ON THE *AYOTTE* PARENTAL NOTIFICATION CASE

By Professor Gerard Bradley, Professor of Law at Notre Dame Law School and Federalist Society Religious Liberties Practice Group Executive Committee Chairman

Ayotte v. Planned Parenthood is the first abortion case that the Supreme Court has heard since it overturned a partial-birth abortion ban in *Stenberg v. Carhart*. *Ayotte* also promises to supply the first word on abortion from our new Chief Justice, John Roberts, whose hearings supplied few clues to his thinking on the subject. Though *Ayotte* is surely not the occasion to reconsider Roe, any Roberts opinion in the case should relieve the mystery, at least a bit.

What is the case about? The First Circuit struck down a New Hampshire law which required notice to one parent before an "unemancipated" minor girl could have an abortion. (Think of an unmarried girl, not quite sixteen, living at home). Statutes such as this one are commonplace, and they commonly include (as does New Hampshire's) a judicial bypass. The Supreme Court upheld a statute indistinguishable from this one back in 1990 in *Hodgson v. Minnesota*. However, the First Circuit sidestepped this precedent, saying it was "unconsidered." Then the judges below held that a "health" exception to the bypass process was constitutionally required.

Now, the statute at issue contains, it is true, no explicit exception whereby a pregnant teen could obtain an abortion with neither parental notice nor a judicial finding of maturity for "health" reasons. But, still, she could: as Kelly Ayotte (New Hampshire's Attorney General) argued below and in the Court last week, general provisions governing consent to medical treatment for minors allow for emergency care without further ado. She described these provisions as the "functional equivalent" of a health exception. But that was not good enough: the First Circuit said that abortionists needed more protection than do all other doctors treating all other patients incapable of consent for all other conditions. The First Circuit held, in other words, that there had to be a "health" exception to the normal "health" exception (to normal requirements of parental consent or notice) when it comes to abortion.

This is what the case is about: the continuing abortion distortion of our law. The question is whether abortionists may be treated like other doctors. May—and not must: no one is saying in *Ayotte* that a state has to require abortionists to meet ordinary professional ethical standards. (One could wonder, why not?) The issue is whether Roe prohibits states from treating abortionists like other doctors, and abortion like other surgeries.

This case is about whether the law may treat an unemancipated minor girl who happens to be pregnant just as it treats her across the board. May—and not must: no one argues in *Ayotte* that this girl—call her "Jane"—has to be treated the same when it comes to pregnancy as when it comes to any other huge decision. (Again: why not?) Under New Hampshire law Jane may not have any surgery at all without parental consent. She may not marry the father of her child in utero without her parents' consent, or put her

baby up for adoption. In fact, being not quite sixteen, she is presumed in law to be unable to consent to the sexual intercourse by which she became pregnant. Sex with girls like Jane has a name in New Hampshire, as it does across the country: statutory rape.

RESPONSE TO PROFESSOR GERARD BRADLEY'S "ON THE *AYOTTE* PARENTAL NOTIFICATION CASE"

By Dara Klassel, Co-counsel for Plaintiffs/Respondents in Ayotte v. Planned Parenthood of Northern New England and Director of Legal Affairs, Planned Parenthood Federation of America.

Ayotte v. Planned Parenthood of Northern New England is a challenge to a New Hampshire law that requires notice to a parent of a minor 48 hours in advance of her abortion. The law contains a single exception for situations where the teen confronts a medical emergency that requires an abortion before her parent can be notified: the physician must certify that the minor would die in the time it takes to notify her parent. Yet, the uncontested facts in the case showed that there are numerous situations where a minor could suffer serious health consequences, yet not die in the time it took to notify a parent: these include loss of fertility, liver or kidney damage and blindness. The lower courts struck the New Hampshire law because it failed to allow the physician to act to avert serious health damage to a teenager in these medical emergency situations.

The lower court rulings are dictated by on over 30 years of Supreme court precedent, going back to *Roe v. Wade*, 410 U.S. 113 (1973), holding that when states regulate abortion, a woman's health must take precedence over all other state concerns. Professor Bradley says the First Circuit "sidestepped" the Supreme Court's ruling in *Hodgson v. Minnesota*, 497 U.S. 417 (1990), upholding a law like New Hampshire's. However, the issue in *Hodgson* was whether a state may require that both parents of a minor be notified without providing a "judicial bypass" whereby minors mature enough to decide about abortion on their own or those who would be harmed by notifying their parents could obtain a court waiver of the notice requirement. The Court ruled that such a bypass is required. The lack of a medical emergency exception in the two parent notice law was never even discussed by the Court. Therefore, the *Hodgson* case is not a precedent on the issue of the need for a medical emergency exception.

Professor Bradley rightly says that "general provisions governing consent to medical treatment for minors allow for emergency care without further ado," but then wrongly argues that abortion providers are asking for "more protection" than this. Quite the contrary, physicians are asking that they be allowed to handle emergencies that call for an abortion the same as all others emergencies and be allowed to provide the best care for their patient "without further ado." It is New Hampshire's law that requires that only in the case of abortion must a physician be certain that her patient will die before she provides treatment. Thus, New Hampshire's law endangers the health of teens facing medical emergencies.