

# **NOTE: THE EMERGENCY EXCEPTION IN PARENTAL INVOLVEMENT LAWS AND THE NECESSITY OF POST-EMERGENCY NOTIFICATION**

Winter, 2006

## **Reporter**

4 Ave Maria L. Rev. 171 \*

**Length:** 32990 words

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## **Text**

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### Introduction

In 1973, the Supreme Court held that before a fetus was viable, a woman's right to choose whether to terminate her pregnancy outweighed any interest of the State in the life of the fetus. <sup>1</sup> As the pregnancy advances towards full term, a state's compelling interest in the child and health of the mother increased - compelling interests that allow certain regulations on abortion. <sup>2</sup> After this decision, states attempted many laws to regulate abortion. The focus of this note is the regulation of abortion for pregnant minors. <sup>3</sup>

Although pregnant minors were also granted the right to an abortion in *Roe v. Wade*, the states have "additional interests" that justify more rigid regulations over minors. <sup>4</sup> The state regulations typically require the pregnant minor to notify her parents, or to obtain their consent, before a physician may perform an abortion (parental consent and parental notification laws are collectively "parental involvement laws"). <sup>5</sup> As of this writing, twenty-five states require parental consent and nineteen states require parental notification for a [\*172] minor to obtain an abortion. <sup>6</sup> Of

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<sup>1</sup> [\*Roe v. Wade\*, 410 U.S. 113, 163 \(1973\)](#).

<sup>2</sup> [\*Id.\* at 163-64](#).

<sup>3</sup> This note does not discuss the constitutional legitimacy or morality of abortion, only the present state of the law. Any discussion of reversing *Roe v. Wade* or any other Supreme Court precedent exceeds the scope of this article. However, *Roe v. Wade* should be recognized as "the greatest example and symbol of the judicial usurpation of democratic prerogatives in this century." Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 116 (1990).

<sup>4</sup> [\*Planned Parenthood of Idaho v. Wasden\*, 376 F.3d 908, 922 \(9th Cir. 2004\)](#).

<sup>5</sup> Teresa Stanton Collett, *Protecting Our Daughters: The Need for the Vermont Parental Notification Law*, [26 Vt. L. Rev. 101, 106 \(2001\)](#) [hereinafter Collett, *Protecting Our Daughters*].

<sup>6</sup> See [\*Ayotte v. Planned Parenthood\*, 126 S.Ct. 961, 966 n.1 \(2006\)](#); NARAL Pro-Choice America Foundation, *Restrictions on Young Women's Access to Abortion*, [http://www.prochoiceamerica.org/yourstate/whodecides/maps/young\\_women.cfm](http://www.prochoiceamerica.org/yourstate/whodecides/maps/young_women.cfm).

these forty-four state statutes, four requiring parental consent and five requiring parental notification have been held unenforceable.<sup>7</sup> This high percentage of state statutes that are currently unenforceable is due to the lack of clear standards that are necessary to make a parental involvement statute constitutional.

One of the necessary elements of a valid parental involvement law is an exception from the consent or notification requirement in an emergency situation. Despite frequent litigation of the emergency exception requirement, the courts have yet to provide clear standards for adjudication. In *Planned Parenthood of Idaho v. Wasden*,<sup>8</sup> a recent Ninth Circuit case concerning Idaho's parental consent statute, the court declared: "There is little definitive law on what constitutes an adequate emergency medical exception."<sup>9</sup> Even though abortions based on medical emergencies amount to a small fraction of total abortions, an inadequate emergency exception is often the court's basis for striking down an abortion regulation.<sup>10</sup> This note attempts to define the constitutional standards for the emergency exception in parental involvement laws and demonstrates that in order to achieve the purpose of the parental involvement laws, these laws must include a post-emergency notification clause.

Part I of this note presents a brief discussion of the constitutional standards concerning parental involvement laws. This discussion includes the general policy considerations behind parental consent and notification laws as well as the requirements of the judicial bypass procedure. The judicial bypass procedure is particularly important to a post-emergency notification law. Part II focuses on the Supreme Court's major pronouncements on the emergency exception in abortion statutes. The three Supreme Court cases discussed in this section address many different abortion regulations, not just parental involvement laws. Any discussion of parental involvement laws [\*173] must discuss these cases, because they form the basis for the judgment of any emergency exception. Part III further examines the more specific requirements of the emergency exception that have been litigated in the lower courts. Understanding how the lower courts have interpreted Supreme Court precedent is essential to comprehending the emergency exception. This section focuses specifically on which categories of health conditions are considered medical emergencies and what standard should be used to judge the physician's determination that an emergency exists. Finally, Part IV argues that parental involvement laws cannot fulfill their purpose if they do not include a post-emergency notification clause. This section will demonstrate that post-emergency notification is necessary to accomplish the goals of a parental involvement statute and a post-emergency notification law would pass all constitutional requirements presented in the previous sections.

#### I. The Constitutional Requirements Of Parental Involvement Laws

The woman's right to obtain an abortion before the child reaches viability is not absolute before the woman reaches the age of majority. This age gives rise to competing constitutional interests and concerns that do not exist in adult women. One competing concern is the "liberty of parents and guardians to direct the upbringing ... of children under their control."<sup>11</sup> Another consideration is the interest of the State in protecting pregnant minors.<sup>12</sup> In one parental consent case, the Supreme Court identified "three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical

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<sup>7</sup> *Id.*

<sup>8</sup> [376 F.3d 908 \(9th Cir. 2004\)](#).

<sup>9</sup> [Id. at 923](#).

<sup>10</sup> See, e.g., [A Woman's Choice-East Side Women's Clinic v. Newman \(Newman I\)](#), [980 F. Supp. 962, 969 n.2 \(S.D. Ind. 1997\)](#) ("Indiana residents obtain approximately 15,000 induced abortions each year, and only a small portion of those are performed for medical reasons of any kind, let alone emergencies."); Randy Alcorn, *ProLife Answers to ProChoice Arguments* 221 (2000) ("Less than 1 percent of all abortions are performed to save the mother's life.").

<sup>11</sup> [Pierce v. Soc'y of Sisters](#), [268 U.S. 510, 534-35 \(1925\)](#).

<sup>12</sup> [Hodgson v. Minnesota](#), [497 U.S. 417, 442 \(1990\)](#).

decisions in an informed, mature manner; and the importance of the parental role in child rearing." <sup>13</sup> The State's ability to regulate abortions on minors logically follows many other laws:

The State's interest in the welfare of its young citizens justifies a variety of protective measures. Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel where he pleases, or **[\*174]** even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent. Indeed, such consent is essential even when the young woman is already pregnant. The State's interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible. <sup>14</sup>

The Supreme Court announced two definitive decisions on parental consent laws in the late 1970s, *Planned Parenthood of Central Missouri v. Danforth* <sup>15</sup> and *Bellotti v. Baird*. <sup>16</sup> These decisions have provided guidance for states creating parental consent laws.

In *Danforth*, the Court held that a Missouri parental consent provision was invalid because it gave the parent an absolute veto of the minor daughter's abortion. <sup>17</sup> The Missouri law required an unmarried woman under the age of eighteen to present written consent of one parent unless the abortion was necessary to preserve the life of the mother. <sup>18</sup> Although the Court said that the State had "somewhat broader authority to regulate the activities of children than of adults," it "may not impose a blanket provision" as a requirement for a minor to obtain an abortion. <sup>19</sup> Justice Stewart's concurring opinion added the insight that only the parent's absolute veto was unconstitutional; if there had been some bypass mechanism for mature minors or situations in the minor's best interest, this statute may not have been invalidated. <sup>20</sup>

The Court's decision in *Bellotti* clarified the constitutional requirements for parental consent statutes. Building on its *Danforth* decision, the *Bellotti* Court announced that requiring parental consent before a minor obtained an abortion was constitutional if there was "an alternative procedure whereby authorization for the abortion can be obtained." <sup>21</sup> The Court announced two situations where the pregnant minor would be entitled to the alternate procedure: to show **[\*175]** she is suitably informed and mature enough to make the abortion decision without approval from her parents, or even if she is not mature enough to make this decision, to show it is in her best interest. <sup>22</sup> The best

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<sup>13</sup> [Bellotti v. Baird, 443 U.S. 622, 634 \(1979\)](#).

<sup>14</sup> [H.L. v. Matheson, 450 U.S. 398, 421-22 \(1981\)](#) (Stevens, J., concurring) (quoting [Planned Parenthood v. Danforth, 428 U.S. 52, 102 \(1976\)](#) (Stevens, J., concurring in part and dissenting in part)).

<sup>15</sup> [428 U.S. 52 \(1976\)](#).

<sup>16</sup> [443 U.S. 622 \(1979\)](#).

<sup>17</sup> [Danforth, 428 U.S. at 74](#).

<sup>18</sup> [Id. at 72](#).

<sup>19</sup> [Id. at 74](#).

<sup>20</sup> [Id. at 90-91](#) (Stewart, J., concurring).

<sup>21</sup> [Bellotti, 443 U.S. at 643](#) (footnote omitted).

<sup>22</sup> [Id. at 643-44](#).

interests provision includes, for example, any situation where informing a parent may lead to sexual, physical, or emotional abuse.<sup>23</sup>

In addition to situations where a minor is entitled to a judicial bypass, the Court announced two additional factors for bypass hearings to be constitutional. First, the procedure must be anonymous.<sup>24</sup> A pregnant minor's anonymity may be ensured in several ways, including using a pseudonym<sup>25</sup> or her initials.<sup>26</sup> Second, the bypass hearing must be able to be scheduled quickly and include an expedited appeal process.<sup>27</sup> Although no specific time limit has been provided by the Court, it has upheld a bypass procedure that could take up to "17 calendar days plus a sufficient time for deliberation and decisionmaking at both the trial and appellate levels" and a statute that could require 22 calendar days in a "worst-case analysis."<sup>28</sup> The Court merely held that the hearing must be conducted with "sufficient expedition."<sup>29</sup>

The Court's decision in *Bellotti* has become the benchmark for deciding the constitutionality of judicial bypass procedures for parental consent statutes.<sup>30</sup> The bypass procedure must satisfy the four criteria presented in that case.<sup>31</sup> While the bypass procedure question is settled for parental consent statutes, the law is not as clear with parental notification laws.

Parental notification does not present the same constitutional problem as parental consent. Without a judicial bypass provision, a parental consent statute could theoretically work as a parent's absolute veto over the pregnant minor's decision to have an abortion. A parental notification law, on the other hand, could never be used as **[\*176]** an absolute veto because it only requires the pregnant minor to consult with a parent, not obtain permission.<sup>32</sup> The Fourth Circuit has held that a parental notification statute, with exceptions for situations involving parental abuse, was constitutional without a judicial bypass procedure.<sup>33</sup> The court stated that the Constitution does not require the same safeguards when the statute only requires "mere notice," not actual parental consent.<sup>34</sup> Other circuits, however, have reached the opposite conclusion.<sup>35</sup> Many states include a bypass provision in their parental notification statute because of the possible constitutional conflict.<sup>36</sup> Regardless of whether parental notification

<sup>23</sup> Teresa Stanton Collett, *Seeking Solomon's Wisdom: Judicial Bypass of Parental Involvement in a Minor's Abortion Decision*, [52 Baylor L. Rev. 513, 532-33 \(2000\)](#).

<sup>24</sup> [Bellotti, 443 U.S. at 644](#).

<sup>25</sup> [Planned Parenthood League v. Bellotti, 641 F.2d 1006, 1025 \(1st Cir. 1981\)](#).

<sup>26</sup> [Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476, 491 n.16 \(1983\)](#).

<sup>27</sup> [Bellotti, 443 U.S. at 644](#).

<sup>28</sup> [Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 514 \(1990\)](#) (citing [Ashcroft, 462 U.S. at 479 n.4](#)).

<sup>29</sup> [Bellotti, 443 U.S. at 644](#).

<sup>30</sup> [Akron Ctr. for Reprod. Health, 497 U.S. at 511](#).

<sup>31</sup> [Id. at 511-14](#).

<sup>32</sup> [Hodgson v. Minnesota, 497 U.S. 417, 445 \(1990\)](#).

<sup>33</sup> [Planned Parenthood v. Camblos, 155 F.3d 352, 367 \(4th Cir. 1998\)](#).

<sup>34</sup> *Id.*

<sup>35</sup> See [Planned Parenthood v. Miller, 63 F.3d 1452, 1460 \(8th Cir. 1995\)](#); [Indiana Planned Parenthood Affiliates Ass'n v. Pearson, 716 F.2d 1127, 1132 \(7th Cir. 1983\)](#).

requires a judicial bypass procedure, for the purposes of this note it is sufficient that a parental notification statute which includes a proper judicial bypass procedure is constitutional.

Parental involvement laws, both parental consent and notification, with a judicial bypass procedure that meets the standards set forth in *Bellotti*, are constitutional. Under *Bellotti*, a parental consent statute must include a judicial bypass procedure that allows access to an abortion without consent for either a mature minor or a minor in a situation where it is in her best interest not to involve a parent. The bypass procedure must be anonymous and include an expedited appeal. However, this is only the beginning of the analysis; many aspects of parental involvement laws are challenged. The remainder of this note specifically addresses one common challenge and unsettled area of the law: the emergency exception.

## II. The Major Supreme Court Decisions Concerning The Emergency Exception In Abortion Statutes

In a law restricting abortion, an emergency exception allows the doctor to proceed if the abortion is medically necessary, despite the requirements of the statute. The general law is that a medical emergency includes the life or health of the mother and every abortion statute must contain this exception to be constitutional. The Supreme Court has decided three major cases that provide the basis [\*177] for the law on emergency exceptions in abortion statutes: *Roe v. Wade*,<sup>37</sup> *Planned Parenthood v. Casey*,<sup>38</sup> and *Stenberg v. Carhart*.<sup>39</sup>

### A. *Roe v. Wade*: The Emergency Exception Is Required

*Roe* and its companion case *Doe v. Bolton*,<sup>40</sup> which are meant to be read together,<sup>41</sup> declared abortion legal until viability, but also discussed the required emergency exception in any post-viability regulations.<sup>42</sup> One of *Roe*'s holdings was that after viability of the fetus, the State has a compelling interest in protecting the child's life and can regulate or even prohibit abortions.<sup>43</sup> However, the Court required an emergency exception in any abortion regulation because, even though the State has a compelling interest in the life of the child after viability, this interest could not outweigh the State's interest in protecting the health of the mother.<sup>44</sup> *Roe* explicitly stated the medical emergency exception included the "life or health" of the mother.<sup>45</sup>

The Court further explained the emergency exception in *Doe*. The appellant argued that the emergency exception was unconstitutionally vague, because "health" was not properly defined.<sup>46</sup> The Court disagreed because the

<sup>36</sup> Collett, *Protecting Our Daughters*, supra note 5, at 110.

<sup>37</sup> [410 U.S. 113 \(1973\)](#).

<sup>38</sup> [505 U.S. 833 \(1992\)](#).

<sup>39</sup> [530 U.S. 914 \(2000\)](#).

<sup>40</sup> [410 U.S. 179 \(1973\)](#).

<sup>41</sup> [Roe, 410 U.S. at 165](#).

<sup>42</sup> [Id. at 164-65](#). Interestingly, both the Texas statute in *Roe* and the Georgia statute in *Doe*, which were held to unconstitutionally proscribe abortions, contained emergency exceptions. [Id. at 118 n.1](#) (citing Tex. Penal Code Ann. 1196 (1961)); [Doe, 410 U.S. at 183](#) (citing [Ga. Code Ann. 26-1202\(a\)\(1\)](#) (1968)).

<sup>43</sup> [Roe, 410 U.S. at 162-63](#).

<sup>44</sup> [Id. at 163-64](#).

<sup>45</sup> [Id. at 165](#).

<sup>46</sup> See [Doe, 410 U.S. at 191-92 \(1973\)](#).

health of a patient was a judgment that a doctor or physician must make frequently.<sup>47</sup> It listed the factors that were included in a medical judgment of health: "physical, emotional, psychological, familial, and the woman's age."<sup>48</sup>

This broad definition of health, although not declared void-for-vagueness, has resulted in confusion as to what areas the term includes.<sup>49</sup> The Court's consideration of such broad factors in an [\*178] emergency exception suggested that any health concern of the mother would overcome the State's interest in the survival of the fetus. In fact, the Court stated that the decision "allowed the attending physician the room he needs to make his best medical judgment. And it is room that operated for the benefit, not the disadvantage, of the pregnant woman."<sup>50</sup> Thus, although Roe and Doe did not sufficiently explain what must be included in a proper emergency exception, the Court made it clear that an exception was required.

#### B. Planned Parenthood v. Casey: The Emergency Definition Is Provided

The next milestone in abortion jurisprudence occurred in 1992. Many critics and opponents of legalized abortion thought Planned Parenthood v. Casey<sup>51</sup> would be the Supreme Court's opportunity to overturn Roe v. Wade.<sup>52</sup> The Court, however, reaffirmed Roe's basic holding before reviewing the constitutionality of certain Pennsylvania abortion statutes.<sup>53</sup> One of the regulations the Court addressed was Pennsylvania's definition of a medical emergency for the emergency exception:

That condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious [\*179] risk of substantial and irreversible impairment of a major bodily function.<sup>54</sup>

The Court granted deference to the Third Circuit's construction of the medical emergency statute. The Third Circuit read the statute "to assure that compliance with its abortion regulations would not in any way pose a significant threat to the life or health of a woman."<sup>55</sup>

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<sup>47</sup> [Id. at 192](#) (citing [United States v. Vuitch, 402 U.S. 62, 72 \(1971\)](#)).

<sup>48</sup> [Id.](#)

<sup>49</sup> See [infra Part III.A.](#)

<sup>50</sup> [Doe, 410 U.S. at 192.](#)

<sup>51</sup> [505 U.S. 833 \(1992\).](#)

<sup>52</sup> See Elisabeth H. Sperow, Redefining Child Under the State Children's Health Insurance Program: Capable of Repetition, Yet Evading Results, [12 Am. U. J. Gender Soc. Pol'y & L. 137, 147 \(2004\)](#) ("The Court specifically relied on the doctrine of stare decisis ... in not overruling Roe despite the anticipation that the Court would use the opportunity presented in Casey to overturn Roe."); Jed Handelsman Shugerman, A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court, [37 Ga. L. Rev. 893, 936 n.282 \(2003\)](#) ("Presidents Ronald Reagan and George H.W. Bush expected Justices O'Connor, Kennedy, and Souter to overturn Roe v. Wade, but surprisingly they upheld it in 1992 in Casey v. Planned Parenthood."); Emery G. Lee III, Overruling Rhetoric: The Court's New Approach to Stare Decisis in Constitutional Cases, [33 U. Tol. L. Rev. 581, 603-04 \(2002\)](#) ("In Planned Parenthood v. Casey, the Court reaffirmed what it called the 'essential holding' of Roe v. Wade, despite the efforts of the first Bush administration to persuade the Court to overturn Roe and the widespread expectation that the Court would do so.") (footnotes omitted).

<sup>53</sup> [Casey, 505 U.S. at 869.](#)

<sup>54</sup> [Id. at 879](#) (quoting [18 Pa. Cons. Stat. 3203](#) (1990)).

<sup>55</sup> [Id. at 880](#) (quoting [Planned Parenthood v. Casey, 947 F.2d 682, 701 \(3d Cir. 1991\)](#)).

The Pennsylvania definition of a medical emergency was challenged based on three medical conditions: preeclampsia, inevitable abortion, and prematurely ruptured membrane.<sup>56</sup> The question was whether the emergency exception covered these three conditions because these conditions "could pose a serious threat to a woman's health without immediately creating a serious risk of substantial and irreversible impairment to a major bodily function."<sup>57</sup> The challengers were concerned that these conditions would not fall under the exception when the symptoms began, because the serious health risk was not yet present.<sup>58</sup>

The Third Circuit insisted that common sense guide the analysis: "The Pennsylvania legislature did not choose the wording of its medical emergency exception in a vacuum, and we do not believe the words chosen should be interpreted in one."<sup>59</sup> Even though the risk of a serious health problem is less when the symptoms first appear than in a later stage of development, the court believed that the medical condition in its early stages was a serious health risk, because "all of these conditions, if left untreated, could progress to such a point that death or substantial and irreversible impairment of a major bodily function will occur."<sup>60</sup> Furthermore, the normal recommended treatment for all three conditions was abortion, even in desired pregnancies.<sup>61</sup> The court did not believe that the legislature meant to [\*180] alter the normal medical procedures in an emergency situation, but only to "prevent negligible risks to life or health or significant risks of only transient health problems from serving as an excuse for noncompliance."<sup>62</sup> Clearly, legitimate concerns for a woman's health can be treated early if symptoms expose the serious problem before it actually develops, such as in the case of preeclampsia, inevitable abortion, and prematurely ruptured membrane.

The Supreme Court granted deference to the Third Circuit's analysis concerning the challenged emergency exception. The Pennsylvania statute, held constitutional by the Court, became the benchmark for all emergency exceptions in abortion statutes.<sup>63</sup> If a state followed the language of the emergency exception in *Casey*, the statute would be constitutional.<sup>64</sup>

### C. *Stenberg v. Carhart*: The Emergency Requirement Is Reinforced

The Supreme Court's third landmark decision concerning the emergency exception in abortion statutes was *Stenberg v. Carhart*.<sup>65</sup> *Carhart* involved a Nebraska ban on partial-birth abortion.<sup>66</sup> The statute was held

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<sup>56</sup> *Id.* "Preeclampsia is a combination of symptoms related to an immunological disorder." [Casey, 947 F.2d at 700](#). Inevitable abortion includes "bleeding from the uterus and cramps in the lower abdominal area" and results in "blood loss, shock, infection, and, if there is serious hemorrhaging and shock, even death" if the pregnancy is not immediately terminated. *Id.* A prematurely ruptured membrane around the fetus can lead to "an overwhelming septic infection, hemorrhaging, shock, and even death." *Id.*

<sup>57</sup> *Id.* (internal citations omitted).

<sup>58</sup> [Id. at 699-700](#).

<sup>59</sup> [Id. at 701](#).

<sup>60</sup> [Id. at 700](#) (internal citation omitted).

<sup>61</sup> [Id. at 701](#).

<sup>62</sup> *Id.*

<sup>63</sup> See [Planned Parenthood of Idaho v. Wasden, 376 F.3d 908, 926 \(9th Cir. 2004\)](#) ("Essentially [the *Casey*] definition is used in the statutes of 26 states.").

<sup>64</sup> See, e.g., [Utah Women's Clinic v. Leavitt, 844 F. Supp. 1482, 1492 n.12 \(D. Utah 1994\)](#) ("This definition is nearly identical to the Pennsylvania medical health exception, which was upheld by the Supreme Court in *Casey*."); cf. [Wasden, 376 F.3d at 926, 937](#) (Idaho's medical emergency provision, not "precisely equivalent" to the one in *Casey*, was unconstitutional).

<sup>65</sup> [530 U.S. 914 \(2000\)](#).



unconstitutional for two independent reasons: the lack of an emergency exception concerning the health of the mother and the undue burden on the woman's choice of the partial-birth abortion procedure.<sup>67</sup>

The Nebraska emergency exception statute stated: "No partial birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother."<sup>68</sup> The Court declared that, based on *Roe* and *Casey*, an emergency exception is necessary and it must include "the preservation of the ... health of the mother."<sup>69</sup>

One argument raised by Nebraska was that a health exception was not necessary because the statute only banned partial-birth [\*181] abortions; the pregnant woman could obtain an abortion by an alternative method in an emergency situation.<sup>70</sup> The Court, however, stated that "the word 'necessary' in [the *Casey* opinion], cannot refer to an absolute necessity or to absolute proof."<sup>71</sup> Doctors may disagree on the proper treatment, but this does not make a treatment unnecessary. Likewise, for the Court, even if an alternative procedure was available, it did not mean the questioned procedure was unnecessary.

The Court's holding concerning the health exception was a reaffirmation of the principle in *Roe* and *Casey*, which concerned the regulation of abortions, not just partial-birth abortions.<sup>72</sup> Even though the issues in *Carhart* specific to partial-birth abortion procedures are of no import to parental involvement laws, the case is essential for its emergency exception analysis. Based on *Carhart*, the Court does not give the states latitude concerning the emergency exception in abortion laws. The State may enforce certain abortion regulations, but they must provide very broad exceptions for the life and health of the mother.

In his dissent, Justice Thomas described this "insistence on a health exception" as "a fig leaf barely covering [the majority's] hostility to any abortion regulation by the States."<sup>73</sup> However, *Carhart* was the Court's third major declaration requiring health in a statute's emergency exception after *Roe* and *Casey*. The repeated affirmations lead to the conclusion that, in order to be constitutional, statutes regulating abortion must have an emergency exception covering the life and health of the mother.<sup>74</sup>

<sup>66</sup> [Id. at 921](#).

<sup>67</sup> [Id. at 930](#) (citations omitted).

<sup>68</sup> [Id. at 921](#) (quoting Neb. Rev. Stat. Ann. 28-328.1 (Michie 2001)).

<sup>69</sup> [Id. at 930](#) (quoting [Planned Parenthood v. Casey, 505 U.S. 833, 879 \(1992\)](#)).

<sup>70</sup> [Id. at 931](#) (citation omitted).

<sup>71</sup> [Id. at 937](#) (citation omitted).

<sup>72</sup> See [Roe v. Wade, 410 U.S. 113, 165 \(1973\)](#); [Planned Parenthood v. Casey, 505 U.S. 833, 879 \(1992\)](#).

<sup>73</sup> [Carhart, 530 U.S. at 1013](#) (Thomas, J., dissenting).

<sup>74</sup> See, e.g., [Carhart v. Gonzales, 413 F.3d 791, 796 \(8th Cir. 2005\)](#) ("Stenberg establishes a per se constitutional rule in that the constitutional requirement of a health exception applies to all abortion statutes, without regard to precisely how the statute regulates abortion."); [Richmond Med. Ctr. for Women v. Hicks, 409 F.3d 619, 622 \(4th Cir. 2005\)](#); [Planned Parenthood v. Heed, 390 F.3d 53, 60 \(1st Cir. 2004\)](#), cert. granted sub nom, [Ayotte v. Planned Parenthood, 125 S. Ct. 2294 \(2005\)](#); [Planned Parenthood of Idaho v. Wasden, 376 F.3d 908, 936 \(9th Cir. 2004\)](#); [Planned Parenthood of the Rocky Mountains Servs. v. Owens, 287 F.3d 910, 918 \(10th Cir. 2002\)](#); [Planned Parenthood v. Verniero, 41 F. Supp. 2d 478, 504 \(D.N.J. 1998\)](#), aff'd on other grounds sub nom, [Planned Parenthood v. Farmer, 220 F.3d 127 \(3d Cir. 2000\)](#); [Planned Parenthood v. Brady, 250 F. Supp. 2d 405, 407-10 \(D. Del. 2003\)](#).

An argument can be made that a health exception is not required in a parental notification statute. In [Hodgson v. Minnesota, 497 U.S. 417 \(1990\)](#), the Supreme Court spoke approvingly of a statute that required parental notification for an abortion. [Id. at 445](#).



**[\*182]** An emergency exception is necessary in any parental involvement statute. Beyond the preservation of the life and health of the mother, however, there is still much confusion over the more specific requirements of the emergency exception. The lower courts have addressed several different aspects of the emergency exception; the next Part of this note will clarify those decisions.

### III. The Lower Courts' Continued Development of the Emergency Exception In Abortion Statutes

As discussed in Part II, an abortion statute must contain an exception for an emergency where an abortion is necessary to preserve the life or health of the mother. The standard constitutional definition of a medical emergency from *Casey*,<sup>75</sup> as well as the Supreme Court's other decisions addressing the emergency exception have proven insufficient. Lower courts have judged the emergency exceptions of various state abortion statutes inconsistently. The Supreme Court has not expressly addressed several health issues and whether they must be included in the emergency exception. The lower courts also lack an express Supreme Court answer to what standard of care must be used to judge a physician's determination of a medical emergency.

#### A. Which Health Issues Are Included in the Emergency Exception?

Although the Supreme Court decided that the emergency exception in an abortion statute must include an exception for the health of the mother, the Court did not explain what constituted an impairment serious enough to necessitate such an exception.<sup>76</sup> The *Casey* definition of health emergency, a condition "for which a delay **[\*183]** will create serious risk of substantial and irreversible impairment of a major bodily function," is inconclusive regarding several health issues.<sup>77</sup> Two issues that lower courts have specifically struggled with are whether the emergency exception includes temporary health risks and mental health conditions.

##### 1. The Emergency Exception Does Not Have to Include Temporary Health Risks

In a non-abortion medical context, a true emergency is "one in which treatment is required to ... preserve life or prevent permanent bodily harm."<sup>78</sup> Under that definition, a temporary risk would not be considered an emergency because it is not a permanent harm. However, the standard for medical emergencies in the abortion context is different. Several courts have addressed whether a temporary harm is included within the medical emergency exception for abortion regulations. Though the answers are inconclusive, it appears that temporary harms should not be covered by the emergency exception.

Although it did not directly address the issue, *Casey* offers evidence that temporary health risks are not considered medical emergencies. As stated above, the Supreme Court granted deference to the Third Circuit's construction of the medical emergency statute in *Casey*.<sup>79</sup> The Third Circuit stated that the wording of the medical emergency definition seemed "carefully chosen to prevent negligible risks to life or health or significant risks of only transient health problems from serving as an excuse for noncompliance."<sup>80</sup> This declaration that the medical emergency

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<sup>448</sup> However, a health exception was not at issue in *Hodgson*. The First Circuit has stated that even if *Hodgson* implicitly stated that a parental notification statute did not require a health exception, "the subsequent decisions in *Casey* and *Stenberg* would nevertheless require a health exception [for a parental notification requirement]." *Heed*, 390 F.3d at 60. Since *Hodgson*, two circuit courts have held that a parental notification law that does not contain a health exception is constitutionally invalid. *Id.*; *Owens*, 287 F.3d at 918. The Supreme Court had the opportunity to settle this issue, but instead addressed the proper remedy for a challenge to an abortion statute. *Ayotte v. Planned Parenthood*, 126 S. Ct. 961 (2006). Without deciding the issue, the Court reaffirmed that precedent required a health exception. *Id.* at 967. Thus, it appears clear that a health exception is required in parental notification statutes,

<sup>75</sup> See supra note 63-64 and accompanying text.

<sup>76</sup> See supra Part II.

<sup>77</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992) (quoting *18 Pa. Cons. Stat. 3203* (1990)).

<sup>78</sup> Marguerite R. Mancini & Alice T. Gale, *Emergency Care and the Law* 93 (1981) (emphasis added).

<sup>79</sup> See supra Part II.B.

definition in Casey does not include temporary health problems, even severe conditions, gives strong weight to the conclusion that temporary health conditions are not medical emergencies in the abortion context, since Casey has come to be the constitutional benchmark of all medical emergency definitions in abortion regulations.<sup>81</sup>

**[\*184]** The issue of temporary health risks in Casey was determined in the context of what was considered a "serious risk." Since Casey, the issue of temporary risks has been specifically raised in one case. *A Woman's Choice-East Side Women's Clinic v. Newman*<sup>82</sup> questioned whether an Indiana emergency exception to an abortion statute included severe but temporary conditions.<sup>83</sup> A severe but temporary health problem is a situation "where some form of medical intervention is necessary, and where an immediate abortion is one medically reasonable treatment but not the only medically reasonable treatment."<sup>84</sup> These situations are distinguished from emergencies where an immediate abortion is the only medically reasonable treatment. In *Newman I*, two doctors submitted affidavits that identified four "conditions that could involve 'severe but temporary' problems" - hyperemesis gravidarum, gestational diabetes, preeclampsia, and premature rupture of the membranes.<sup>85</sup>

The law challenged in *Newman I* was an Indiana statute requiring an eighteen-hour waiting period and disclosure of certain information prior to an abortion.<sup>86</sup> The emergency exception in the statute was **[\*185]** written "to conform with the construction given to the medical emergency exception in [Casey]." <sup>87</sup> The United States District Court for the Southern District of Indiana certified three questions to the Supreme Court of Indiana, including whether the emergency exception included "severe but temporary physical health problems for the woman."<sup>88</sup>

<sup>80</sup> [Planned Parenthood v. Casey, 947 F.2d 682, 701 \(3d Cir. 1991\)](#) (emphasis added).

<sup>81</sup> See [Planned Parenthood of Idaho v. Wasden, 376 F.3d 908, 926 \(9th Cir. 2004\)](#) ("Essentially [the Casey] definition is used in the statutes of 26 states.") (citation omitted).

<sup>82</sup> [980 F. Supp. 962 \(S.D. Ind. 1997\)](#).

<sup>83</sup> [Id. at 965](#).

<sup>84</sup> [Id. at 967](#).

<sup>85</sup> [Id. at 967-68](#). Hyperemesis gravidarum involves "nausea and vomiting of sufficient intensity to produce weight loss, dehydration, acidosis from starvation, alkalosis from loss of hydrochloric acid in vomitus, and hypokalemia." [Id. at 967](#). Hospitalization may become necessary if the condition becomes severe. *Id.* However, "even the severe condition is manageable by administration of fluids and nutrition" and therefore "termination of the pregnancy is not necessary." *Id.* The risks from delaying an abortion - in order to obtain parental consent, for example - included "modest risks of infection" and discomfort. *Id.* The second example of a severe but temporary health risk is gestational diabetes, which "by definition ... is resolved by delivery." *Id.* Several severe dangers are listed as potential effects of diabetes - blindness, heart failure, and kidney failure - but "even severe cases of gestational diabetes can be managed so that the pregnancy may continue to full term, most often by changes in diet" or, for the most severe cases, insulin injections. *Id.* The third condition, preeclampsia, is "pregnancy-induced hypertension with protein in the urine." *Id.* It can turn into eclampsia, "which can involve seizures, liver failure, kidney failure, and cardiac failure." *Id.* The condition continues to worsen until the pregnancy is ended, by birth or abortion, and "in its most severe form, preeclampsia can be life-threatening." *Id.* Ordinarily a delay in treatment would not result in "negative medical consequences," but severe preeclampsia can set in quickly. [Id. at 967-68](#). The final condition offered as an example of a severe but temporary health risk is premature rupture of the membranes that surround the fetus. [Id. at 968](#). This causes a "loss of amniotic fluid and creates risks of infection, which can lead in turn to sepsis, kidney failure, and potentially the death of both the woman and the fetus." *Id.* However, even a rupture early in the pregnancy can be treated so the pregnancy can reach full term. *Id.* The risk of death is only present if the membranes have already ruptured and become infected before the pregnant woman sees a physician. *Id.*

<sup>86</sup> [Id. at 964](#).

<sup>87</sup> [A Woman's Choice-East Side Women's Clinic v. Newman \(Newman II\), 671 N.E.2d 104, 107 \(Ind. 1996\)](#).

<sup>88</sup> [Newman I, 980 F. Supp. at 965](#).

The Indiana Supreme Court unanimously agreed that "severe-but-temporary conditions in which an abortion is not the medically necessary treatment are not covered by the exception."<sup>89</sup> The court reasoned the emergency exception only included "death or substantial and irreversible impairment," whereas "temporary problems pass and are not ordinarily of such severity that they necessitate treatment by abortion."<sup>90</sup>

The district court received the answer to this certified question, and was concerned that this interpretation might interfere with a pregnant woman's "right to make her own decisions about her own medical treatment" by forcing the woman "to undergo other unwelcome medical treatment in order to protect her health while she waits the mandated time before an abortion."<sup>91</sup> The court stated that if a woman did not want the alternative treatments, this could be "taken into account" in the determination of medical emergency.<sup>92</sup> Following this reasoning - that the medical emergency requirement applies but "does not prohibit a physician from evaluating the medical consequences of ... a patient's refusal to undergo alternative treatments in the interim" - any temporary harm could constitute a medical emergency.<sup>93</sup> This is the opposite conclusion that the Indiana Supreme Court decided on the certified question. In fact, there is some evidence that after *Newman I*, Indiana adopted the Indiana Supreme Court's standard instead of the district court's modification.<sup>94</sup>

**[\*186]** It is important to note that the district court in *Newman I* incorrectly categorized severe but temporary harms in its memorandum. The court focused on conditions with "serious risks to [a woman's] health while the abortion is delayed."<sup>95</sup> This is contrary to the Indiana Supreme Court's categorization that temporary conditions would not include conditions that may lead to serious health risks for the woman.<sup>96</sup> The district court's mistake is clear from the examples it presented. Two of the four examples, preeclampsia and prematurely ruptured membrane, should not be considered temporary conditions, because "if left untreated, [they] could progress to such a point that death or substantial and irreversible impairment ... will occur."<sup>97</sup> The district court recognized that "preeclampsia constitutes a medical emergency under virtually anyone's definition."<sup>98</sup> Preeclampsia and premature ruptured membrane are not truly temporary risks since "immediate abortion may well be necessary in severe cases,"<sup>99</sup> not just one treatment option, as is the definition of severe but temporary health risk.<sup>100</sup>

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<sup>89</sup> [Newman II, 671 N.E.2d at 111.](#)

<sup>90</sup> *Id.*

<sup>91</sup> [Newman I, 980 F. Supp. at 969.](#)

<sup>92</sup> [Id. at 970.](#)

<sup>93</sup> *Id.*

<sup>94</sup> See [Clinic for Women v. Brizzi, 814 N.E.2d 1042, 1045 n.3 \(Ind. Ct. App. 2004\)](#) ("Severe but temporary conditions in which an abortion is not the medically necessary treatment are not covered by [Indiana law]."). The court only mentioned the exception for "significant and imminent threats to her life or either her physical or mental health" but made no reference to the patient's right to undergo alternative treatments. *Id.*

<sup>95</sup> [Newman I, 980 F. Supp. at 970.](#)

<sup>96</sup> See [A Woman's Choice-East Side Women's Clinic v. Newman \(Newman II\), 671 N.E.2d 104, 111 \(Ind. 1996\)](#) ("Severe-but-temporary conditions in which an abortion is not the medically necessary treatment are not covered by the exception.").

<sup>97</sup> [Planned Parenthood v. Casey, 947 F.2d 682, 700 \(3d Cir. 1991\)](#) (internal citations omitted).

<sup>98</sup> [Newman I, 980 F. Supp. at 967.](#)

<sup>99</sup> [Id. at 967-68.](#)

<sup>100</sup> See *supra* note 84 and accompanying text.

The two other examples offered by the court, hyperemesis gravidarum and gestational diabetes, also do not support a necessary exception from a consent or notification requirement. First, the court noted that a patient can generally treat both conditions by dietary or nutritional changes.<sup>101</sup> In a severe case of hyperemesis gravidarum, hospitalization and intravenous fluids may be necessary to stabilize the condition.<sup>102</sup> However, "if the condition is severe, the patient should be stabilized before an abortion is performed, and a patient in a hospital would ordinarily be stabilized before abortion would even **[\*187]** be discussed."<sup>103</sup> If there must be a delay while a pregnant woman is stabilized before an abortion, there is no reason this time could not also be used to obtain parental consent or notification, or undergo a bypass procedure.

The severe cases of gestational diabetes, which may require insulin injections instead of simple dietary changes, cannot justify the district court's reasoning. Insulin is required in the "most severe cases," which may qualify as an alternative treatment with which the district court in *Newman I* was concerned.<sup>104</sup> However, if a pregnant woman's gestational diabetes can be classified as one of the "most severe cases," the condition may be life-threatening or cause "blindness, heart failure, and kidney failure."<sup>105</sup> Like preeclampsia and premature ruptured membrane, a severe case of gestational diabetes could not be considered temporary because of the potential permanent results.<sup>106</sup>

Because the district court classified these health conditions as temporary, even though they can lead to permanent conditions, the reasoning of the case is built on a false foundation. The court focused on the woman's right to decline alternative treatments, although it did not actually consider temporary conditions, but conditions that have generally been accepted as medical emergencies based on their potential permanent harms.

It is difficult to define exactly what should be considered a temporary condition. The courts have not presented an adequate definition. This is understandable considering the difficulty of classifying conditions that contain a broad range of possible harms. Based on the relative severity of specific cases, it is difficult in the abstract to classify which conditions constitute a temporary risk. But considering the flawed basis of the district court's analysis, the Indiana Supreme Court's conclusion that severe but temporary harms are not medical emergencies seems to be the more valid option.

The Sixth Circuit has also considered this issue and determined that the emergency exception does not have to include temporary health problems. The emergency exception of an Ohio statute banning partial-birth abortions was challenged in *Women's Medical Professional Corp. v. Taft*.<sup>107</sup> The court held that the statute was valid **[\*188]** because it allowed partial-birth abortions "when necessary to prevent significant health risks."<sup>108</sup>

In language almost identical to *Casey's* medical emergency definition, the Ohio statute permitted a partial-birth abortion if it was "necessary, in reasonable medical judgment, to preserve the life or health of the mother as a result

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<sup>101</sup> [Newman I, 980 F. Supp. at 967.](#)

<sup>102</sup> *Id.* Hospitalization for severe cases of hyperemesis gravidarum does not, ipso facto, lead to the conclusion that this condition should be included in the medical emergency exception. In fact, "both physicians agree that because even the severe condition is manageable by administration of fluids and nutrition, termination of the pregnancy is not necessary, but that it is one treatment option." *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> [Newman I, 980 F. Supp. at 967, 970.](#)

<sup>105</sup> [Id. at 967.](#)

<sup>106</sup> See *supra* notes 97-100 and accompanying text.

<sup>107</sup> [353 F.3d 436 \(6th Cir. 2003\).](#)

<sup>108</sup> [Id. at 445](#) (emphasis added).

of the mother's life or health being endangered by a serious risk of the substantial and irreversible impairment of a major bodily function." <sup>109</sup> A "serious risk of the substantial and irreversible impairment of a major bodily function" was defined as "any medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the substantial and irreversible impairment of a major bodily function." <sup>110</sup>

The Sixth Circuit's analysis looked to Casey, where the emergency exception included only "significant threats to the life or health of [the mother]," not any threat at all. <sup>111</sup> The Supreme Court held that this definition of a medical emergency did not impose an undue burden on a woman's right to an abortion. <sup>112</sup> Based on the language of Casey's medical emergency definition, along with issues from Carhart that specifically applied to the partial-birth abortion procedure, the court held that "a valid health exception need only permit [the regulated abortion] when necessary to prevent significant, as opposed to negligible, health risks." <sup>113</sup> The court said this "clearly excluded negligible risks, trivial complications, and circumstances having nothing to do with the health of the particular patient." <sup>114</sup>

Taft did not classify temporary conditions as significant health risks covered by the emergency exception. First, the court reaffirmed the Third Circuit's statement that the Casey emergency exception did not include "significant risks of only transient health problems." <sup>115</sup> Next, Taft looked to another Sixth Circuit decision, *Women's Medical Professional Corp. v. Voinovich*. <sup>116</sup> In describing mental health emergencies, the Voinovich court stressed that the conditions that **[\*189]** must be covered were "non-temporary" and "irreversible." <sup>117</sup> The Taft court determined that its decision that the emergency exception only covered a "significant health risk" did not conflict with Voinovich because that holding was limited to "'serious[,] non-temporary' and 'severe[,] irreversible' threats to mental health." <sup>118</sup> Thus, Taft relied on the Voinovich requirement that a mental health exception must be severe and irreversible as well as Casey's declaration that only permanent conditions are medical emergencies to determine that temporary conditions were not "significant health risks" within the medical emergency exception of the challenged Ohio statute. <sup>119</sup>

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<sup>109</sup> *Id.* at 444 (quoting *Ohio Rev. Code Ann. 2919.151(B)*, (C) (West 2004)).

<sup>110</sup> *Id.* (quoting *Ohio Rev. Code Ann. 2919.151(A)(5)* (West 2004)).

<sup>111</sup> *Id.* at 445 (quoting *Planned Parenthood v. Casey*, 947 F.2d 682, 701 (3d Cir. 1991)).

<sup>112</sup> *Id.* at 446 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 880 (1992)).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 449.

<sup>115</sup> *Id.* at 446 (quoting *Planned Parenthood v. Casey*, 947 F.2d 682, 701 (3d Cir. 1991)).

<sup>116</sup> *130 F.3d 187 (6th Cir. 1997)*.

<sup>117</sup> *Voinovich*, 130 F.3d at 209. For Voinovich's discussion of mental health emergencies, see *infra* Part III.A.2.

<sup>118</sup> *Taft*, 353 F.3d at 448-49 (quoting *Voinovich*, 130 F.3d at 209).

<sup>119</sup> The Hyde Amendment to the Federal Medicaid Act also defines "necessary medical services." **42 U.S.C. 1396a(a)(10)(C)(i)** (2000). Although the Act applies to federal funding of abortions and not the constitutional right to obtain an abortion, it still provides insight into what is considered a medical emergency. The Hyde Amendment excludes "abortions which are medically recommended to prevent an insignificant or temporary impairment to a pregnant woman's health" from "necessary medical services." *Right to Choose v. Byrne*, 398 A.2d 587, 591 (N.J. Super. Ct. Ch. Div. 1979) (emphasis added). Thus, under Medicaid, a temporary harm cannot constitute a medical emergency. Though this pronouncement carries no weight regarding the constitutional right to abortion, it is persuasive, or at least interesting, that Congress has also declared that temporary risks are not medical emergencies in abortions.

Based on the opinions above, not all health risks must be included within the emergency exception. The medical definition in Casey did not include "significant risks of only transient health problems."<sup>120</sup> According to the Indiana Supreme Court, "temporary problems pass and are not ordinarily of such severity that they necessitate treatment by abortion."<sup>121</sup> The Sixth Circuit upheld an emergency exception that does not cover temporary problems.<sup>122</sup> The only conflicting authority that has addressed the issue is the District Court of the Southern District of Indiana.<sup>123</sup> However, the district court based its reasoning on examples that were not truly temporary conditions, because medical conditions that may create serious health risks should not be considered temporary and passing conditions. Although the issue is not resolved, it appears that under a proper analysis, truly temporary **[\*190]** conditions, even if severe, do not have to be included in a constitutional definition of a medical emergency.

## 2. The Emergency Exception in Parental Involvement Laws Does Not Have to Cover Mental Health Issues

In addition to temporary health conditions, another problematic issue for lower courts is whether the emergency exception must include situations where "carrying the fetus to term would cause the woman to suffer severe mental or emotional harm."<sup>124</sup>

At first glance, it appears that the emergency exception must include mental health problems. In *United States v. Vuitch*,<sup>125</sup> the Supreme Court stated that "the modern understanding of the word 'health[]' ... included psychological as well as physical well-being."<sup>126</sup> The factors in *Doe v. Bolton* that a physician could use to determine if there was an emergency situation were "physical, emotional, psychological, familial, and the woman's age."<sup>127</sup> Finally, in *Colautti v. Franklin*,<sup>128</sup> the Supreme Court acknowledged that *Vuitch* and *Doe* "had been interpreted to allow the physician to make his determination in the light of all attendant circumstances - psychological and emotional as well as physical - that might be relevant to the well-being of the patient."<sup>129</sup>

Although it appears from these cases that the Supreme Court included mental health within the emergency exception, the definition of a medical emergency from the Court's subsequent decision in *Casey* does not include a mental health exception. The language in the *Casey* statute explicitly limits medical emergencies to conditions concerning "a major bodily function."<sup>130</sup> In fact, the emergency exception in *Casey* allows a physician "to forego many of the [Pennsylvania abortion regulation's] requirements when there is a medical emergency to the woman's physical health."<sup>131</sup> The court also stated that "physically threatening emergencies [were] covered" **[\*191]** under the exception, but made no reference to mental health conditions.<sup>132</sup> Thus, between *Casey* on one hand and

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<sup>120</sup> [Planned Parenthood v. Casey, 947 F.2d 682, 701 \(3d Cir. 1991\).](#)

<sup>121</sup> [A Woman's Choice-East Side Women's Clinic v. Newman \(Newman II\), 671 N.E.2d 104, 111 \(Ind. 1996\).](#)

<sup>122</sup> See supra text accompanying notes 107-18.

<sup>123</sup> See supra text accompanying notes 91-94.

<sup>124</sup> [Women's Med. Prof'l v. Voinovich, 130 F.3d 187, 209 \(6th Cir. 1997\).](#)

<sup>125</sup> [402 U.S. 62 \(1971\).](#)

<sup>126</sup> [Id. at 72.](#)

<sup>127</sup> [410 U.S. 179, 192 \(1973\)](#) (emphasis added).

<sup>128</sup> [439 U.S. 379 \(1979\).](#)

<sup>129</sup> [Id. at 394.](#)

<sup>130</sup> [Planned Parenthood v. Casey, 505 U.S. 833, 879 \(1992\)](#) (internal citation omitted) (emphasis added).

<sup>131</sup> [Planned Parenthood v. Casey, 947 F.2d 682, 701 \(3d Cir. 1991\)](#) (emphasis added).



Vuitch, Doe, and Colautti on the other, Supreme Court opinions offer conflicting inferences about the need for a mental health exception.

In *Newman II*, the Supreme Court of Indiana determined that mental health concerns were included in its emergency exception to a law requiring a mandatory waiting period before a woman could obtain an abortion.<sup>133</sup> The Indiana statute's definition of a medical emergency was almost identical to the *Casey* definition, so the Indiana Supreme Court addressed the statutory imposition that the risk must be to "a major bodily function."<sup>134</sup> The court reasoned that "mental processes are done by the brain ... and the brain is an organ, so mental processes are bodily functions even though they are not mechanical or chemical."<sup>135</sup> Thus, the court found no problem including mental health issues in the *Casey* definition of a medical emergency.

The Sixth Circuit also addressed the necessity of a mental health exception when it reviewed two Ohio post-viability abortion regulations in *Voinovich*.<sup>136</sup> The *Voinovich* court concluded that an emergency exception must include mental health conditions, but reached this conclusion using different reasoning than the *Newman II* court. The court recognized that *Casey* did not include mental health in its medical emergency definition, stating that "the definition in *Casey* was clearly limited to physical health risks."<sup>137</sup> Even though the court read *Casey* as not including mental health conditions, it relied on the Supreme Court's decisions in *Vuitch, Doe, and Colautti* and held that "despite [the Court's] decision in *Casey* ... a woman has the right to obtain a post-viability abortion if carrying a fetus to term would cause severe non-temporary mental and emotional harm."<sup>138</sup>

**[\*192]** In order to reach this conclusion, the Sixth Circuit distinguished the Ohio ban on post-viability abortions from the statute in *Casey*.<sup>139</sup> The court determined that the statutes were different because the issue before the court was a "regulation that banned post-viability abortions, while in *Casey* the Court was faced with a regulation that only delayed abortions."<sup>140</sup> Because of the difference between regulations causing a delay and an absolute ban on certain abortions, the court declared that *Casey* was too narrow and did not apply.<sup>141</sup>

The Supreme Court had the opportunity to settle this issue of whether mental health conditions must be included in the medical emergency definition for abortion regulations in *Voinovich v. Women's Medical Professional Corp.*, but the Court denied certiorari.<sup>142</sup> In a dissent from the denial of certiorari, Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, addressed the issues of the case, including the mental health issue. The dissent's argument focused on *Doe*, where the statute included emotional and psychological factors as relevant to the decision of whether there was a medical emergency.<sup>143</sup> Justice Thomas explained that *Doe* did not hold that

<sup>132</sup> [Id. at 702](#) (emphasis added).

<sup>133</sup> [A Woman's Choice-East Side Women's Clinic v. Newman \(Newman II\), 671 N.E.2d 104, 106 \(Ind. 1996\)](#).

<sup>134</sup> [Id. at 106 n.2](#) (quoting [Ind. Code Ann. 16-18-2-223.5](#) (West 1997)).

<sup>135</sup> [Id. at 111](#).

<sup>136</sup> [130 F.3d 187, 206-10 \(6th Cir. 1997\)](#).

<sup>137</sup> [Id. at 207](#).

<sup>138</sup> [Id. at 209](#). See also *supra* notes 125-29 and accompanying text on *Vuitch, Doe, and Colautti*.

<sup>139</sup> [Voinovich, 130 F.3d at 190, 208](#).

<sup>140</sup> [Id. at 208](#) (emphasis omitted).

<sup>141</sup> [Id. at 207-08](#).

<sup>142</sup> [523 U.S. 1036 \(1998\)](#).

emotional and psychological health must be included in the emergency exception, but that the statute in Doe was not vague because it included these factors.<sup>144</sup> Considering whether a mental health exception is necessary, "Doe simply did not address that question."<sup>145</sup>

Three Supreme Court Justices have stated that an emergency exception does not have to apply to mental health conditions. Additionally, the Casey medical emergency definition applies only to physical conditions. This gives some support to the possibility that the Court will not mandate that abortion regulations must contain mental health exceptions. At least one lower court has followed this line of reasoning in an informed consent case and stated "the Supreme Court has never held that an informed consent statute must [\*193] have an explicit exception for mental health."<sup>146</sup> However, Newman II found that an emergency exception nearly identical to Casey covered mental health concerns and Voinovich held that a post-viability ban required a mental health exception. Until the Supreme Court takes on this issue, the mental health question will remain unanswered.

Even if mental health exception questions remain unanswered for all abortion regulations, the answer appears somewhat clearer for parental involvement laws. The Sixth Circuit distinguished Casey from the Ohio abortion regulation in Voinovich, stating that the Casey emergency definition, which was "clearly limited to physical health risks," only applied to regulations that led to delays in obtaining an abortion, not outright bans.<sup>147</sup> Looking at this distinction, parental involvement laws would be classified as regulations that only delayed a pregnant minor from obtaining an abortion. Parental involvement laws do not ban pregnant minors from having an abortion; the laws merely require another step in the procedure, either parental notification or consent, depending on the specific law, or a bypass procedure.

It is arguable that a parental consent statute could prevent a pregnant minor from obtaining an abortion if her parent does not give permission, but this argument is unconvincing. The law is not preventing an abortion in the same manner as the Voinovich ban on post-viability abortions. In Voinovich, the law itself prevented the abortion. Under a parental consent law, the parent, not the law, is preventing the abortion. Additionally, a valid parental consent law means that a parent will never have an absolute veto over the pregnant minor's abortion.<sup>148</sup> In a situation where a parent would not give consent to an abortion even though the pregnancy is causing mental harm to the pregnant minor, the judicial bypass procedure is available.<sup>149</sup>

Thus, even if it is possible to distinguish some abortion statutes from the statute in Casey, which only covers physical health risks, parental involvement laws are not distinguishable. Since parental involvement laws do not ban abortions, but merely delay the [\*194] procedure in order to obtain consent or to carry out a judicial bypass procedure, these laws are constitutional if they comport with the language of the Casey medical emergency definition. In light of this, it is arguable that mental health conditions do not have to be included in the emergency exception of parental involvement laws. However, without further clarification from the Supreme Court, this matter remains unresolved.

#### B. What Standard Is Necessary to Determine if There Is a Medical Emergency?

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<sup>143</sup> *Id.* at 1039 (Thomas, J., dissenting from denial of cert.) (citing [Doe v. Bolton, 410 U.S. 179, 192 \(1973\)](#)).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Summit Med. Ctr. v. Siegelman, 227 F. Supp. 2d 1194, 1200 (M.D. Ala. 2002)*. After describing the Supreme Court's precedent, the court read the statute in question broadly enough to include mental health conditions. *Id.*

<sup>147</sup> [Women's Med. Prof'l v. Voinovich, 130 F.3d 187, 207-08 \(6th Cir. 1997\)](#).

<sup>148</sup> See supra notes 17-29 and accompanying text.

<sup>149</sup> [Planned Parenthood v. Danforth, 428 U.S. 52, 90-91 \(1976\)](#) (Stewart, J., concurring).

In a medical emergency, a physician can perform an abortion despite any proscriptions. The physician must first determine if the woman's condition constitutes a medical emergency. This determination is difficult because "highly qualified knowledgeable experts on both sides of the issue" have opposing views.<sup>150</sup> Because of the State's interest in enforcing its laws and protecting the life of the child, a physician must be held to some standard when making the decision that a medical emergency warranting an exception from the abortion regulation exists.

There are three possible standards by which to judge a physician's decision of whether a situation is a medical emergency. There is the subjective standard, the objective standard, and a standard that combines the subjective and objective standards. A state law may utilize any standard, as long as it is clearly defined. The combination of a subjective and objective standard is the hardest to clearly define, and the statute may have to include a scienter element to clarify the dual standard.

### 1. The Subjective Standard

A subjective standard is the most permissive standard. This standard looks only to what the attending physician believed at the time of the diagnosis. Based on the experience and knowledge of each physician, what constitutes a medical emergency may differ from "physician to physician."<sup>151</sup> Judging a physician's decision subjectively is constitutional.

**[\*195]** Any discussion of emergency exception provisions should begin with the accepted language in *Casey*, which states the decision should be made "on the basis of the physician's good faith clinical judgment."<sup>152</sup> The *Casey* standard is subjective, because a "physician's "experience, judgment or professional competence[]" [is] a subjective point of reference."<sup>153</sup> The Court affirmed *Casey*'s subjective standard in *Stenberg v. Carhart*.<sup>154</sup>

Other courts have followed the Supreme Court's subjective standard. For example, the Indiana Supreme Court declared that "a physician who acts with care and good faith has no rational fear of criminal prosecution when deciding to dispense with the statute's [regulations on abortion]."<sup>155</sup> The court stated that the subjective standard was proper because "in many instances there can be no fixed rule by which to determine the duty of a physician, and he must often use his own best judgment and act accordingly."<sup>156</sup>

The subjective standard relies completely on the attending physician's judgment, therefore it has a potential for abuse. In fact, Justice Kennedy explained it as "the vice of a health exception resting in the physician's discretion."<sup>157</sup> He stated "[a] ban which depends on the 'appropriate medical judgment' of [the physician] is no ban at all."<sup>158</sup> Despite Justice Kennedy's warning, the subjective standard has been accepted by a majority of the Supreme Court. Thus, an emergency exception in which the physician's decisions are judged based on a subjective or good faith standard is constitutional.

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<sup>150</sup> [Stenberg v. Carhart, 530 U.S. 914, 937 \(2000\)](#).

<sup>151</sup> [United States v. Vuitch, 402 U.S. 62, 74 \(1971\)](#) (Douglas, J., dissenting in part).

<sup>152</sup> [Planned Parenthood v. Casey, 505 U.S. 833, 879 \(1992\)](#) (quoting [18 Pa. Cons. Stat. 3203](#) (1990)).

<sup>153</sup> [Colautti v. Franklin, 439 U.S. 379, 391 \(1979\)](#).

<sup>154</sup> [Carhart, 530 U.S. at 938](#).

<sup>155</sup> [A Woman's Choice-East Side Women's Clinic v. Newman \(Newman II\), 671 N.E.2d 104, 109 \(Ind. 1996\)](#).

<sup>156</sup> [Id. at 109 n.7](#) (quoting [Seats v. Lowry, 930 S.W.2d 558, 562 \(Tenn. Ct. App. 1996\)](#)).

<sup>157</sup> [Carhart, 530 U.S. at 972](#) (Kennedy, J., dissenting).

<sup>158</sup> *Id.*

## 2. The Objective Standard

Since an emergency exception that judges the physician subjectively is equivalent to "no ban at all,"<sup>159</sup> the emergency exception in an abortion statute may be written to judge the physician's determination objectively. An objective standard, though based on medical standards instead of the physician's personal [\*196] beliefs, does not present one right solution for each situation and bar all other possible actions. According to the Seventh Circuit in *Karlin v. Foust*,<sup>160</sup> "in any given medical situation there is likely to be a number of reasonable medical options and disagreement between doctors over the appropriate course of action" and "the doctor who chooses [any of the] reasonable options will have acted within her reasonable medical judgment."<sup>161</sup>

The challenged law in *Karlin* was a Wisconsin abortion informed consent statute that required a twenty-four hour waiting period before a woman could have an abortion.<sup>162</sup> The waiting period could be waived if there was a medical emergency.<sup>163</sup> Unlike the *Casey* definition of a medical emergency, Wisconsin required "medical indications supporting the physician's "reasonable medical judgment" for a medical emergency."<sup>164</sup>

The Seventh Circuit began its analysis by declaring that an objective standard per se has never been held unconstitutional.<sup>165</sup> Several opinions discussed the objective standard in dicta, but not as part of their holdings.<sup>166</sup> The court indicated "the incorporation of an objective element could pose some hazards," but the objective standard in itself is not enough to render a statute unconstitutional.<sup>167</sup> This is because "an abortion statute that imposes liability on a physician for erroneous medical determinations is void for vagueness only if it leaves physicians uncertain as to the relevant legal standard under which their medical determinations will be judged."<sup>168</sup> Under the Wisconsin statute, there was no uncertainty as to the legal standard in effect; it was clear that physicians were held to an objective standard.<sup>169</sup>

The objective standard in *Karlin* was also challenged for not providing "fair warning" to physicians as to what behavior was objectively reasonable.<sup>170</sup> However, the *Karlin* court properly asserted [\*197] that this is the same standard that physicians are held to for every other medical decision.<sup>171</sup> Physicians must routinely make decisions in emergency situations "knowing that if they make an objectively erroneous determination they may be subject to

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<sup>159</sup> *Id.*

<sup>160</sup> [188 F.3d 446 \(7th Cir. 1999\)](#).

<sup>161</sup> [Id. at 464](#).

<sup>162</sup> [Id. at 454](#).

<sup>163</sup> [Id. at 455](#).

<sup>164</sup> [Id. at 456](#) (quoting [Wis. Stat. 253.10\(3\)\(f\)](#) (1996)).

<sup>165</sup> [Id. at 460-63](#).

<sup>166</sup> [Id. at 461 n.10](#).

<sup>167</sup> [Id. at 463](#).

<sup>168</sup> *Id.*

<sup>169</sup> [Id. at 464](#).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

civil liability,"<sup>172</sup> yet this has not halted the practice of medicine due to a fear of unexpected liability from an objective standard.

Based on Karlin, an objective standard provides a clear legal guide. A physician would be held to the same objective standard of care that guides every medical decision the physician made. Thus, an objective standard may be used to determine if there is a medical condition that necessitates an emergency abortion contrary to state law.

### 3. The Mixed Subjective and Objective Standard

As stated above, "an abortion statute that imposes liability on a physician for erroneous medical determinations is void for vagueness only if it leaves physicians uncertain as to the relevant legal standard under which their medical determinations will be judged."<sup>173</sup> Thus, the standard in a medical emergency statute may be purely subjective or objective.<sup>174</sup> The third possibility is a standard that requires both subjective good faith belief as well as an objectively reasonable determination that there is a medical emergency. A standard that contains both subjective and objective requirements appears too problematic because of the potential confusion over what legal standard will judge the physician's actions. A brief discussion of the mixed standard provides the probable answer to the constitutionality of this standard.

The mixed standard is not per se unconstitutional.<sup>175</sup> In *Colautti v. Franklin* the Supreme Court invalidated a Pennsylvania statute that imposed criminal penalties on physicians who performed an abortion on a viable fetus.<sup>176</sup> The standard applied to the physician's determination of the fetus's viability was declared void for vagueness.<sup>177</sup> However, the statute was ambiguous as to whether it [\*198] "imported a purely subjective standard, or whether it imposed a mixed subjective and objective standard."<sup>178</sup> The Court did not determine whether a mixed standard was unconstitutional, but found the statute, which imposed criminal liability, vague because it lacked a scienter requirement.<sup>179</sup>

The Sixth Circuit found an Ohio post-viability abortion ban that contained a mixed standard in the medical emergency definition unconstitutionally vague, but again focused on the lack of a scienter requirement, instead of the mixed standard.<sup>180</sup> The court held that "the combination of the objective and subjective standards without a scienter requirement renders these exceptions unconstitutionally vague, because physicians cannot know the standard under which their conduct will ultimately be judged."<sup>181</sup>

A statute must clearly state the standard to which the regulated conduct will be held. Judging the physician's determination of whether there is a medical emergency using a mixed standard seems likely to be struck down.

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<sup>172</sup> [Id. at 465.](#)

<sup>173</sup> [Id. at 463.](#)

<sup>174</sup> See supra Part III.B.1-2.

<sup>175</sup> See [Summit Med. Assocs. v. James, 984 F. Supp. 1404, 1442 \(M.D. Ala. 1998\).](#)

<sup>176</sup> [Colautti v. Franklin, 439 U.S. 379, 381, 401 \(1979\).](#)

<sup>177</sup> [Id. at 390.](#)

<sup>178</sup> [Id. at 391.](#)

<sup>179</sup> [Id. at 395.](#) The scienter requirement is discussed infra Part II.B.4.

<sup>180</sup> [Women's Med. Prof'l v. Voinovich, 130 F.3d 187, 203 \(6th Cir. 1997\).](#)

<sup>181</sup> [Id. at 205.](#)

However, the courts that have decided on the mixed standard have focused on the lack of a scienter element. Thus, it seems that with a scienter element, a mixed standard would probably not be unconstitutional.

#### 4. The Scienter Requirement

Scienter is "[a] degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission."<sup>182</sup> Although the scienter requirement is necessary in a medical emergency statute containing a mixed subjective and objective standard, the Supreme Court has never held that an emergency exception to an abortion statute must have a scienter requirement.<sup>183</sup> The Supreme Court expressly declined to address this issue in *Colautti*.<sup>184</sup> In fact, the principle in *Colautti* is that "a scienter requirement can mitigate the vagueness of an otherwise vague law - [\*199] not that the absence of a scienter requirement will 'create' vagueness where it does not otherwise exist[]." <sup>185</sup>

The lack of a scienter requirement generally does not create a problem in abortion emergency exceptions. The subjective standard lacking a scienter element, which is found in the *Casey* definition, is constitutional.<sup>186</sup> The Sixth and Seventh Circuits have acknowledged that "an objective element could pose some hazards," but the Seventh Circuit upheld a medical emergency definition with an objective standard of care that did not contain a scienter requirement.<sup>187</sup>

Of the three possible standards by which a physician's determination of a medical emergency may be judged, both the purely subjective standard and the purely objective standard have been held constitutional. The mixed standard has not been ruled per se unconstitutional, but most courts that have addressed this issue have found a mixed standard without a scienter requirement vague, because of the uncertainty as to what standard will judge the physician's conduct.<sup>188</sup>

#### IV. A Post-Emergency Notification Clause In Parental Involvement Statutes Is Necessary And Constitutional

So far, this note has addressed the constitutional requirements of a valid emergency exception in a parental involvement statute. The remainder of the note will address one additional requirement that should be added to parental involvement laws: a post-emergency notification clause. A post-emergency notification clause would require the physician to inform the minor's parent that an emergency abortion had taken place to save the life or health of the pregnant minor. The purpose of parental involvement laws is only fulfilled when there is a post-emergency abortion notification of the minor's [\*200] parents and, with a judicial bypass mechanism similar to the procedure necessary in parental consent statutes, a post-emergency notification clause is constitutional.

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<sup>182</sup> Black's Law Dictionary 1373 (8th ed. 2004).

<sup>183</sup> *Voinovich v. Women's Med. Prof'l*, 523 U.S. 1036, 1038 (Thomas, J., dissenting from denial of cert.).

<sup>184</sup> [Colautti v. Franklin](#), 439 U.S. 379, 396 (1979).

<sup>185</sup> [Women's Med. Prof'l](#), 130 F.3d at 216 (Boggs, J., dissenting); see also *Voinovich*, 523 U.S. at 1038-39 (Thomas, J., dissenting from denial of cert.) (explaining that the lack of a scienter requirement in *Colautti* compounded the vagueness of the statute, but was not necessarily its source); [Fargo Women's Health Org. v. Schafer](#), 18 F.3d 526, 534 (8th Cir. 1994) (citing [Vill. of Hoffman Estates v. Flipside, Hoffman Estates](#), 455 U.S. 489, 499 (1982)) ("scienter requirement may mitigate a law's vagueness").

<sup>186</sup> [Karlin v. Foust](#), 188 F.3d 446, 461 n.10 (7th Cir. 1999) ("[A] statute that contains a subjective standard alone ... will not be found to be void for vagueness.").

<sup>187</sup> [Id. at 463-64](#).

<sup>188</sup> See, e.g., [Women's Med. Prof'l](#), 130 F.3d at 205 ("The lack of scienter is compounded by the fact that this Act requires that a physician meet both an objective and a subjective standard in order to avoid liability.").



Both sides of the debate over parental involvement laws generally agree the best situation for the pregnant minor is to have her parents involved.<sup>189</sup> In specific cases where parental involvement would be detrimental, the judicial bypass provides a mechanism for minors to avoid parental involvement.<sup>190</sup> In addition to the judicial bypass, there is another way a minor may have an abortion without the parental involvement required by the statute: a medical emergency. However, when a minor receives an emergency abortion without parental consent or notification because of a medical emergency, it does not change the fact that it is best for the minor to receive assistance from her parents. Yet, currently, only one statute has contemplated notification of a parent after the minor's emergency abortion.<sup>191</sup>

Only Idaho has attempted to enforce a post-emergency notification provision.<sup>192</sup> Its parental consent statute required that, after an emergency abortion, the physician must "attempt to provide a parent of an unemancipated minor actual notification of the medical emergency."<sup>193</sup> The statute then lists several procedures the physician must follow to conform to the "due diligence" required by the notification provision.<sup>194</sup> The Idaho district court invalidated this provision because "in limited circumstances [it] would ultimately lead to an infringement of the minor's right to confidentiality, and that non-abused as well as abused minors have a constitutional right to avoid notification of their parents in some circumstances."<sup>195</sup> On appeal, the Ninth Circuit held the medical emergency exception as a whole unconstitutional and therefore did not decide the constitutionality of the post-emergency notification.<sup>196</sup>

## **[\*201]**

### A. A Post-Emergency Notification Law Should Be Judged by a Standard of Strict Scrutiny

In order to demonstrate the constitutionality of a post-emergency notification provision, the standard of review must be identified. The constitutionality of abortion-related issues is generally determined using the undue burden standard.<sup>197</sup> However, because of the nature of the post-emergency notification provision, the undue burden test is not an effective measure of its constitutionality.

The undue burden standard maintains that "'a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability' is unconstitutional."<sup>198</sup> The Court explained in *Casey* that "an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."<sup>199</sup> A post-emergency notification provision will not restrict a woman's ability to obtain an abortion. It could not possibly place a

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<sup>189</sup> Collett, *Protecting Our Daughters*, supra note 5, at 106.

<sup>190</sup> See supra Part I.

<sup>191</sup> See [Idaho Code Ann. 18-609A\(1\)\(a\)\(v\)](#) (2004).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> [Planned Parenthood of Idaho v. Wasden](#), 376 F.3d 908, 915-16 (2004).

<sup>196</sup> [Id. at 937](#).

<sup>197</sup> [Stenberg v. Carhart](#), 530 U.S. 914, 921 (2000) (citing [Planned Parenthood v. Casey](#), 505 U.S. 833, 877 (1992)).

<sup>198</sup> *Id.* (quoting [Planned Parenthood v. Casey](#), 505 U.S. 833, 877 (1992)).

<sup>199</sup> [Planned Parenthood v. Casey](#), 505 U.S. 833, 877 (1992).

"substantial obstacle in the path of a woman seeking an abortion" because the minor in this situation will have already had an abortion.

In addition to hindering a woman's ability to obtain an abortion, a statute is invalid if the effect of the statute results in an undue burden on the woman's choice.<sup>200</sup> There can be no valid argument that the notification provision would be an undue burden to the pregnant minor's decision to have an abortion. The provision would only be enforceable subsequent to an abortion that circumvents the parental involvement statute because of a medical emergency. In this situation, the notification law would not affect the minor's decision, or it would be a constitutionally acceptable burden.

A post-emergency notification provision could not unduly burden a pregnant minor's decision to terminate her pregnancy because it could not possibly affect the pregnant minor's decision. In a state with a parental involvement law, this provision is only triggered after an abortion based on a medical emergency that creates such a significant risk to the life or health of the pregnant minor that the abortion cannot be postponed until the required consent is obtained **[\*202]** or notice is given. Thus, the possibility that her parents may be notified after the abortion would not weigh into the pregnant minor's choice because the medical condition was such that the pregnant minor did not have a choice.

This argument, however, is slightly disingenuous. The pregnant minor always has a choice. For example, if a pregnancy complication will create a substantial risk to the health of the mother if the fetus is not aborted, the mother can always choose to carry the child to full term and risk the adverse consequences to her own health. But, even if the possibility of post-abortion parental notification could weigh in the pregnant minor's decision, it would not rise to the level of undue burden, which, as stated above, "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."<sup>201</sup>

In *Hodgson v. Minnesota*,<sup>202</sup> the Supreme Court declared that "it is clear that a requirement that a minor wait 48 hours after notifying a single parent of her intention to get an abortion would reasonably further the legitimate state interest in ensuring that the minor's decision is knowing and intelligent."<sup>203</sup> Eight years later, one circuit held that "a parental notice statute that includes the exceptions to notice identified in *Hodgson* is, without more, facially constitutional."<sup>204</sup> Specifically, the court stated that a parental notice requirement could not "condition the minor's access to abortion upon notice to abusive or neglectful parents."<sup>205</sup> In *Hodgson*, a Minnesota statute provided an exception from the notice requirement for a minor who declared that she had an abusive parent, but mandated that the authorities be notified of the abuse.<sup>206</sup> The problem with this statute was that abuse victims would not take advantage of the statutory exception because reporting the abuse to the authorities "created a substantial risk that the confidentiality of the minor's decision to terminate her pregnancy [would] be lost."<sup>207</sup>

The situation in *Hodgson* is distinguishable from the post-emergency notification provision suggested in this note. Under the proposed post-emergency notification provision, there would not be **[\*203]** the same substantial risk that the minor would lose the confidentiality of her decision to obtain an abortion. Specifically, as explained below, this

<sup>200</sup> See *id.*

<sup>201</sup> *Id.*

<sup>202</sup> [497 U.S. 417 \(1990\)](#).

<sup>203</sup> [Id. at 448](#).

<sup>204</sup> [Planned Parenthood v. Camblos, 155 F.3d 352, 367 \(4th Cir. 1998\)](#).

<sup>205</sup> *Id.*

<sup>206</sup> [Hodgson, 497 U.S. at 422](#).

<sup>207</sup> [Id. at 440 n.26](#) (quoting [Hodgson v. Minnesota, 648 F. Supp. 756, 764 \(D. Minn. 1986\)](#)).

provision would contain a judicial bypass that would allow a minor to avoid notification in situations, such as parental abuse, where contemplation of notification could possibly be considered an undue burden.<sup>208</sup>

Furthermore, the post-emergency notification could not be shown to cause a chilling effect on a physician's willingness to perform emergency abortions. Many states already have provisions requiring physicians to verify in a medical record the reason they performed the emergency abortion.<sup>209</sup> Also, physicians may already be subject to penalties for their erroneous judgment as to whether a medical emergency warrants an abortion.<sup>210</sup> Since statutory punishment is legitimate and the fear of penalty has not caused doctors to stop performing emergency abortions, neither will the requirement that they notify the minor's parents of a medically necessary abortion.

Based on the preceding arguments, a post-emergency notification statute does not impose an undue burden upon the minor's decision to have an abortion. This analysis leaves only two options: a post-emergency notification law is constitutional or undue burden is not the proper standard of review. If an undue burden is not the proper standard of review, then a court may look to strict scrutiny.<sup>211</sup> A post-emergency notification law also passes this analysis.

The only court to decide on a post-emergency notification provision, the district court of Idaho, held that the provision violated the minor's right to confidentiality.<sup>212</sup> The district court determined **[\*204]** "that nonabused as well as abused minors have a constitutional right to avoid notification of their parents in some circumstances" and that the Idaho post-emergency notification provision "would ultimately lead to an infringement of the minor's right to confidentiality."<sup>213</sup> An invasion of constitutionally protected privacy rights by the State "would only be consistent with the Constitution if it were necessary to promote a compelling state interest."<sup>214</sup> A post-emergency notification law is justified by compelling state interests. Thus, as long as it is written as narrowly as possible to achieve the State's interests, it will be constitutional.

#### B. The State Has a Compelling Interest in Notifying a Minor's Parents After Her Emergency Abortion

Courts have recognized that the Constitution "jealously protects the sanctity of the family as the cornerstone of society."<sup>215</sup> The Supreme Court has repeatedly stated that "the unique role in our society of the family, the institution by which "we inculcate and pass down many of our most cherished values, moral and cultural," requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children."

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<sup>208</sup> See *infra* Part IV.C.

<sup>209</sup> See, e.g., Colo. Rev. Stat. Ann. 12-37.5-105(1)(c) (West 2005); Ga. Code Ann. 15-11-116 (2005); [750 Ill. Comp. Stat. Ann. 70/20\(3\)](#) (West 1999); [Kan. Stat. Ann. 65-6705\(j\)\(2\)](#) (2002).

<sup>210</sup> See *supra* Part III.B.

<sup>211</sup> Before undue burden became the accepted standard of review, abortion statutes were reviewed under strict scrutiny. See [Planned Parenthood v. Casey, 505 U.S. 833, 929 \(1992\)](#) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("The Court has held that limitations on the right of privacy are permissible only if they survive 'strict' constitutional scrutiny."); [Akron v. Akron Center for Reprod. Health, 462 U.S. 416, 427 \(1983\)](#) ("Restrictive state regulations of the regulation of the right to choose abortion ... must be supported by a compelling state interest."); [Roe v. Wade, 410 U.S. 113, 155 \(1973\)](#) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.") (citations omitted).

<sup>212</sup> See [Planned Parenthood of Idaho v. Wasden, 376 F.3d 908, 915-16 \(9th Cir. 2004\)](#) (describing the district court's ruling).

<sup>213</sup> *Id.*

<sup>214</sup> [Whalen v. Roe, 429 U.S. 589, 607 \(1977\)](#) (Brennan, J., concurring) (citations omitted).

<sup>215</sup> [Planned Parenthood v. Camblos, 155 F.3d 352, 371 \(4th Cir. 1998\)](#).

<sup>216</sup> In addition to the protection of the family, the Court has expressed an interest in providing special protection for children, because "children have a very special place in life which law should reflect." <sup>217</sup>

Parental involvement laws are based upon the Court's justifications for the additional protection of minors, including "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." <sup>218</sup> In *Hodgson*, the Supreme Court stated that the State's "strong and legitimate interest in the welfare of its young citizens ... which justifies state-imposed requirements that a minor obtain his or her parent's consent before undergoing an [\*205] operation, marrying, or entering military service, extends also to the minor's decision to terminate her pregnancy." <sup>219</sup>

A recent case concerning the constitutionality of executing a minor provides further evidence of the compelling interest in protecting minors. In *Roper v. Simmons*, <sup>220</sup> the Court held it unconstitutional to sentence a minor to death, stating that a minor could not be classified among offenders requiring the death penalty. <sup>221</sup> The Court declared that minors have "a lack of maturity and an underdeveloped sense of responsibility" compared to adults. <sup>222</sup> The Court also found that a minor's character is "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." <sup>223</sup> A minor's immaturity and inability to understand the repercussions of his crime also presumes that a minor does not fully understand the consequences of an abortion.

Furthermore, reports offered to the Supreme Court by the American Psychological Association ("APA") suggest that the suspected maturity of the minor may not be as reliable as once considered. The APA's amicus brief in *Hodgson* in 1990 stated that their research demonstrated that girls as young as fourteen or fifteen were mature enough to make an informed decision as to whether or not to have an abortion. <sup>224</sup> By 2005, the APA's stand on the maturity of minors had changed. In *Roper*, the APA amicus brief stated that individuals under eighteen do not have the capacity to take moral responsibility for their choices. <sup>225</sup> It is unclear what the APA discovered in the fifteen year interval which led to the reversal of their study, but it suggests that the APA would say that a minor is not as mature as it suspected in *Hodgson*.

In addition to the interest in parental involvement before a pregnant minor has an abortion, states have a compelling interest in protecting minors after an abortion. It is essential for parents to be informed of their daughter's abortion in order to help recognize post-abortion complications. The Fourth Circuit justified a parental notice law in part because "by ensuring that parents are informed of their child's intention to obtain an abortion, the parental notice statute also [\*206] enables the parents ... to better support their daughter's physical and emotional recovery in the aftermath of the abortion." <sup>226</sup> Many states have recognized this interest in the legislative intent of their parental

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<sup>216</sup> [Bellotti v. Baird, 443 U.S. 622, 634 \(1979\)](#) (quoting [Moore v. City of E. Cleveland, 431 U.S. 494, 503-04 \(1977\)](#)).

<sup>217</sup> [Id. at 633](#) (quoting [May v. Anderson, 345 U.S. 528, 536 \(1953\)](#) (Frankfurter, J., concurring)).

<sup>218</sup> [Id. at 634](#).

<sup>219</sup> [Hodgson v. Minnesota, 497 U.S. 417, 444-45 \(1990\)](#) (internal citations omitted).

<sup>220</sup> [543 U.S. 551 \(2005\)](#).

<sup>221</sup> [Id. at 569, 578](#).

<sup>222</sup> [Id. at 569](#) (quoting [Johnson v. Texas, 509 U.S. 350, 367 \(1993\)](#)).

<sup>223</sup> *Id.*

<sup>224</sup> [Id. at 617-18](#) (Scalia, J., dissenting).

<sup>225</sup> [Id. at 617](#) (Scalia, J., dissenting).

involvement laws, providing a factual finding such as: "Parents who are aware that their minor daughter has had an abortion may better ensure that their daughter receives adequate medical attention after the abortion." <sup>227</sup>

Only about one-third of all women who have an abortion return for a post-operative examination, and this number is lower among teenage girls. <sup>228</sup> If a minor is hiding an abortion from a parent, it would be more difficult for her to return for a post-abortion examination. Because of this, a minor is less likely to discover post-abortion complications until a later stage of development. <sup>229</sup>

Based on the discussion above, the concern for a girl's post-abortion care is a legitimate and compelling interest. In fact, because of the nature of the emergency provision in parental involvement statutes, not only is a post-emergency notification provision permissible, but it is necessary to achieve the aim of these provisions. If the minor would have otherwise needed consent or notification of a parent before an abortion, the State is justified in notifying a parent of **[\*207]** a minor who has received an emergency abortion. The function of the emergency exception to an abortion regulation is to save time in an emergency, not to assure anonymity any more than the law already requires.

#### C. The Post-Emergency Notification Provision Must Include a Bypass Procedure to Achieve the Narrowness Required Under Strict Scrutiny

A statute is narrowly tailored if it advances the State's interest in the least restrictive way possible. It must not "sweep unnecessarily broadly and thereby invade the area of protected freedoms." <sup>230</sup> Parental involvement statutes are intended to be the least invasive means to promote the State's interests. The addition of a properly written post-emergency notification provision to a parental involvement statute would not violate the child's right of confidentiality.

A post-emergency notification provision involves limited disclosure that conforms to the constitutional intent of the law: to protect the minor and involve the parent in this difficult process. In fact, many statutes already provide that a

<sup>226</sup> [Planned Parenthood v. Camblos](#), 155 F.3d 352, 370 (4th Cir. 1998).

<sup>227</sup> [Tenn. Code Ann. 37-10-301\(b\)\(5\)](#) (2001). Accord [Ala. Code 26-21-1\(b\)\(5\)](#) (1992); [Del. Code Ann. tit. 24, 1781\(a\)\(5\)](#) (1997); [Idaho Code Ann. 18-602\(1\)\(e\)](#) (2005); [Mont. Code Ann. 50-20-202\(1\)\(e\)](#) (2003); [W. Va. Code Ann. 16-2F-1](#) (West 2001); [Wis. Stat. Ann. 48.375\(1\)\(a\)\(5\)](#) (West 2003).

<sup>228</sup> Collett, Protecting Our Daughters, *supra* note 5, at 114.

<sup>229</sup> For a listing of the possible repercussions of abortion, see generally *Detrimental Effects of Abortion* (Thomas W. Strahan ed., 3d ed. 2001). This book is an annotated bibliography of works on the effects of abortion. For studies concerning detrimental effects of abortion on adolescents, see generally [id. at 235-59](#). The following sample of findings demonstrates the health risks for adolescents undergoing abortions: "Teenagers 17 years old or less were significantly more likely to have postabortion endometritis, cervical lacerations, or hemorrhage greater than 500 ml. following abortion compared to women age 20-29." [id. at 257](#) (citing Ronald T. Burkman et al., Morbidity Risk Among Young Adolescents Undergoing Elective Abortion, *Contraception*, Aug. 1984, at 99). Women between the ages of 13 and 19 who tested positive for chlamydia were more likely than older women to develop certain conditions, including postabortion endometritis and postabortion salpingitis. *Id.* (citing S. Osser & K. Persson, Postabortal Pelvic Infection Associated With Chlamydia Trachomatis Infection And The Influence of Humoral Immunity, 150 *Am. J. Obstet. Gynecol.* 699, 699-703 (1984)). "Pain was more severe in adolescents who underwent first trimester suction abortion under local anesthesia compared with older women." [id. at 258](#) (citing E. Belanger et al., Pain of First-Trimester Abortion: A Study of Psychological and Medical Predictors, 36 *Pain* 339, 339-49 (1989)). See also The Justice Foundation, <http://www.operationoutcry.org/pressroe.html> (including expert testimony and personal affidavits of women who have had abortions describing an abortion's negative effects on the pregnant woman).

<sup>230</sup> [Griswold v. Connecticut](#), 381 U.S. 479, 485 (1965) (quoting [NAACP v. Alabama](#), 377 U.S. 288, 307 (1964)).

doctor must "certify in the patient's medical record that a medical emergency exists and there is insufficient time to provide the required notice." <sup>231</sup>

The notification provision would inform the minor's parents of her abortion, but this would not be an unconstitutional breach of confidentiality. The narrow release of information is comparable to the Supreme Court's decision in *Whalen v. Roe*, <sup>232</sup> which considered the legitimacy of a New York State law that required certain prescription drug purchases to be filed with the State and maintained for five years. <sup>233</sup> The Court upheld the statute and stated that the disclosure required by this law did not violate the patients' right to privacy:

It is, of course, true that private information must be disclosed to the authorized employees of the New York Department of Health. Such disclosures, however, are not significantly different from those **[\*208]** that were required under the prior law. Nor are they meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care. Unquestionably, some individuals' concern for their own privacy may lead them to avoid or to postpone needed medical attention. Nevertheless, disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient. Requiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy. <sup>234</sup>

As the concurring opinion stated, this was not a case of "broad dissemination ... of such information" which would have "clearly implicated constitutionally protected privacy rights." <sup>235</sup> Similarly, the post-emergency notification provision would only provide the information to the minor's parents, who have a legitimate interest in this information in order to care for their daughter's health. Although *Whalen* concerned the release of information to state officials and a post-emergency notification provision would release the information to the minor's parent, it is analogous because the information is only being released to the party with a legitimate interest in the information. A parent is in the best position to assist his or her minor daughter with any post-abortion complications.

One argument against this breach of confidentiality is presented in *Hodgson*. An exception to the parental notice requirement in *Hodgson* was available if the minor's parent was abusive. <sup>236</sup> If the minor claimed abuse, an obligation was imposed to report the abuse to the proper authorities. <sup>237</sup> The district court found that the exception was ineffective because reporting the abuse could destroy the confidentiality of the minor's decision to have an abortion. <sup>238</sup> This result is not surprising: if a minor is afraid to tell a parent about an abortion out of fear of abuse, then the minor will avoid any action that may lead to the parent's discovery of the abortion. <sup>239</sup> However, a **[\*209]** judicial bypass that protects the confidentiality of minors in at-risk circumstances would ameliorate concerns about the minor's privacy.

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<sup>231</sup> 750 Ill. Comp. Stat. Ann. 70/20-3 (West 1999).

<sup>232</sup> [429 U.S. 589 \(1977\)](#).

<sup>233</sup> [Id. at 591, 593](#).

<sup>234</sup> [Id. at 602](#).

<sup>235</sup> [Id. at 606](#) (Brennan, J., concurring).

<sup>236</sup> [Hodgson v. Minnesota, 497 U.S. 417, 422 \(1990\)](#).

<sup>237</sup> *Id.*

<sup>238</sup> [Id. at 440 n.26](#) (citation omitted).

<sup>239</sup> This is in addition to the general reluctance of a sexually abused victim to admit to the abuse. *Id.*



To ensure the law was enacted in the narrowest way possible to protect minors from post-abortion complications, the post-emergency notification provision must include a judicial bypass similar to the bypass required for parental consent statutes under Bellotti.<sup>240</sup> The bypass procedure would waive the notification requirement for mature minors and minors whose best interests are served by not notifying the parents, such as in cases of abuse.<sup>241</sup> The Idaho post-emergency notification, which was invalidated by the district court of Idaho, did not contain a judicial bypass procedure.<sup>242</sup> This would have alleviated the district court's concern over the circumstances in which "minors have a constitutional right to avoid notification of their parents."<sup>243</sup>

The State has a compelling interest in protecting the minor from any post-abortion complications. In the case of an emergency abortion, where the young person has not chosen an abortion, but undergone the procedure because of a medical emergency, the concern over post-abortion complications remains. Current valid parental involvement laws do not advance this state interest. A provision requiring physicians to notify a minor's parent after an emergency abortion would serve this compelling interest of the State. The post-emergency notification provision could be written narrowly enough to achieve the State's interest without infringing upon the minor's rights. The law would only apply to abortions under the emergency exception of a valid parental involvement law. A judicial bypass procedure for mature minors and minors whose best interests are served by not notifying the parents must also be included. A judicial bypass procedure that conforms to the standards accepted by the Supreme Court for parental consent would be constitutional, because the notification provision is less intrusive upon a minor's rights than the pre-abortion parental consent requirement. Since a post-emergency notification provision with a bypass procedure **[\*210]** advances a compelling state interest by the narrowest possible means, it will pass constitutional scrutiny.

#### Conclusion

The Supreme Court has determined that any abortion regulation must contain an exception for the life or health of the mother. Parental involvement laws must abide by these restrictions. However, the health exception covers serious conditions that may result in substantial and irreversible impairment to a major bodily function. This means a parental involvement law does not have to include exceptions for minor conditions, temporary impairment or mental health concerns.

A state may implement a subjective or objective standard of care to judge the physician's decision as to the presence of a medical emergency that necessitates an emergency abortion. Whatever standard is implemented must be clear. The physician must understand exactly what standard will judge his decisions. A statute may contain a mixed subjective and objective standard that includes a scienter requirement. However, the drafters of the statute must ensure that the standard of care is clear and understood.

Even with all that is required by the courts, a valid emergency exception to a parental involvement statute fails to protect the minor's health from post-abortion complications. A post-emergency notification clause would require a doctor who performs an emergency abortion on a minor to inform the girl's parents, who are in the best position to help their daughter cope with any complications that arise from the abortion. A post-emergency notification clause must include a bypass procedure that waives this notification requirement if the minor is sufficiently mature or if the best interests of the minor would be served by not informing the parents. With a post-emergency notification clause, the emergency exception to the parental involvement laws would better serve the law's purpose and protect the pregnant minor.

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<sup>240</sup> [443 U.S. 622, 643-44 \(1979\)](#). See supra Part I for a further explanation of the judicial bypass procedure.

<sup>241</sup> *Id.*

<sup>242</sup> [Idaho Code Ann. 18-609A](#) (2005).

<sup>243</sup> [Planned Parenthood of Idaho v. Wasden, 376 F.3d 908, 915-16 \(9th Cir. 2004\)](#). The district court's concern for the breach of privacy of the non-abused minors would be answered by the compelling interests presented above.

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