



THE PEW  
FORUM  
ON RELIGION  
& PUBLIC LIFE

THE FORUM IS  
A PROJECT OF  
THE PEW  
RESEARCH  
CENTER

FEBRUARY 2006

# Supreme Court's Decision in *Ayotte v. Planned Parenthood*: *Unanimous Court Sends Abortion Decision Back to Lower Court*

On January 18, 2006, the U.S. Supreme Court ruled that a lower federal court had erred in striking down in its entirety a New Hampshire law requiring parental consent for minors seeking an abortion. The case, *Ayotte v. Planned Parenthood of Northern New England*, involves a decision by the 1st Circuit Court of Appeals to invalidate the state's Parental Notification Prior to Abortion Act because it lacks a waiver provision for cases in which a woman's health is at risk.

Writing for a unanimous court, Justice Sandra Day O'Connor did not question the circuit court's determination of the need for a health exception. However, she did take issue with its decision to invalidate the entire statute, arguing that it was inappropriate to do so because only some aspects of the act raised constitutional concerns. The high court returned the case to the court of appeals with instructions to craft a narrower remedy.

The high court's opinion, issued just seven weeks after oral argument on the case, surprised many observers, who had expected the justices to rehear the case once O'Connor's successor, Samuel A. Alito, Jr., was sworn in. The decision has garnered attention not only for the ruling but also for the clues it might offer about the court's likely consideration of the federal Partial-Birth Abortion Ban Act later this year.

The New Hampshire law at issue in *Ayotte* prohibits physicians from performing an abortion on a pregnant minor or on an adult woman for whom a guardian or conservator has been appointed until 48 hours after written notice has been delivered to at least one parent or guardian. The notification requirement may be waived under certain circumstances. For example, notification is not required if

## LEGAL BACKGROUND

the attending abortion provider certifies that an abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice.

Planned Parenthood of Northern New England and several other abortion providers challenged the New Hampshire statute on the grounds that it does not include an explicit waiver that would also allow an abortion to be performed to protect the health of the woman. In prior abortion cases, beginning with *Roe v. Wade*, the court indicated that a state may regulate, and sometimes prohibit, abortions as long as such regulation stipulates that an abortion can be performed to preserve the life or health of the woman.

The 1st Circuit invalidated the New Hampshire statute in its entirety because, although it included a waiver for life-threatening emergencies, it did not include an explicit health exception. The court also maintained that the act's waiver in life-threatening cases was worded so vaguely that it would force physicians to wait until a patient's death was imminent before they could perform an abortion without parental notification.

Declining to revisit the court's prior abortion decisions, O'Connor said that *Ayotte* presented the court with only a question of remedy. More specifically, she noted, because the New Hampshire law would be unconstitutional only in medical emergencies, a narrower remedy, rather than the wholesale invalidation of the act, was appropriate. "Generally speaking," O'Connor observed, "when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer,

for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force . . . or to sever its problematic portions while leaving the remainder intact."

O'Connor identified three interrelated principles that inform the court's approach to remedies.

First, the court tries not to nullify more of a legislature's work than is necessary, because a ruling of unconstitutionality inherently frustrates the intent of the people's elected representatives.

Second, O'Connor explained that the court must be mindful that its constitutional mandate and institutional competence are limited. She noted that "making distinctions in a murky constitutional context" may involve a far more serious invasion of the legislative domain than the court ought to take.

Third, the touchstone for any decision about remedy is legislative intent; that is, a court cannot use its remedial powers to circumvent the intent of the legislature. O'Connor observed: "After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all?"

In light of the decision, the court of appeals must now attempt to determine the intent of the New Hampshire legislature when it enacted the parental notification statute. During oral argument, the New Hampshire attorney general stated that the legislature's intent can be understood by the inclusion of a severability clause in the statute. Such a clause allows the statute to remain in force even if part of it is struck down

---

*Declining to revisit the court's prior abortion decisions, O'Connor said that Ayotte presented the court with only a question of remedy.*

---

by a court. However, Planned Parenthood and the other respondents pointed out that many in the New Hampshire legislature had argued against a health exception and would probably prefer no statute at all rather than one that would include a health exception. Thus, despite the Supreme Court's assertion that the statute could be saved from total invalidation, it is possible that the lower court will determine the New Hampshire legislature never intended for the statute to operate in a limited fashion.

Some legal experts have criticized the Supreme Court's willingness to invalidate the statute only as it applies during medical emergencies. Although it is not uncommon for federal courts to save a statute from invalidation by severing its unconstitutional provisions, these courts have generally limited this practice to federal, as opposed to state, laws. Critics claim that O'Connor's opinion represents an unwarranted expansion of federal judicial power over the states. They also argue the opinion could encourage states to enact legislation with provisions that are purposely vague or even clearly unconstitutional, knowing that a reviewing court will likely sever the impermissible provisions and allow the remaining statute to continue in force.

## Impact on Future Cases

Opponents of the federal Partial-Birth Abortion Ban Act worry that the *Ayotte* decision may prompt the court to take a similar surgical approach, if, as seems increasingly likely, it ends up reviewing the constitutionality of that statute. When the court in 2000 reviewed Nebraska's partial-birth abortion law in *Stenberg v. Carhart*, however, it found the law unconstitutional for more than just the lack of a health exception. The court in *Stenberg* also determined that the

statute's definition of the banned procedure was so vague that it could be interpreted to prohibit another, more common abortion procedure as well, and thus would impose an undue burden on a woman's ability to have an abortion. Therefore, even if the absence of an explicit health exception in the federal statute does not prompt the court to invalidate it, the act's definition of partial-birth abortion, which resembles the Nebraska definition, may prompt the court to strike down the law in its entirety.

The court had been expected to announce by early January 2006 whether it would hear the federal partial-birth abortion case, *Carhart v. Gonzalez*. But the court's silence, its quick decision in *Ayotte* and the confirmation of Justice Alito have made the timing of an announcement less certain. Nevertheless, most observers still expect the court to review the decision.

On January 31, 2006, the U.S. Courts of Appeals for the 2nd and 9th Circuits delivered opinions affirming lower-court decisions that found the Partial-Birth Abortion Ban Act unconstitutional. Both cases were decided in light of *Ayotte*. The 2nd Circuit, in *National Abortion Federation v. Gonzalez*, deferred the question of remedy until after the parties could submit briefs on the issue. In *Planned Parenthood v. Gonzalez*, the 9th Circuit concluded that striking down the statute was the appropriate remedy because more "finely drawn" relief would be inconsistent with the *Ayotte* precepts. The 9th Circuit determined that a narrower injunction would require the court "to violate the intent of the legislature and usurp the policy-making authority of Congress." The legislative history of the Partial-Birth Abortion Ban Act makes clear that Congress rejected numerous amendments that would have added a health exception to the measure. Thus, the 9th Circuit reasoned, a decision that inserted a health

exception into the statute would violate congressional intent.

Apart from its impact on the partial-birth abortion cases, *Ayotte* is also likely to affect general abortion jurisprudence in the years ahead. As a result of *Ayotte*, federal courts that review state

abortion measures will be able to invalidate parts of a statute as long as the resulting law does not conflict with legislative intent. But while *Ayotte* will likely affect the way courts review abortion restrictions, it will in no way impact the underlying abortion protections set out in *Roe v. Wade*.

*Released February 9, 2006*

*This report was written by David Masci, a senior fellow at the Pew Forum on Religion & Public Life, and Jon Shimabukuro, an attorney in the Congressional Research Service of the Library of Congress. The views expressed in this article are the authors' and do not reflect the views of the Congressional Research Service, the Library of Congress or the United States Congress.*



THE PEW FORUM ON RELIGION & PUBLIC LIFE DELIVERS TIMELY, IMPARTIAL INFORMATION TO NATIONAL OPINION LEADERS ON ISSUES AT THE INTERSECTION OF RELIGION AND PUBLIC AFFAIRS; IT ALSO SERVES AS A NEUTRAL VENUE FOR DISCUSSIONS OF THESE MATTERS. THE FORUM IS A NONPARTISAN ORGANIZATION AND DOES NOT TAKE POSITIONS ON POLICY DEBATES. BASED IN WASHINGTON, D.C., THE FORUM IS DIRECTED BY LUIS LUGO AND IS A PROJECT OF THE PEW RESEARCH CENTER.

1615 L STREET, NW SUITE 700 WASHINGTON, DC 20036-5610  
202 419 4550 TEL 202 419 4559 FAX [WWW.PEWFORUM.ORG](http://WWW.PEWFORUM.ORG)

© 2006 Pew Research Center

*Pew Forum on Religion & Public Life*