OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

ORIGINAL

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1255 & 81-1623

TITLE PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC. ET AL., Petitioners v. JOHN ASHCROFT, ATTORNEY GENERAL OF MISSOURI ET AL.; and
JOHN ASHCROFT, ATTORNEY GENERAL OF MISSOURI ET AL., Petitioners v. PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC. ET AL.

PLACE Washington, D. C.

DATE November 30, 1982

PAGES 1 thru 51

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IN THE SUPREME COURT OF THE UNITED STATES

PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., ET AL., Petitioners, v. JOHN ASHCROFT, ATTORNEY GENERAL OF MISSOURI ET AL. — No. 81-1255

and

JOHN ASHCROFT, ATTORNEY GENERAL OF MISSOURI ET AL., Petitioners v. PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., ET AL — No. 81-1623

Washington, D.C.

Tuesday, November 30, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:05 o'clock p.m.

APPEARANCES:

FRANK SUSMAN, ESQ., St. Louis, Missouri; on behalf of Planned Parenthood Association of Kansas City

JOHN ASHCROFT, ESQ., Attorney General of Missouri, Jefferson City, Missouri; on behalf of John Ashcroft, Attorney General of Missouri.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Planned Parenthood Association of Kansas City, Missouri against John Ashcroft, Attorney General of Missouri, and the related case. Mr. Susman, you may proceed whenever you're ready.

ORAL ARGUMENT OF FRANK SUSMAN

ON BEHALF OF PLANNED PARENTHOOD ASSOCIATION OF MISSOURI

MR. SUSMAN: Mr. Chief Justice, and may it please the Court:

We are here today on a case that the Eighth Circuit decided exactly one year ago today. Restrictions in question here, like all legislative abortion restrictions, adversely and disproportionately affect minors and indigent women who frequently lack the maturity, education, sophistication and financial resources to overcome the additional legislative hurdles placed in front of them while seeking to exercise some reasonable control over their reproductive functions.

There are basically only four of the restrictions at issue here today before this Court. There were many others decided by the district court, and some of those were not appealed to the court of appeals; there were others that were appealed to the court of appeals and were not further appealed to this

Court.

Those four issues involve minors, the in-hospital provision after 12 weeks, the requirement of two doctors being in attendance when an abortion is performed on a viable fetus, and lastly, a requirement that pathology be done by a certified pathologist on all specimens regardless of the length of pregnancy.

Before addressing those four issues, though, I would be remiss if I did not respond in part to the argument and to the brief of the Solicitor General, which brief was jointly filed in this case as well as in the Akron case, although his argument was solely taken during the time of the Akron matter.

It seems that his brief -- and as supported by his oral argument and he so states on page 3 of that brief -- that the primary underpinning of his argument is, and I quote, "that the legislature has superior factfinding capabilities." I would submit to this Court that that is absolutely not true; that at best, it is fallacious and at worst it is probably naive.

Initially, at least certainly in Missouri and with all other state legislatures with which I am familiar, the assignment as to which committee any particular piece of legislation goes has a lot to do with whether those in power in that particular

legislative body desire that piece of legislation to pass or to fail.

And secondly, the factfinding that goes on, if any, -- and very little goes on in Missouri, and I have attended many of these legislative findings in these various pieces of legislation, not only in this case but in the Danforth case -- they are not open hearings, they are not hearings that invite an unbiased, an impartial and a fair hearing of evidence. Frequently, speakers only on one side of the issue are asked to attend, and there certainly is no great factfinding ability that would be superior to the type of hearing that goes on in court. Particularly the type of open hearing, unbiased hearing, that went on in this case.

As the Court is aware in this case, it was not just one, but there were two district court trials because certain issues the appellant court felt, and particularly in regard to the in-hospital issue, had not been fully decided as to the necessary facts that needed to be resolved, so said the Eighth Circuit, and so it was remanded to the district court for a second trial.

In addition, I would suggest the bootstrap argument also suggested by the Solicitor General that appears on page 9 of his brief, that legislatures fully take into account all of the constitutional implications

of those enactments which they pass judgment on because of the fact that they all take an oath to uphold the Constitution, which we are here today discussing, is awesome.

QUESTION: We've said that in a number of our opinions.

MR. SUSMAN: That's correct.

QUESTION: Why is that so startling to you?

MR. SUSMAN: It is not startling, but I do not feel that they accurately do it. If, in fact, they did, these cases would not be here today. Whether they --

QUESTION: Well, that's one of these generalizations which has the value of many generalizations. But we have said as much in a number of our opinions.

MR. SUSMAN: Yes, you have, Mr. Chief Justice. But the fact that they may, even -- although unintentionally, not pay the proper price for the Constitution is the reason that the cases are brought, and often successfully. Because they have avoided or ignored or not correctly applied that oath which they have taken.

QUESTION: Do you think that, say a judge of the court of appeals who takes an oath to follow the Constitution who writes an opinion that is reversed by

this Court is not being faithful to his oath?

MR. SUSMAN: No, I think he's being faithful to the oath if he intentionally tries to apply it to the best of his or her ability.

I think the suggestion of heavy deference to the legislative judgment on policy issues, which is suggested very strongly by the Solicitor General -- and in those cases that he suggests of different segments of society have strongly competing views is a terrifying thought.

The entire concept of fundamental basic rights is sought to be undermined and discarded in one fell swoop. Constitutional rights will then be bargained by lobbying interests in the legislature, and woe be it to the minority who seek to rely on basic equality, justice and decency for their protection.

A comment by Justice Blackmun, as to whether or not Roe versus Wade or Marbury versus Madison was being sought to be overruled I think is apropos. If one is to adopt the suggestions of the Solicitor General, 179 years of constitutional history would appear to fly out the door.

I would suggest lastly in this regard that the government's somewhat simplistic suggestion of how to resolve this matter and how to avoid any further

abortion cases coming before this Court creates more problems than it purports to solve. It basically would eliminate the entire concept, in my opinion, of fundamental rights.

The first issue that I would wish to address in our chapter, in our section that was passed, is the issue of the minors. I would somewhat simplify this particular argument by noting that with two possible exceptions, it is a question of statutory construction. Those two exceptions would be whether or not this act does require or insure that appellate review be swift and complete.

Respondents take the position that since this statute was enjoined the day following its enactment, the day following it went into law, since it has never been in practice in the state of Missouri, that the Supreme Court of the state of Missouri has waited to enact any rules covering appellate review in these cases.

I don't know and would not speak to the reason they have waited. It is clear that in the three years since the statute has been on the books that no rules have been adopted. But again, in all candor, the statute has never been in effect to this date.

The second exception that I would raise in addition to the statutory construction problem on this

issue of the minors is that the statute makes absolutely no exceptions whatsoever for any emergency of any kind, even when life or health is threatened. Under all possible scenarios, it is necessary that the minor, if she cannot obtain the permission of one parent, go to the juvenile court and go through this hearing and any subsequent appeals that might come along the way, and receive the court's sanction for this procedure, regardless of the fact that her life or health is immediately being threatened by the fact that the doctor cannot perform the abortion.

And yet, it is interesting to note that Section 3 of this same statute makes an exception of this very like kind when it is necessary to perform an abortion against the minor's will. It says if an abortion is necessary to save the life of the minor, and she doesn't want it and she says no, then the doctor may proceed. But not the reverse. If she wants the abortion and her life or health is threatened, he cannot proceed until he receives, again, the sanction of either one parent or the court.

With those two exceptions, then, we are back to the statutory construction problem of Section 188.028.2(4). The district court found that the state had not made any argument to convince it that its

interpretation of that statute was clear, that the use of this conjunctive word "or" between the options available to the juvenile court of a, b or c, the court had the option to pick any of those, and not necessarily in any order and not necessarily by rejecting others first.

The appellate court disagreed. It came to an opposite conclusion. We have suggested in our Reply Brief recently filed with this Court that in light of the difference of opinions of reasonable judicial minds, that perhaps this Court should abstain from the issue inasmuch as a decision by the Missouri state courts would, in fact, or could possibly resolve any federal constitutional question as to what, in fact, the statute does mean.

There has never been an opportunity for the Missouri state courts to rule on this issue, and perhaps abstention is appropriate. Abstention, in an identical type of situation, was the route taken by this Court in 1976 in Bellotti 1, and that position of abstaining in that kind of an issue was recently affirmed in H.L. versus Matheson in referencing Bellotti 1.

The second matter that we would address is the in-hospital provision. This provision probably has the most serious impact upon the actual delivery of abortion

services than any of the other provisions involved before this Court in this case. And probably in the other cases as well. It is clear that this provision would stop and prevent more procedures from taking place, than any of the other provisions involved or under review.

As Justice Rehnquist indicated in the Themopolous case, it is the practice of this Court to take the factual findings of the lower courts as they find them.

This case is unique in regard to the in-hospital provision, as opposed to any of the other district courts that have decided this issue, and there have been many. This issue has been decided by the District Court in Louisiana, in Kentucky, in Missouri and very recently and unreported yet, in the last two weeks, by courts in Illinois and Wisconsin. All have found that this is an unreasonable regulation.

There were two separate district court trials on this issue, as I indicated. And in fact, the trial on remand, the second district court trial, -- and it was specifically remanded for this particular issue because the appellate court said, we want to know specifically whether or not it is safer to perform second trimester procedures in a hospital or in an

outpatient facility. And while the district court had held the section unconstitutional, they had not in so many words made that factual finding.

And when it was sent back on remand and the second trial was held, respondents chose not to offer any testimony whatsoever. And the only additional witnesses at the trial on remand were those offered by the petitioner.

The district court made some very specific findings. These are all contained in the Joint Appendix and the various opinions. They found, as a matter of fact, that the D&E procedure is the safest second trimester abortion technique currently available. They found that second trimester D&E procedures are currently performed in only one hospital in the entire state of Missouri, that being in Kansas City, Missouri which is on the western border.

QUESTION: Mr. Susman, where are the findings on remand?

MR. SUSMAN: These are all in the Joint Appendix on pages 12 through 14 -- actually, 12 through 14, and then the same findings by the appellate court, or additional findings, are found on the Cross-Petition at A61 and A116.

The district court went on to find that in the

last final year, when only hospitals could perform abortions in Missouri -- that being 1979 -- that 540 second trimester D&E procedures were performed. The district court ruled on this issue in January of 1980 and so it's fair to compare the year of 1980, if you want to count it as a whole year, in which procedures were available both in the hospital and both outpatient.

The court found, as opposed to the 540 performed in a hospital when it could only be performed in a hospital in 1979, that in 1980 there were some 1400 second trimester procedures, 700 of which were performed in hospitals and 690 in outpatient facilities.

And so what is clear is when the outpatient facilities began to do them, they did not draw from the patient population of the hospitals who had been doing them previously. What they did, in fact, was merely help to fill a certain portion of the unmet need for second trimester procedures. They were not taking patients from the hospitals.

In fact, as Dr. Henshaw testified, who is a national expert on the issue of these types of statistics, that Missouri in 1979, again with only hospitals to perform these procedures, was only meeting 13 percent of the unmet need for second trimester procedures. And in 1980, when both hospitals and

outpatient facilities could perform them, the unmet need went from 13 percent of the met need up to 34 percent; still leaving some 66 percent of the second trimester need unmet in Missouri.

The court also found that there was substantial interference. It certainly was much more expensive, that they were not readily available by reason of one hospital in the entire state being on the western border, and in Missouri the other major metropolitan area, St. Louis, is on the eastern border of the state.

The appellate court found additional findings to the district court. They found, as was argued, that when Roe was decided in 1973, a D&E procedure was virtually unknown in the United States. They also found it was the safest procedure known, and they also made the specific finding that non-hospital second trimester D&E procedures are no more dangerous to maternal health than hospitalized procedure.

QUESTION: Is that true throughout the period?

MR. SUSMAN: It was true throughout the period that they were presently being performed in Missouri and by the physicians who were the experts testifying.

QUESTION: No, I mean is it true about -- the relative safety -- is it true throughout the second

trimester?

MR. SUSMAN: I would suggest that it is probably not true. But I think in conjunction with that we have to realize of what percentage of procedures we are talking about that are done beyond 18 weeks. 98 percent of all abortion procedures are conducted prior to the 18th week.

QUESTION: Well, if the evidence showed that this relative safety was true only up to the 16th week, for example, the statute arguably might be unconstitutional, to that extent. But why on its face?

MR. SUSMAN: Because first of all, all second trimester procedures were not really an issue in this case. The evidence only went to the method of D&E, and the other methods, the installation methods, whether they be saline, prostaglandin, urea or a combination of many other types of chemicals were not in issue in this case.

QUESTION: No, but the question is whether hospitalization is necessary.

MR. SUSMAN: Correct. As to whether --

QUESTION: Throughout the period, throughout the second trimester.

MR. SUSMAN: Then if it does not eliminate that period of time when it is not safer, then it has

not been narrowly tailored.

QUESTION: But why is it invalid on its face? This isn't a First Amendment case.

MR. SUSMAN: I'm not sure but this requirement is, in fact, invalid on its face. I think one has to have factual evidence on this particular type of requirement. I think the requirement itself on its face, in fact, is very beguiling and very deceptive. And only when one hears the evidence and listens to the physicians who perform the procedures, and looks at the statistics, then can one look past the beguiling nature of the statute on its face and see that, in fact, it does not bear out that, in fact, it is not safer.

QUESTION: I'm talking about the evidence that was submitted.

MR. SUSMAN: Yes.

QUESTION: The evidence did not suggest that aborting throughout the second trimester was as safe as childbirth.

MR. SUSMAN: No, there was no evidence discussing the higher range of the second trimester.

QUESTION: Well, what did it discuss?

MR. SUSMAN: Theoretically, it would even be past --

QUESTION: What did it discuss?

MR. SUSMAN: It discussed -- the experts who testified, and the statistics, mainly went through 18 weeks.

QUESTION: And -- well, what was the period during which the testimony indicated that aborting was as safe as childbirth? For what limits?

MR. SUSMAN: The district court found through the 18th week. It makes a reference in a footnote, to the 18th week of pregnancy.

QUESTION: And tell me again who was the district judge?

MR. SUSMAN: Judge Elmo Hunter, now senior status.

QUESTION: Mr. Susman, does Missouri license outpatient clinics at all?

MR. SUSMAN: No, Your Honor, although that's not a complete answer. We have an ambulatory surgical licensing law that licenses certain ambulatory surgical centers as opposed to hospitals. Those would be the only two classes of institutions licensed by the state; hospitals and ambulatory surgical centers. But the definition of what is an ambulatory surgical licensing center and, therefore, deciding whether or not you have to apply, does not cover abortion facilities, and there is not a single abortion facility in the state that is

licensed as an outpatient surgical center.

QUESTION: Are abortion procedures specifically barred by the regulations?

MR. SUSMAN: No, Your Honor. But it has to do with certain portions of the definition of what is such a facility, and abortion facilities do not fit into the defintion.

For example, two of the parts that I recall offhand, one says that you must have, to be in the definition, a permanent staff of physicians. Many abortion facilities --

QUESTION: More than one or just a permanent -- ?

MR. SUSMAN: It just says a permanent staff. And secondly, it also as part of the essential definition says that there must be a physician present on the site at any time that a patient is present.

QUESTION: Without regard to the surgical procedure?

MR. SUSMAN: Abso -- well, that's what the definition says, yes, Your Honor.

QUESTION: In any event, the clinics you represent were not licensed --

MR. SUSMAN: Both of these clinics are not-for-profit agencies, tax exempt under the IRS.

QUESTION: And your position is that they would not have been licensed if they had applied for a license.

MR. SUSMAN: I don't know whether they would have been licensed, but the statute clearly does not require it, no one has ever suggested it. In fact, that's not true that it hasn't been suggested. Letters have been written to the state by other people suggesting that these places have to have licenses, and the state has never taken any action in that regard, and the clinics do not feel they have to comply.

I would save some time for rebuttal, but I would point out that the Clinic for Reproductive Health Services, which is one of the plaintiffs here, is licensed, in fact, by the city of St. Louis. Not a state license, but the city of St. Louis issued it a license.

QUESTION: In the prior case there was testimony referred to by the president or past president of the American College of Obstetricians --

MR. SUSMAN: Dr. Schmidt.

QUESTION: -- that all second trimester procedures should be in a hospital. Was there any such testimony in this case?

MR. SUSMAN: Well, curiously enough, that same

Dr. Schmidt testified in this case. Now, of course, his testimony came prior to the change in the ACOG standard. But in our case, he says -- and this is found in the Joint Appendix, page 154 -- on cross examination he admits that doing these procedures outpatient is acceptable if it works all right.

You know, the proof is in the pudding. He might not be comfortable doing them, and he doesn't do abortions, If people are doing them and the bottom line is that they work all right, then it's acceptable. And he was then asked the follow-up question of whether he knew of any untoward effects and wasn't it working all right, and he said yes, it was.

I'll reserve the remaining time.

CHIEF JUSTICE BURGER: Mr. Ashcroft, Mr. Attorney General?

ORAL ARGUMENT OF JOHN ASHCROFT, ESQ.

ON BEHALF OF JOHN ASHCROFT, ATTORNEY GENERAL OF MISSOURI

MR. ASHCROFT: Mr. Chief Justice, and may it please the Court:

The balancing of rights reached by this Court in Roe versus Wade included an explicit recognition of compelling state interests which justify, if not require, state regulation of abortions to protect the individual health and safety of citizens. No state can

properly ignore this responsibility; indeed, the state of Missouri has not.

In the spring of 1979 the elected representatives of the people, together with the people themselves, wrestled with the concept of the proper role for the state of Missouri in regulation abortions, consistent with -- consistently with constitutional imperatives.

After hearings and testimony in both houses of the legislature and debate in both chambers of the legislature, along with substantial public discussion, the state of Missouri forged a comprehensive program meeting its responsibility to safeguard the wellbeing of our citizens, and a program which would be subject to change by the legislature in the light of adjusting factors that they felt were necessary.

Four crucial elements of the state's comprehensive program in relation to that abortion regulation framework are before the Court today; the second trimester hospitalization requirement, the second doctor requirement for abortions of viable, unborn children, the consent provision for minors, a pathology requirement, and these are to be considered in this proceeding.

The proceedings before the trial court and the

Circuit Court of Appeals were basically a legislative process assessing the wisdom of the Missouri enactments. It's clear, inasmuch as the enactments have never been in place, they were enjoined, all of the sections that were challenged were enjoined within 24 hours after they went into effect.

The trial objections made by the state relating to standing and ripeness were brushed aside as the district court plunged headlong into its assessment of expert witnesses. So this is a case where we are assessing an uninterpreted, unenforced statute, but a statute which is alleged to be one which is infirm and unconstitutional.

As a result of both the trial and appeal of this case centered on policy-related testimony regarding what can best be characterized as a significant debate within the medical profession. This effort really replicated what a legislative process should be. The legislature had drawn conclusions about that debate when it enacted the statutes earlier.

Of the four abortion matters raised in this Court, the Eighth Circuit Court of Appeals substantially agreed with the legislative judgment of the Missouri legislature on the consent issue relating to minors, and overruled the Missouri legislature on the other issues,

the issues of a second trimester hospitalization, a second doctor in the event of the abortion of a viable, unborn child, and a requirement for pathology.

The requirement for hospitalization for abortion procedures conducted after the 12th week of pregnancy was ruled unconstitutional below. And I believe that the district court and the Eighth Circuit Court of appeals erred in so doing.

The basic premise I believe that we can understand from Roe versus Wade is a premise that the state has an interest in guarding and protecting the health of individuals; and secondly, that the state can regulate to protect that interest. I think given that interest and the ability of the state to regulate, most states would accept that responsibility and so do.

The problem that we see is that regulation is impossible if this Court is to retreat from the bright line drawn in Roe where it divided the time of a pregnancy into areas when the state could exercise its judgment.

If, indeed, the courts are to pursue the latest statement of the medical society or even a vocal minority of individuals in the medical community, to change what is allowable in terms of state statutes, I think we'll find states in an impossible position; not

only impossible in terms of ever making judgments which can withstand tests, but we'll be finding ourselves here over and over again relitigating issues over and over.

Roe clearly set forth some guidelines, and I urge this Court not to retreat from its indication that there are certain specific times in which the state should be able to rationally regulate in relation to the compelling interests of the state.

I believe that there is clear evidence in the record of this case that the state can rationally conclude that the facilities available in hospitals are reasonably related to the objective of the preservation and protection of maternal health.

I believe that the record in this case supports the concept that the state can rationally conclude that a second doctor at the abortion of a viable, unborn child is rationally related to the state's separate and distinct interest in the potential life of that child.

These are concepts which are --

QUESTION: May I interrupt with a question before you go on to the second doctor issue? On the hospital requirement in the second trimester, do you challenge any of the district court's finding on the remand as clearly erroneous?

MR. ASHCROFT: We believe that there is a great deal of testimony that indicates that medical debate is going on here as to whether or not it is as safe or safer to require these in the hospital.

QUESTION: I understand. Do you challenge any of the district court's findings? He found, for example, that there is an impairment in the number of second trimester abortions that are performed in that period by reason of the hospital requirement. Should we take that as an established fact?

MR. ASHCROFT: The finding is an established fact. I don't think that we have conclusive evidence to that regard in the record.

QUESTION: Are you urging that we set aside the finding as clearly erroneous?

MR. ASHCROFT: No.

QUESTION: Should we decide the case on the assumption that the finding is correct?

MR. ASHCROFT: Even if you find that the finding is correct, I am urging this Court to --

QUESTION: If that's true, is it not established that this requirement does reduce the number of abortions that are performed during this period? So at least, it establishes some burden on the choice; now, whether it's constitutional is still a separate

inquiry. But must we not assume that?

MR. ASHCROFT: The state of Missouri is willing to concede that the choice for an abortion in a hospital is more difficult than the choice in a clinic facility.

QUESTION: So in consequence of the statute, a fewer number of abortions in this period are performed, at least performed lawfully. Now, is there --

MR. ASHCROFT: The state is unwilling to concede that. While it may be more difficult to reach the decision, the state isn't in a position to say that that decision still will not be reached. It may not provide a threshold which is so significant as to impair anyone's real willingness to reach the decision.

QUESTION: What I'm wondering is what happens to these women who want abortions during this period and are not going to hospitals by reason of the statute; are they safer or less safe by reason of the requirement?

MR. ASHCROFT: Are they safer by not going to the hospital or less safe than --

QUESTION: I mean, are they going someplace else that may be an unlawful choice, or are they giving up their opportunity that they want? What are they doing?

MR. ASHCROFT: There is no evidence in the

record of this case to indicate that the women are going to unlawful sources for abortion.

QUESTION: General Ashcroft, Justice Stevens asked you about a finding of fact the district court made that the effect of the statute -- and I'm simply repeating what I thought either he said or you said -- that the effect of the statute is to cut down the number of abortions actually performed. Is that what the district court found?

MR. ASHCROFT: The district court --

QUESTION: Well, let me get to my basic question I want to put to you. I was under the impression this statute had been enjoined from taking effect, and I'm curious to know if the district court did find that this was the effect of the statute, how it could have been other than a very hypothetical finding in view of the fact that the statute had never been in effect.

MR. ASHCROFT: I think the district court looked to a time in Missouri when hospitalization was required. That was preceding this statute. We had another statute passed earlier which required hospitalization. Now, that was not challenged at the time it was in effect, and it was when this statute would go into effect that the challenge took place, and

the suspension of -- and the availability of abortions in clinics --

QUESTION: So his finding related to a time period during which this statute wasn't in effect.

MR. ASHCROFT: It was based upon information from a time period when this statute was not in effect, and that's why the state is reluctant to agree with the conclusion in that matter.

QUESTION: Wouldn't it be possible that one explanation might be that they went elsewhere into another jurisdiction?

MR. ASHCROFT: It is possible. Both of the major metropolitan areas in Missouri are located on the border of the state; either in St. Louis or Kansas City, and there is quite an exchange of clientele.

QUESTION: Where do people go from St. Louis? East St. Louis?

MR. ASHCROFT: They might go into Illinois somewhere. In Kansas City, they might --

QUESTION: East St. Louis. You just cross the bridge.

MR. ASHCROFT: Yes, sir. Yes, Your Honor.

QUESTION: Are you suggesting that the statistic is not too reliable?

MR. ASHCROFT: I am suggesting that it's not

an inevitable statistic. I can understand that the court may have --

QUESTION: Well, the court found that -- and the court of appeals agreed with it -- said it was supported by the evidence.

MR. ASHCROFT: That's correct. I believe that there is some evidence to support it. I disagree that it's a conclusion that you have to reach. I believe --

QUESTION: Normally, on your statement of the standard, we would normally then accept that finding. Is that not so?

QUESTION: Well, you would say that even if we judge the case on that basis, you should win. That's your submission. Even if the number of abortions weren't what they would have been without the hospitalization requirement. You say that you're entitled to impose the --

MR. ASHCROFT: Yes. My view is that there's a substantial compelling interest that exists already in the state for maternal health. And we have come -- the legislature has concluded that that interest is furthered and is reasonably related to the hospitalization requirement; that the imposition of that hospitalization requirement is justified on that basis.

QUESTION: Is there any evidence in the record

as to the number of illnesses or such, or complications that were caused by reason of second trimester abortions being performed other than in a hospital?

MR. ASHCROFT: There is some evidence about complications and deaths outside of hospitals, but basically, this evidence which was in the case took place prior to the suspension of the law, during a period of time when second trimester abortions were required to be in hospitals in the state of Missouri.

I think Dr. Willard Cates of the Center for Disease Control in Atlanta testified that of the 18 deaths that he had examined, 11 of them had been clinic settings and 7 of them from hospital settings, relating to those deaths in those abortion cases.

QUESTION: Mr. Attorney General, you heard some questions in the previous case about legislative history and whatnot. Is there any legislative history underlying this statute?

MR. ASHCROFT: Missouri does not record -- other than the fact that hearings may have been held and the like -- that there is --

QUESTION: They keep no record of hearings?

MR. ASHCROFT: That's correct. There is, to my knowledge, no verbatim account of what was said or --

QUESTION: Are there any legislative findings

that precede this statute?

MR. ASHCROFT: Not to my knowledge.

It is argued in this case that there is a change in technology that has resulted in the concept of hospitalization for second trimester abortions being outdated. I think it's important to look at the record in the case and to analyze the testimony presented. There was an overwhelming consensus among the medical experts at trial that the vast majority of abortions in post 12-week pregnancies belonged in the hospital.

Some of the record is confusing because the Center for Disease Control statistics reflect what are known as weeks of gestation rather than weeks of pregnancy. Weeks of gestation are counted from the last menstrual period, and according to Dr. Cates, who is the Chief of Abortion Surveillance there, you have to subtract two weeks from any of their statistics in order to find out what the real impact is on weeks of pregnancy.

The only disputed area really is early trimester D&E abortions. There is a dispute in the medical community and a debate which indicates that up to 15, 16, some say up to 18 weeks of gestational age, those can be done safely in a clinic setting.

QUESTION: Well, the district court found 18

weeks. Didn't it?

MR. ASHCROFT: Yes, sir.

QUESTION: And the court of appeals affirmed that.

MR. ASHCROFT: Neither the district court nor the court of appeals acknowledged to any willingness to differentiate between the weeks of gestation statistics, which were supplied over and over again, and the Missouri statute's requirement for weeks of pregnancy.

Now, Dr. Cates of the Center for Disease Control, who was the most experienced of the witnesses testifying in behalf of the plaintiffs, indicated that at the end of the 15th week, which would be the end of the 13 week in pregnancy terms rather than gestational terms, that hospitalization would be appropriate.

I think what we're talking about in those kinds of circumstances when you put him in conjunction with the expert witnesses of the state, is an overlap perhaps of about seven days.

It's important also to note some other things. Of the 45 percent of the death cases that Dr. Cates investigated, indicated that the physican had made a mistake of at least four weeks in judging the fetal age before performing the abortion. And as a matter of fact, the Center for Disease Control statistics are all

arrived at after the fact of the abortion through post-abortion techniques.

I don't think it's unreasonable at all, if we're talking about an aperture of seven to maybe 14 days early in the second trimester, to give the state the right to demand a margin of safety inasmuch as doctors who are making the evaluations about whether or not they're to conduct the abortion in a hospital or not are frequently involved in having difficulty estimating the fetal age in the pre-abortion context.

After the abortion, it's clear that the fetal age is easier to estimate, but that certainly doesn't leave us with much leeway or much protection.

I think the point that I would like to make is that there is a medical debate about a small fragment of second trimester abortions. That medical debate relates to early D&E procedures. Some would say that those go to the end of the 15th week of gestation or the end of the 13th week of pregnancy, as Dr. Willard Cates does, or some would carry it as far as the district court found.

In the situation where there is a medical debate that rages, and there are significant medical experts and credible individuals who will testify that they all belong in a hospital in the second trimester,

and there is a debate relating to just a small aperture and just a narrow portion of procedures, I think the state ought to have the ability to opt as a policy to reqire second trimester hospitalization.

And I do not believe the technology has advanced to such a degree in relation to this matter as to take us away from the ability of the state in scoring this debate to err on the side of safety, if you will, and require its citizens who choose to have abortions in the second trimester to have them in a hospital setting.

QUESTION: Mr. Ashcroft, one other question. Are there any other areas of medical debate with which you're familiar where the state legislature in Missouri has opted on one side or the other of the debate, and said they must do it the safer way? Or is this just specifically abortion-related legislation.

MR. ASHCROFT: Well certainly, this enactment is abortion related. But --

QUESTION: But is there any other counterpart in any other field of medicine where the legislature has said, for example, in heart surgery or something else, you may perform one technique and not another?

MR. ASHCROFT: I don't know in reference to a specific technique. Now we have, of course, a lot of statutes relating to health care, the hospitals, what

standards they have to meet and those kinds of things which --

QUESTION: Do you have any others which say you must do it in a hospital?

MR. ASHCROFT: I don't have an awareness of any other statute requiring that a particular surgical procedure must be in a hospital.

QUESTION: You had the example in the Danforth case of amniocentesis as being proscribed.

MR. ASHCROFT: That's correct.

QUESTION: There's an example where your legislature undertook a medical determination.

MR. ASHCROFT: That's correct, and it was not allowed and declared unconstitutional by this Court.

QUESTION: Could the legislature of a state constitutionally require that all childbirths take place in a hospital, absent an emergency?

MR. ASHCROFT: I believe that it could.

A second --

QUESTION: Would be a little hard to enforce, I think.

(Laughter.)

QUESTION: And who would pay for it?

QUESTION: The reservation of "absent emergency" would take care of that problem, wouldn't it?

MR. ASHCROFT: That would be my understanding.

QUESTION: Would lack of money be an emergency?

MR. ASHCROFT: No, I don't think it would, and I don't think the lack of money would really prevent that --

QUESTION: So that a poor woman who couldn't afford a hospital had a baby, she'd commit a crime. Is that right?

MR. ASHCROFT: We've made provision in Missouri for individuals who seek -- are having children who don't have the resources to afford the hospital setting to be provided for in the hospital.

The second point that I'd like to make is to address the issue of the need for a second doctor in the operating room, or in attendance I would say more specifically at the time an abortion is performed in a case where there is a viable, unborn child. This is really related to the third trimester of a proceeding. Viability, according to the medical experts who testified at trial, only occurs in the third trimester. The earliest solid testimony in the record indicates that 24 weeks; the consensus I believe would place viability at 26 weeks.

Roe v. Wade indicated that there are, indeed, separate and distinct interests in the state in the

potential of life, and that interest can be protected reasonably.

It's my view that the state of Missouri has harmonized in a significant way the interests of the mother and the interests of the unborn potential life in its statute. And I think it's done so quite well.

I should add that in the third trimester, the law, as I understand it, is that there is no right to an abortion except when the woman's health is endangered, and therefore, we are not talking about the same kind of right relating to the woman in the third trimester that we are in the second and first trimester.

We have two sets of rights then that are to be guarded by the state and two interests that are present. The maternal health interests, and the interests in the state in the potential life. There is significant testimony in the record, particularly the testimony of Dr. Elizabeth James who was the Director of Neonatal Intensive Care, a unit at the University of Missouri Medical Center, that indicates that children who leave the environment of the mother at 26 weeks now have a 50 percent chance of survival. At 28 weeks, the record in the medical center is a 75 percent chance of survival.

She provided testimony indicating that she

thought it was necessary that a second individual be in attendance at the time, and that that second individual could be crucial in a couple of ways. First of all, the most important thing for a premature child, a newborn, at that stage of development is that they begin to respirate, and the ability to get respiration going is a job which requires the attendance of a physician.

Secondly, circulation, and she indicated that heart massage may be necessary. She pointed to the fact that this is crucial that it be done expeditiously because a failure to respirate can result in neurological damage, so that while a child might survive, it might not survive with the same quality that it would otherwise have.

Given the fact that Roe v. Wade talked about the potential for meaningful life existing, I think when we're talking about that effort to make sure that the respiration is there and we avoid neurological damage is part of it, I believe that we are guarding that adequately.

The Eighth Circuit struck this down saying that there are occasions when doctors might perform an abortion in the period of viability using the D&E, dilatation and evacuation, technique. That technique, concededly, if it's carried through, will destroy the

fetus. It dismembers the fetus, usually especially as in larger fetuses which you would expect at late times in development, as it withdraws the fetus from the environment of the mother, and I think it's clear that that fetus is not going to survive.

It was thought then that this statute be overbroad because we required it in all abortions pursuant to the determination by the physician of viability. I don't believe that it is so overbroad and I don't believe it is infirm. And the court in Beal versus Doe indicated that it's not until the time of viability that the state has the right to unduly burden the decision. But it's pretty clear that in that third trimester there are such strong competing interests that the state indeed has a right to place a heavy burden.

Secondly, I don't know that in the hospital context, that a second physician is all that heavy a burden which is imposed in this circumstance. Thirdly, I think it's important to note that sometimes a decision will be made to use the D&E procedure, and the D&E procedure would not be carried out as a result of complications encountered in the procedure itself. At such time, another procedure might be invoked to complete the surgery, and the potential life should be guarded.

Another point that I think ought to be made in relation to the alleged over-breadth of the statute in this context is that when the doctor who is choosing what type of abortion ought to be made is selecting between procedures, his awareness that a second doctor will be involved in the operation I think is a therapeutic influence.

D&E procedures are generally faster and easier to conduct, and the one doctor in this case that testified that he used D&E procedures after viability is the same doctor who testified that he believed that the mother is always entitled to a dead fetus. And that he would do, and generally did, nothing to try and protect the life of any newborn that was a result of an abortion; that it wasn't his responsibility and he had no interest in that.

I don't believe that that's a position which the state of Missouri can accept. We believe that that potential for life is valid, that it's real, that it's important and that we ought to protect it. And as a result, I do not believe that the requirement of a second doctor after viability is an overly-broad requirement. It is a safeguard. It is perhaps burdensome, but it is well justified as a result of compelling interest of the state; that compelling

interest of the state being in relation to that potential life of the unborn.

QUESTION: Does Missouri require the presence of a second doctor with a premature normal birth?

MR. ASHCROFT: The Missouri law does not. There is testimony in the record that indicates that it is a surgical practice for such to be the case, and I believe that it's a good practice and I think it's appropriate for the legislature to recognize that and to require it in these circumstances.

QUESTION: You would recommend that the legislature do this?

MR. ASHCROFT: Pardon?

QUESTION: You would recommend that the legislature pass a statute requiring the presence of a second physician, second surgeon, second OB, whatever you want, in the delivery room for a premature, normal birth.

MR. ASHCROFT: Yes.

QUESTION: Your office would so recommend.

MR. ASHCROFT: Yes, I would.

QUESTION: Thank you.

MR. ASHCROFT: There are two other issues which I want to address to the Court and call to your attention. One has already been addressed by Mr. Susman

in this matter. That issue is related to the consent provision of the statute.

These consent provisions, in my view, are as close to a direct response to Bellotti 2 as you could possibly get. It's almost -- well, it's just very interesting that the statute was passed three weeks before the decision, but it's very close. If the court has a right to provide the consent absent parental consent, the court is to do that if the plaintiff is not mature enough to make a decision and only if the plaintiff is not emancipated.

The court is to first decide whether or not there's adequate maturity to reach the decision on the part of the minor. The court secondly is to make a determination as to whether or not the minor is, indeed, emancipated. And thirdly, the court would provide for consent and is limited to good cause in providing that consent -- and good cause are the terms used in the statute -- requiring legal grounds to be used for saying if in the event the court determines the statute not to be in the best interest of the minor, those have to be good cause grounds for denying it.

The statute says that the court shall consider the emotional development of the minor, the nature of the abortion, the possible consequences of the abortion,

the alternatives to abortion, the intellectual capability and understanding of the minor. We are asking judges, who are sworn to uphold the Constitution of the United States and who administer the law fairly. There is an appeal procedure required in statute, and the Supreme Court is directed in the statute, once it's operative, to develop an expeditious appeal in the event that injustice is done there.

I believe that the state has met its burden in this case, that it is clearly covered by the Bellotti 2 decision, and as a matter of fact, this consent provision which was upheld by the Eighth Circuit should be affirmed by this Court.

QUESTION: Mr. Attorney General, did I understand counsel for petitioner to say that the Supreme Court of Missouri had not construed the consent provisions and, therefore, we shouldn't address it here?

MR. ASHCROFT: I think that's what the petitioner said. In his Reply Brief. That was the first time we heard about abstention.

QUESTION: What is your answer to that?

MR. ASHCROFT: My answer is that the state could accept abstention --

QUESTION: The construction by C.A. Eighth? We could accept the construction by the Court of Appeals

for the Eighth Circuit?

MR. ASHCROFT: Yes, we could easily do that. We argued abstention before the Eighth Circuit and before the district court. And this is the first time we've heard about abstention in this matter.

QUESTION: Well, Mr. Attorney General, does Missouri have a certification procedure?

MR. ASHCROFT: No, we don't.

QUESTION: Then how could we get it for the state courts?

MR. ASHCROFT: I would just assume that the state courts would have to accommodate this Court by a ruling.

QUESTION: Otherwise, we'd have to rely on the Eighth Circuit's interpretation of the state law?

MR. ASHCROFT: Indeed, that is what I urge this Court to do.

QUESTION: Was there any Missouri judge on the Eighth Circuit panel?

MR. ASHCROFT: I don't remember, sir.

QUESTION: The answer is no.

CHIEF JUSTICE BURGER: Mr. Susman?

ORAL ARGUMENT OF FRANK SUSMAN, ESQ.

ON BEHALF OF PLANNED PARENTHOOD ASSOCIATION - Rebuttal

MR. SUSMAN: First of all, Justice Rehnquist,

if I might perhaps clear up some confusion. In the Danforth statute, which was adopted in 1974 following Roe versus Wade, there was a specific provision identical to the one under challenge here that said all abortions after 12 weeks must be in a hospital. So they were prohibited by law from '74 up to '79 when that same statute was put into a different chapter and just re-enacted.

So you had a clear period of from 1973 to 1980 when all second trimester procedures statutorily had to be done in a hospital.

QUESTION: Do you know why the 70 provision respecting hospitals from 1974 to 79 in effect then was not challenged, whereas this one, which you say is identical, was?

MR. SUSMAN: I do.

QUESTION: Okay. Will you tell me?

(Laughter.)

MR. SUSMAN: Be more than happy to. Many states adopted this kind of provision immediately following 73 as the first type of legislative response to Roe versus Wade. There were no challenges anywhere to my knowledge against this type of provision in those early years. It was only after medical advances and times changed. And the changes that occurred were the

following.

One, D&E, which was virtually unknown in this country in 1973, became the most prevalent second trimester procedure in the United States over a period of years. Secondly, the second underpinning of this Court in Roe versus Wade in the dicta referring to hospitals, was a reference to the American Public Health Association's policy of saying do them in a hospital. The American Public Health Association changed their policy. Planned Parenthood Federation changed their policy. The American College of OB-GYNs changed their policy.

And for the first time, people thought, when they were beginning to do these things and they were being done successfully in those states which had not enacted this type of restriction, that those states that had it should be challenged.

QUESTION: They thought that our constitutional doctrine should change because views of organizations like the American Public Health Association changed?

MR. SUSMAN: No. But in fact, this Court refers in a footnote to relying upon the APHA's standard of saying that it should be done in a hospital. And that standard changed.

In reference to the second doctor requirement, I think we must note that the state was witness for the petitioner, it's true, but it was the state's statistician who, by law, keeps track of all the abortion procedures done in Missouri, that the only form of second trimester abortion in Missouri is the method of D&E. And every witness, including those for the respondents, agreed unanimously and without exception that there is no chance of survival of a fetus when one performs a D&E procedure. And therefore, it is totally irrational to require a second physician to be in attendance when no one indicated that there was any possibility of survival.

There are no other types of procedures done in Missouri. At least, none had been done at the time of trial.

QUESTION: That doesn't answer his argument that the second doctor provides an additional protection against using that procedure when it may not be the appropriate procedure.

MR. SUSMAN: That second physician, while they might have some idle conversation, has no direct say in that decision. They are not the surgeon. And in fact, it is standard policy, and there was evidence at the trial to this effect, that when you have a second

physician present, such as at a large university medical setting and you have a premature delivery, that the second patient, the child, once it is born, does not become the patient of the neonatologist whom you have standing by until such time as that delivering physician, the obstetrician, chooses to turn that child over to the neonatologist. It is his decision when that turning over of that second patient who has come into existence occurs. He must turn the patient over.

Merely being there accomplishes nothing, particularly when in fact, no procedure is being done in Missouri that would permit such a survival.

We think the analogy to the prohibition in the Danforth case of the saline procedure is identical. The court in that case held -- and all of this language is totally analogous here. You said in 1976 the state would prohibit the use of a method which the record shows is the most commonly used nationally by physicians after the first trimester, and which is safer with respect to maternal mortality than even continuation of the pregnancy until normal childbirth. And the latest study, which appears in the July issue of the Journal of the American Medical Association by Dr. Cates indicates that abortion is now as safe as childbirth up to the 16th week. And moreover, you went on to say as a

practical matter, it forces a woman and her physician to terminate a pregnancy by methods more dangerous to her health than the method outlawed. Everything you said then in Danforth is equally applicable to the provision under consideration here.

The second doctor requirement I think I have discussed. I would only refer this Court back to its language of Collati in 1979, in which you said that Roe stressed, repeatedly the central role of the physician, both in consulting with the woman about whether or not to have an abortion, and in determining how any abortion was to be carried out.

This standard over the past 10 years has proven itself, I suggest, in exemplary fashion. The medical community has distinguished itself by providing abortion services in a safe and disciplined manner. I would disagree with my brother here that there is some great medical debate being waged either in the literature or in the public forums of this country over whether or not it is safe to do abortions outpatient. There is nothing in the literature to substantiate any such debate.

Certainly, they had medical experts at the trial; medical experts who all were morally opposed to abortion, who had never performed an abortion. Now,

we've already discussed with Dr. Schmidt, a past president of ACOG testified in our trial who also testified in Akron. And the only medical expert they had who had experience doing abortions and called by them, Dr. Nathanson, Dr. Nathanson says it's just as safe out of the hospital as it is in. And he is the only expert they had who had ever done abortions.

Abortion today is the most widely-publicized and scrutinized medical procedure because of all the legal implications, but the delivery of abortion health care in this country has not been found wanting to any degree. Excessive legislation in this field can only produce the very untoward medical and health consequences that the respondents would suggest to you they're trying to prevent.

But instead, I suggest to you that the real purpose of all of these statutes and of all of these sections is to thwart the free exercise of the right. It is the very essence of medicine that the physician be able to adjust the course and consequences of treatment to the individual patient. Codifying medicine is the very antithesis of the medical arts.

Women have more rights in the third trimester after viability, for reasons of life or health, than they have under Section 188.028 for minors when even if

you're dying, you still have to go to court or get a parent, and there's no exceptions, or you have in hospital. There is no emergency exception whatsoever in the in-hospital requirement, either. No exception.

You're better off being in the third trimester; at least then you have some hope.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen, the case is submitted.

(Whereupon, at 2:06 p.m, the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., ET AL, Petitioners v. JOHN ASHCROFT, ATTORNEY GENERAL OF MISSOURI ET AL.; # 81-1255 and JOHN ASHCROFT, ATTORNEY GENERAL OF MISSOURI ET AL., Petitioners v. PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI. ET AL # 81-1623

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY Pine Hammond

(REPORTER)