No. 04-1144

In The

Supreme Court Of The United States

KELLY A. AYOTTE,

Petitioners.

v.

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, *et. al*,

Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL LEGAL FOUNDATION,
in support of the *Petitioner*

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INTEREST OF THE AMICUS CURIAE[1]

The National Legal Foundation (NLF) is 501c(3) public interest law firm. Our donors and supporters have a vital interest in the abortion issue. They believe that states maintain the right to exercise the police power in support of protecting unborn children and that New Hampshire has reasonably attempted to do so.

SUMMARY OF THE ARGUMENT

The First Circuit improperly ignored this Court's facial challenge test from *United States v. Salerno*, 481 U.S. 739 (1987), and instead chose to analyze the New Hampshire Revised Statutes § 132:24-28 (2003), Parental Notification Prior to Abortion, under the undue burden test found in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). *Salerno* has never been overturned. Furthermore, the facial challenge test is not *dicta* as has sometimes been asserted. However, should this Court disagree, it should recognize that the *Salerno* test is judicial *dicta* or much closer to judicial *dicta* than to *obiter dicta*, and therefore must be given precedential or nearly precedential value.

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[1] The parties have consented to the filing of this brief. Copies of the letter of consent accompany this brief. No counsel for any party has authored this brief in whole or in part. No person or entity has made any monetary contribution to the preparation or submission of this brief, other than the amicus curiae, its members, and its counsel.

ARGUMENT

The First Circuit upheld the trial court's (a New Hampshire District Court) order declaring unconstitutional, and enjoining the enforcement of, New Hampshire Revised Statutes § 132:24-28 (2003), Parental Notification Prior to Abortion (hereinafter "the Act"). *Planned Parenthood v. Heed*, 390 F.3d 53, 57-58 (2004).

In so doing, the First Circuit ignored this Court's facial challenge test from *United States v. Salerno*, 481 U.S. 739 (1987), and instead chose to analyze the Act under the undue burden test found in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). The First Circuit ruled that *Casey* has replaced *Salerno* for abortion cases and should control, even though this Court never overturned *Salerno, Planned Parenthood v. Heed*, 390 F.3d 53, 57-58 (2004), and held that the Act is facially unconstitutional. There are several interrelated issues before the Court in this case, however, this brief will only address the issue of which test is controlling when determining whether an Act is facially invalid.

I. THE FIRST CIRCUIT SHOULD BE REVERSED BECAUSE *SALERNO* HAS NOT BEEN OVERTURNED.

The First Circuit erroneously declared that *Salerno* had been superseded by *Casey* in the abortion context. *Id*. at 58. This Court has never explicitly overturned *Salerno,* and, as will be explained below, the federal courts of appeals do not have the authority to declare this Court's precedent overturned.

In *Salerno*, this Court stated that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully; since the challenger must establish

that no set of circumstances exists under which the Act would be valid." 481 U.S. at 745. The *Salerno* test has been applied to various statutory challenges throughout the years, including challenges to abortion statutes as recently as 2002. *See, e.g. Schall v. Martin*, 467 U.S. 253 (1984) (Sherman Anti-Trust case), *Pharmaceutical Research and Mfrs. of America v. Concannon*, 249 F.3d 66 (1st Cir. 2001) (Medicaid), *Webster v. Reproductive Health Services*, 492 U.S. 490, 524 (1989) (prohibited use of public facility for abortions), *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990) (parental notification for abortion), *Greenville Women's Clinic v. Commissioner*, 317 F.3d 357 (4th Cir. 2002) (licensing standards for abortion clinics).

However, in *Casey* this Court passed over *Salerno* in silence and fashioned a new test. *Casey*, 505 U.S. at 876. Applying this new test, the joint opinion stated 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." *Id.* at 877. In his dissent, Chief Justice Rehnquist explicitly noted that the joint opinion had failed to apply the *Salerno* test. *Id*. at 972 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

Then, in a memorandum respecting the denial of a petition for certiorari, Justice Stevens explained his view that the *Salerno* test is *dicta* and therefore not controlling. *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1175 (1996) (Stevens, J.). According to Justice Stevens, the no set of circumstances test "was unsupported by citation or precedent. It was also unnecessary to the holding in the case . . . ." *Id*.

Finally, this Court had the opportunity to explicitly overturn *Salerno* post-*Casey* in *Stenberg v. Carhart*, 530 U.S. 914 (2000), but it did not.

The confusion regarding *Salerno* and *Casey* is not limited to the history laid out above. As will be explained immediately below, the courts of appeals have split into four

camps on the issue of the status of *Salerno* post-*Casey*. However, even those courts that have abandoned *Salerno's* facial challenge test in favor of *Casey's* undue burden test have consistently admitted that *Salerno* has not been overturned. *See, e.g., Women's Medical Prof'l Corp. v. Voinovich*, 130 F.3d 187, 194 (6th Cir. 1997) (summarizing how courts to that date had characterized *Salerno's* status).[2].

Seven courts of appeals have abandoned *Salerno* in favor of *Casey*, but their widely varied reasons for doing so are inconsistent. Four of the courts of appeals have decided that '[a]lthough *Casey* does not expressly purport to overrule *Salerno*, in effect it does." *Women's Medical Pro'. Corp.* , 130 F.3d at 194. *Accord Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1458 (8th Cir. 1995); *Planned Parenthood of S. Ariz. v. Lawall*, 180 F.3d 1022, 1027 (9th Cir. 1999); *Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir. 1996).

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[2] In a dissent to the Sixth Circuit's opinion in *Women's Medical Prof'l Corp.* , Judge Boggs expressed frustration with the post-*Casey* decisions, as they have discarded *Salerno*, and clung to *Casey's* ambiguous language ensuring legislatures that they have the right to regulate abortion, but not clearly defining the parameters for such regulation. 130 F.3d at 218 (Boggs, J., dissenting).

> The post-*Casey* history of abortion litigation in the lower courts is reminiscent of the classic recurring football drama of Charlie Brown and Lucy in the *Peanuts* comic strip. Lucy repeatedly assures Charlie Brown that he can kick the football, if only *this time* he gets it just right. Charlie Brown keeps trying, but Lucy never fails to pull the ball away at the last moment.

Boggs implored this Court to bring clarity to the issue, and to provide guidance to the state legislatures as to what abortion regulations will be upheld as constitutional. *Id.* at 219.

Two of the Circuits, including the court below, have held that, while this Court did not overturn *Salerno*, the *Casey* decision simply "set a new standard for facial challenges to pre-viability abortion laws." *Planned Parenthood of Central N.J. v. Farmer*, 220 F.3d 127, 143 (3rd Cir. 2000) (citation and internal quotation omitted). *Accord, Planned Parenthood*, 390 F.3d at 58.

Finally, the Seventh Circuit declared that *Salerno* was merely a "suggestion" and could, therefore, be ignored. *A Woman's Choice-East Side Women's Clinic v. Newman* , 305 F.3d 684, 687 (7th Cir. 2002). The Seventh Circuit essentially said that *Salerno* was mere *dicta*, and cited *Troxel v. Granville*, 530 U.S. 57, 85 n.6 (2000), for that proposition. However, the Seventh Circuit did not indicate that the passage cited in support of that proposition was not from this Court's opinion, but from Justice Stevens' dissent.

On the other side of the equation, two circuits have recognized *Salerno* as binding precedent on multiple occasions. The Fifth Circuit first dealt with the question in *Barnes v. Moore*, 970 F.2d 12 (5th Cir. 1992), the same year *Casey* was decided, and held that this Court had not overturned *Salerno*. *Id.* at 14 n. 2. The Fifth Circuit reaffirmed *Barnes'* use of *Salerno* in *Causeway Medical Suite v. Ieyoub*, 109 F.3d 1096, 1102-04 (5th Cir. 1997).

Similarly, the Fourth Circuit has held that *Casey* did not overturn *Salerno*, and declared that it was bound to apply *Salerno* as precedent until such time as this Court might explicitly overturn it. *Manning v. Hunt*, 119 F.3d 254 268 n.4 (4th Cir. 1997). The Fourth Circuit has reaffirmed this decision twice. *Greenville Women' s Clinic v. Bryant*, 222 F.3d 157 (4th Cir. 2000); *Greenville Women' s Clinic v. Commissioner,* 317 F.3d 357 (4th Cir. 2002).

Thus, at least technically speaking (and in several cases, more than technically speaking) none of the courts of appeals have declared that *Salerno* has been actually overturned. Nonetheless, to the extent that some of the courts of appeals *treated Salerno* as overturned, they

exceeded their authority. This principle is evident in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), in which this Court wrote that '[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.* This principle has been expanded to include precedent that seems to have been overruled by implication. *See, e.g. Agostini v. Felton*, 521 U.S. 203 (1997); *State Oil Co. v. Khan*, 522 U.S. 3 (1997). For these reasons, this Court should hold that the First Circuit erred in ignoring the *Salerno* test.

II. THE *SALERNO* TEST SHOULD BE GIVEN PRECEDENTIAL OR NEAR-PRECEDENTIAL VALUE BECAUSE IT WAS NECESSARY FOR THE DETERMINATION OF THE CASE OR, IN THE ALTERNATIVE, BECAUSE IT WAS NOT MERE *DICTA*.

As noted above, Justice Stevens argued in his memorandum in *Janklow* that the *Salerno* test is not binding precedent, but only *dicta.* 517 U.S. at 1175. This is not the case, because, as will be explained, the passage in *Salerno* that contains the facial challenge test was necessary for the proper adjudication of the case. However, even should this Court decide that the passage is *dicta*, the First Circuit should still have given it deference or treated it as precedential because the passage is arguably judicial *dicta* rather than *obiter dicta*, and at a minimum it is much closer to the former than to the latter. Furthermore, this Court should similarly make its decision based upon the *Salerno* test.

A. The Passage Containing The *Salerno* Facial Challenge Test Was Necessary To The

Adjudication Of The Case, And, Therefore, Was Not *Dicta*.

The facial challenge test in *Salerno* was not *dicta* because it was necessary for the adjudication of the case. *Dictum* is "[a]n opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of adjudication . . . ." Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 Chi.-Kent L. Rev. 655, 710 (1999). The sentence that has been dismissed as *dicta* is the articulation of the general rule upon which the case was decided. When a court makes its ruling there are many different issues that it must consider. A holding that is necessary for the adjudication of a case is treated precedentially. *Id*. at 711. When a holding does not address the main issues in a case, but is still necessary for the court to reach its conclusion, that too should be treated precedentially. *Id*. After Chief Justice Rehnquist, writing for the Court, stated the rule in *Salerno*, he immediately proceeded to analyze the facts of the case accordingly to ascertain whether the test had been met. He concluded that the requirements of the test had not been met: "respondents have failed to shoulder their heavy burden to demonstrate that the Act is 'facially' unconstitutional." *Salerno*, 481 U.S. at 745. Because the facial challenge test set forth in *Salerno* was *the rule* upon which the case was decided, the test cannot be classified as *dicta*.

B. Even If This Court Were To Find the Passage In *Salerno* To Be *Dicta*, It Cannot be *Obiter Dicta* And Thus Deserves Precedential Or Near-Precedential Value.

However, because Justice Stevens found the *Salerno* test to be stated more broadly than he thought necessary, he argued in his memorandum in *Janklow* that the test was not

actually binding precedent, but only *dicta.* *Janklow*, 517 U.S. at 1175. This compels one to consider the definition of *dicta*. *Dictum* is "[a]n opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of adjudication . . . ." Quinn, *supra*, at 710. *Dicta* are often divided into *obiter* and judicial *dicta* to determine its precedential value. Id. at 712-13. *Obiter*, or mere, *dicta* is an opinion expressed in passing and has less persuasive value. *Id*. at 713. Judicial *dicta* are a "court's reasoned consideration and elaboration upon a legal norm" and have much more persuasive value. *Id*. at 713-14. Indeed, as will be explained, judicial *dicta* sometimes can and should be given precedential value.

Even if the *Salerno* passage is construed as *dicta*, it should still be given precedential value because it is judicial *dicta*. This Court heavily weighs judicial *dicta*. In *Seminole Tribe v. Florida*, 517 U.S. 44, 66-67 (1996), this Court adhered to judicial *dicta*, which was regarded as a "well-established rationale upon which the Court based the results of its earlier decisions." Similarly, this Court has stated that the "principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law." *County of Allegheny v. ACLU*, 492 U.S. 573, 668 (1989).

Likewise, the Third Circuit noted that "[a] . . . distinction has been drawn between 'judicial *dictum*' and 'obiter *dictum*': Judicial *dicta* are conclusions that have been briefed, argued, and given full consideration even though admittedly unnecessary to a decision. A judicial *dictum* may have great weight." *Cerro Metal Products v. Marshall*, 620 F.2d 964, 978 n.39 (3d Cir. 1980) *(citation omitted)*. Indeed, judicial *dicta* are of such consequence that some courts consider judicial *dicta* issued by supreme courts to be binding precedent: "A Wisconsin court has stated it thus: 'When a court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a dictum

but is a judicial act of the court which it will thereafter recognize as a binding decision.'" *Id.*

Furthermore, the distinction between *obiter dictum* and *judicial dictum* is not a bright line. Quinn, *supra*, at 717-18. Hard and fast divisions "are probably wrong" and can lead to "intellectual chicanery." *Id.* at 730, 776. It is not easy to determine what constitutes judicial *dictum*. *Id.* at 735. In fact, *dicta* are better thought of as being on a continuum. *Id.* at 740. Under this view, *obiter dicta*, in which a court has not deliberated over what it has said, *see id.*, rest at the lower end of the continuum. Judicial *dicta* rest at the upper end of the continuum because the court considers that what it has said will guide future litigation, *id.* at 730. Therefore, it is important under this view to realize that *dicta*, even *dicta* other than that which is *technically* judicial *dicta*, can lie very close to that end of the continuum and can be worthy of receiving precedential or near-precedential value. Certainly, at a minimum, that can be said of *Salerno's* "no set of circumstances" language. [3]

Thus, under any legitimate view, the *Salerno* test should be treated as controlling in the instant case.

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[3] This has not been changed by the post-*Casey* confusion, which is an analytically distinct question.

CONCLUSION

For the foregoing reasons, as well as other reasons stated in the Petitioner's brief, the decision of the First Circuit should be reversed.

Respectfully submitted,
This 8th day of August, 2005

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