have each woman coming forward and saying, no, but as applied to me it's unconstitutional — as applied to me.

TOM CURRY, MSNBC: Following up that point, when the court agreed to hear this case, was Rehnquist still voting on whether to hear it, and why now — or why at the time they agreed to hear the case, did they think it was time to re-think this standard of review?

The other question is, how does this case differ at all, from the one that Mr. Saunders mentioned, *Hodgson versus Minnesota*? Does it involve the same kind of parental notification?

MS. NORTHUP: The second one first. The issue about *Hodgson*, which keeps being argued by New Hampshire and about the lack of a medical emergency exception was not in play in *Hodgson*. It was not one of the claims that the plaintiffs had and thus the court did not rule on it. And when something happens to be lurking in a statute and it's not directly addressed and there is no ruling, then it cannot be used as precedent to say that because they have this problem with their law, it's okay.

Chief Justice Rehnquist was on the court when they took this case. I would be interested too in the insight into why they thought this was the time. It was a surprise. This was viewed as a pretty straightforward case, no medical emergency exception, struck down. But it may be that, as I mentioned before, obviously Scalia and Thomas and Chief Justice Rehnquist, for a number of years have been asking to look at *Salerno*. Others, like Stevens, have been saying *Salerno* is not the standard that we apply in abortion cases and even in other constitutional cases, and that it was basically hyper rhetoric and dictum in the *Salerno* case to say that it has to be unconstitutional in all kinds of circumstances. O'Connor and Souter have otherwise suggested that is not the standard. It may well be that they have thought: Let's settle this once and for all.

MR. SAUNDERS: It's possible; I don't have any idea. To me, it's not such an earth-shaking case. I've been surprised in a way at how much notoriety it gained and how much media coverage because, as I've tried to indicate, it is a narrow issue, and I think a very reasonable response to the question of whether parents should be notified before an underage girl gets an abortion. I think New Hampshire has a very reasonable response. It hardly puts into play the question of abortion in the United States. It hardly puts into play that question of health exception in the United States. It is simply about minors, and minors are not treated the same as adult women. They haven't been treated that way in Supreme Court cases; they're not treated that way in other areas of the law.

I think that all this case is really about is the situation of a minor girl and the question of notice to the parent with whom she lives, from whom she gets advice or input every day on every other decision. So I do not think it portends an earth-shaking decision on abortion in this country.

MIKE SACCONE, COX NEWS: I was wondering if you both could comment on why or why not the court should adopt the *Salerno* line as opposed to the *Casey* undue burden test.

MR. SAUNDERS: It is a question of what they call the facial challenge, which is: Before the statute goes into effect, can you strike it down for being unconstitutional? If you think about it, ordinarily you would say that unless you could show that the statute would be unconstitutional in all cases, you would, as you do in most cases, let the issue arise through litigation and be determined in the courts.

But even *Casey*, in this situation, which has undue burden — what does that mean? It means at least you have to be able to show that in a substantial number of the cases, you're going to have an interference with the constitutional right involved, and that was not done in this case. It was shown there might be a situation in which that would be at issue, but my point is they didn't satisfy — I don't think a factual challenge would be appropriate under either *Casey* or *Salerno*.

MS. NORTHUP: With regard to the question about why it should not, I would say, adopt the *Salerno* standard. In the abortion context, moving quickly is important, and if you have to wait until a woman is in a circumstance in which she has to go to court to terminate her pregnancy, it delays the abortion for a longer time. And there are many women — I mean, let's face it— it is not a normal thing for a United States citizen to go to court when they really want to just be going to the doctor. It would pretty much burden a lot of women's ability to exercise their right to choose. The example I gave before about Guam — you'd have a blanket ban on the books in Guam and you'd make each woman have to go forward to say that she should be an exception to that blanket ban.

The reason the court has not applied the *Salerno* rule in the circumstances of abortion cases is because they want to make sure that the zone of protection is there, so the doctors know what procedures and when they can perform them. We keep talking about why we should treat the minor who is pregnant as if she had a toothache or any other condition. Because the Constitution has said this is a critical event in a woman's or a young woman's life and that it is very central to her destiny, to her health and life, and life directions, and so the Constitution does treat it differently.

DAVE HOLMAN, THE AMERICAN SPECTATOR: Ms. Northup, you mentioned just now that this would burden a lot of women, and earlier you mentioned that there is no evidence that doctors and patients are abusing the health exception. And this seems to get at the heart of the *Salerno* or *Casey* jurisprudence question. Because of the facial challenge, we are unable to see any actual cases in which this has burdened any women in New Hampshire. Is there any case that you know of in any other jurisdiction in which this law has been applied where a woman has been unfairly burdened because of a lack of a medical emergency exception?

MS. NORTHUP: What I do know is most states have the medical emergency exception, so I guess really to answer your question about these cases getting blocked by pre-enforcement challenges, in fact there are over two dozen such laws on the books. It is there that you look and ask, do we see these medical emergency exceptions being abused, and I just don't know of any evidence of that

WENDY WRIGHT, CONCERNED WOMEN FOR AMERICA: In researching this case, one thing I found quite interesting is that among the plaintiffs, none of them had ever had a case in which a medical emergency necessitated an abortion. And in six states that have parental involvement laws and require reporting, none has ever reported a case of a medical emergency. As Nancy mentioned, it's not being abused. Perhaps that's because these are straw men — that in fact there are no cases in which a medical emergency would necessitate having an abortion.

In the cases about the medical emergencies that Nancy mentioned, one of the amicus briefs addressed each of those and found that in fact, in none of those cases would an abortion actually treat the woman. In fact, the procedure could do the opposite; it could end up harming the woman. In at least one of the medical cases cited, an abortion would actually cause the woman's death. So there seems to be an assumption that somehow abortion is safe, when in fact it could cause more harm to the girl than going through with the pregnancy.

Bill Saunders, I'd like to ask you, if you think that, in fact, this argument of medical emergency is really just a straw man to undo the law?

MR. SAUNDERS: I don't think it's the key issue in this case, because, as that question indicates, if the girl wants to have surgery for something else, she can't get it. Why should she be able to get an abortion without her parent being told? A parent has to be notified and consent in all these other situations. Why not this one?

It is true that abortion obviously poses risk for the girl — physical risk. Again, wouldn't you want the parent to be involved in deciding whether that's the right course? Our assumption in these cases with underage girls can't be that she is going to get an abortion because she's not a competent decision-maker under the law. It has to be that she has this issue in her life as an underage girl — how does she resolve it? The statute provides that her parent knows about it and helps her to resolve it. That's not the same for an emancipated woman.

MS. NORTHUP: I would just answer by saying that one of the things I love about the law and adjudication of cases is that facts get put forward and they're tested by counter-facts, and then they sort of move up the line. In this case, the issue that minors were confronted with, like other women with medical emergencies that can permanently threaten their health, were facts that the plaintiffs established and were not countered by the state of New Hampshire. And I think that's really important. We can all sit around in this room and talk about whether this doctor is right or that doctor is right but, again, the beauty of the court proceeding is that we're going to test those facts against the record.

And that is the record in this case, and that's what the doctors in this case are concerned about; that they will be confronted with a rare event. But they will be confronted with a medical emergency and have to deny that teenager care.

WAYNE BEYER, THE FEDERALIST SOCIETY: I guess this question is for Nancy Northup. In states recognizing a medical emergency, if a girl says, I'm going to commit suicide rather than tell my parents about this, is that a recognized medical emergency? And in that event, who makes the decision about whether that's a viable medical emergency?

MS. NORTHUP: Well, in that kind of circumstance, like with any other condition that would present, it would be a doctor who would make that determination about the seriousness of that psychiatric condition. Is she maligning or is it a serious psychiatric state?

MR. BEYER: Would that be the same doctor who is going to perform the abortion or a different, independent person?

MS. NORTHUP: It's a hypothetical circumstance that I wouldn't be able to answer.

MARY MEADE, THE NATURAL LAW STUDY CENTER: I guess I would like both of you to address this. Miss Northup stated that facts can be tested in a court case. But when you're dealing with a term such as "medical emergency" for a minor, you're setting up a precedent in advance. And since much has been made of the meaning of the term "medical emergency," what about the situation where a young woman might be in a battered situation, for example, and she is trying to avoid the coercion of someone, not to prevent the abortion but to force the abortion? What's to prevent an extension of the vague term "medical emergency" to be used against her to force an abortion?

MR. SAUNDERS: I'm not sure I completely understand the question, but it is certainly true that in many of these situations — studies and polls, et cetera, underage girls often will report that they didn't really want an abortion and they felt pressured into having the abortion. And who were they pressured by? Either the older man who got them pregnant or the family; perhaps if it's a younger guy, the parents of the guy. They felt pressured into getting an abortion.

Without parental involvement in that, they will be subject, I think, to coercion, and it is a serious problem.

MS. NORTHUP: I don't think the medical emergency exception would play at all in the circumstance that you describe. The first line of questioning would be from the reproductive health professionals who have to make sure that this young woman has informed consent, even before they go forward. But more importantly than that, in these

circumstances she needs to go talk to a judge about the circumstances, and that judge would be probing, I would assume, of other things, including has someone exercised any coercion over you?

DAVID DRASCHSLER, AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA: Does the statute contain a severability provision, or could it be reasonably interpreted that this particular provision would be severable?

MR. SAUNDERS: It does. I could read it to you, but it does.

MS. NORTHUP: I think the problem is that, unlike if you had a bunch of different regulations, one that you have to wait 48 hours, another that you have to go to court, another that you have to hear a script from a doctor; you might sever one of those. But here the problem is that there is an absence of this exception for when there is delay.

So in fact, what the court would have to do here, if it were to do something more narrow than strike down the whole law, would be to sort of write that exception in, and there I think it would violate the separation of powers principles because, as is clear from the discussion we were having before about the New Hampshire legislature. There is also an amicus brief here from 100 members of the New Hampshire legislature in which they say it's not clear at all the New Hampshire legislature would pass this law with a medical emergency exception. So, for the court to come in and write that would be invading on the province of that branch.

DANE VON BREICHENRUCHARDT, THE U.S. BILL OF RIGHTS FOUNDATION: I want to ask a question, sort of tangential to all of this. I presume the way the law is right now is that it's only notification; the parents can't forbid the abortion?

MR. MASCI: Yeah, it's the notification.

MR.BREICHENRUCHARDT: Well, given that, could the parents essentially say, well then, we're not going to pay for this? And let's say there were complications, not the fault of the physician, just that there were complications, and it got into a long, expensive hospitalization. If the parents could take the position that look, we didn't want this thing to take place in the first place and why should we have to pay for it? How does this law and decision-making process affect things after the fact?

MR. SAUNDERS: Well, you have a whole array of laws dealing with these other issues, but the parents are legally responsible for the child, and so they would be legally responsible for her debts.

MS. NORTHUP: I don't know the ins and outs of New Hampshire's particular regime about who would pay in that circumstance.

SHAHID BUTTAR, AMERICAN CONSTITUTION SOCIETY: I have two questions, one for Mr. Saunders and one for Ms. Northup. For Mr. Saunders, you speak of this notion of how minors should get their parent's notice or involvement and input before a decision of this sort. First, does the law as it stands, recognize a distinction between abortion and other sorts of procedures to which you seem to be equating it? Second, would Planned Parenthood's position in the *Ayotte* case leave in place the policy rationale for the law you described?

For Ms. Northup, I'm curious to know if the extension of *Salerno* in the *Ayotte* case would threaten to bar the doors to courts in contexts beyond those of people seeking to protect and preserve their reproductive freedom.

MR. SAUNDERS: In a sense, the issue in the case is whether they're going to be treated differently or not; whether an abortion for a minor is going to be treated differently than other medical procedures for a minor. And the Supreme Court in parental involvement cases beforehand has not treated them the same. It's not correct to say that the abortion for a minor is necessarily different from any other medical procedure that the minor gets. It is to some extent, but not in other extents, so it's not completely walled off. And the question here is, do you want to make it more or less.

MS. NORTHUP: As to your question about what if the court were to say that unlike we've done in the past in striking down facial challenges, we say that *U.S. v. Salerno* is the law and that unless you are in the First Amendment context (that unless it's unconstitutional under all circumstances) it must be struck down. Certainly, that could have an impact outside of the context of the right to abortion. Just take a look at a 1996 case in which Justice Stevens denied a petition for a cert. The case is called *Janklow*. This is where he says that *Salerno* was a rhetorical flourish. He also calls it a rigid and unwise dictum. He's not just talking there about this case; he's talking about it being rigid and unwise in other areas of the constitutional law. And he talks about the fact that not only has it not been applied in the abortion context, but also where appropriate, it hasn't been applied outside.

MR. MASCI: I want to thank all of you for coming. And I especially, of course, want to thank our two panelists for their excellent presentations and fielding of your questions. Thank you all.