OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-746 & 81-1172

TITLE CITY OF AKRON, Petitioner v. AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL.; and AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL., Petitioners v. CITY OF AKRON

PLACE Washington, D. C.

DATE November 30, 1982

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IN THE SUPREME COURT OF THE UNITED STATES

CITY OF AKRON, Petitioner,	:	
v.	:	No. 81-746
AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL.; and AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL., Petitioners,	:	
v.	:	No. 81-1172
CITY OF AKRON	:	

Washington, D.C.

Tuesday, November 30, 1982

The above-entitled matters came on for oral argument before the Supreme Court of the United States at 11:05 o'clock a.m.

APPEARANCES:

ALAN G. SEGEDY, ESQ., Akron, Ohio; on behalf of City of Akron.

REX E. LEE, ESQ., Solicitor General of the United States, Department of Justice, Washington, D.C.; on behalf of the City of Akron.

STEPHAN LANDSMAN, ESQ., Cleveland, Ohio; on behalf of Akron Center for Reproductive Health.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in City of Akron against Akron Center for Reproductive Health.

Mr. Segedy, I think you may proceed when you are ready.

ORAL ARGUMENT OF ALAN G. SEGEDY, ESQ.,

ON BEHALF OF CITY OF AKRON

MR. SEGEDY: Mr. Chief Justice, and may it please the Court, the principal issues presented in this case are whether the state may reasonably regulate in the area of abortion in a manner designed to ensure an informed decision by a pregnant woman in a situation where there in fact is no physician-patient relationship; likewise, whether the state may require parental consent or judicial consent as a prerequisite to an abortion to be performed upon an immature minor; and finally, exactly what is the standard of review that should be applied in the testing of abortion-related legislation.

The Akron ordinance was passed on February 28, 1978, amongst considerable controversy, but contrary to the characterization by the cross-petitioners that this was a drastic departure from normal legislative procedure, this ordinance and the process whereby it was

enacted is probably one of the finest examples of the legislative process on the local level.

There were at least four public hearings on this ordinance, including an entire day spent with expert medical testimony with doctors from all over the country, and likewise an entire day of legal testimony with respect to legal experts rendering their opinions as to the constitutionality of this ordinance.

I would point out to the Court that the ordinance has not been challenged by a pregnant woman, but has been challenged by three abortion clinics and a doctor who resides approximately 300 miles from the City of Akron.

This case represents a real lawsuit with real parties and real evidence and a trial that lasted for about two-and-a-half weeks, and I think when the Court reviews the record, it will be eminently clear that in the abortion situation in the City of Akron, there is no physician-patient relationship anywhere near what this Court envisioned in the case of Roe versus Wade.

When the Sixth Circuit tested this legislation it applied a two-tier test; first, to determine whether or not there was any legally significant impact or consequence on the abortion decision, and if there was, the court determined that there must be a compelling

state interest. The court then concluded that if the regulation impacted on the first trimester of pregnancy, by its interpretation of Roe versus Wade, the state necessarily did not have a compelling state interest.

QUESTION: When you suggested that no patient was challenging the statute, did you mean to suggest that only a patient could challenge the statute?

MR. SEGEDY: No, Your Honor. I just point that out in reference to the considerations with respect to the parental consent provisions and with respect to minors challenging the statute with respect to parental consent. Clearly Roe versus Wade and subsequent cases tell us that there can be standing by jus tertii on the part of the physician. The City of Akron recognizes that.

However, the city would submit that the proper standard of review that should be applied, and the standard which this Court has reiterated is whether or not the regulation is unduly burdensome on the woman's decision to have an abortion.

This Court stated in Roe versus Wade, and reiterated numerous times that that decision did not represent abortion on demand. The right that is contained which the Court recognized in Roe versus Wade was not simply the right to have an abortion, but the

right to make that choice either to have an abortion or to bear a child. The essential right is that freedom of choice.

The abortion clinics in this case, as the record shows, make certain assumptions with respect to this situation, the first of which is that abortion is always the best choice for the pregnant woman; secondly, that the abortion clinics' interests always align in essentially a one-to-one correspondence with the pregnant woman or the minor; and finally, that the interests of the state or the City of Akron in this case or the parents are somehow adverse to that of the pregnant woman or the pregnant minor.

This Court has recognized interest in maternal health, potential life, and maintaining medical standards. The City of Akron would submit there is also another important interest involved in this area which this Court has not had to face yet, because it has not come up in any particular fact situation, and that is, the city or the state has an interest in protecting the woman's own constitutional right of her freedom of choice as to whether or not to have an abortion or whether to carry her child, her unborn child to term.

The city would submit this is an important interest, in fact compelling, and exists throughout the

entire spectrum of the pregnancy.

The consideration of an abortion statute should not simply be a matter of determining that automatically there must be a compelling state interest. I think the courts below must look at a regulation and determine whether or not there is any impact on the abortion decision. That impact may be choice-enhancing, or that impact may burden -- be burdensome.

If in fact the impact is burdensome, the city would submit that there must be a determination of whether or not there is a substantial burden on the woman's right to choose. If there is a substantial burden, as in Roe versus Wade or Planned Parenthood versus Danforth with respect to the parental veto, then there must be a compelling state interest.

On the contrary, if the burden is only insubstantial, all the state need show is that there is a rational basis for the legislation. In this --

QUESTION: Counsel, is the city relying on all four of the alleged state interests that you described in this instance?

MR. SEGEDY: That's correct, Your Honor.

QUESTION: Okay. Thank you.

MR. SEGEDY: There is another aspect to

abortion --

QUESTION: Mr. Segedy --

MR. SEGEDY: Yes, Your Honor.

QUESTION: -- may I ask, the district court on the parental consent provision held it unconstitutional, did it not?

MR. SEGEDY: That's correct, Your Honor.

QUESTION: And who took it to the court of appeals? Not the city.

MR. SEGEDY: Your Honor, the -- in what was effectively a cooperative effort, the defendant intervenors raised the specific question within their briefs as to the parental consent provision. However, the City of Akron also argued that question at oral argument in the court of appeals.

QUESTION: Well, now, the intervenors didn't bring -- didn't come here.

MR. SEGEDY: Your Honor, the intervenors petitioned this Court also on that question, and we can only speculate whether this Court denied that petition because it was a duplication of the city's petition, and therefore, not being aware of any possible standing arguments, simply determined that --

QUESTION: But I am correct then that you litigated the issue in the district court and lost,

correct?

MR. SEGEDY: When you say "you," Your Honor, you mean --

QUESTION: The city.

MR. SEGEDY: -- the City of Akron?

QUESTION: That's true, isn't it?

MR. SEGEDY: That's correct.

QUESTION: And then the City of Akron did not formally appeal to the court of appeals in that event. It was the intervenors who did that. Is that correct?

MR. SEGEDY: Well, the City of Akron did also, Your Honor, in terms of raising it on oral argument.

QUESTION: Well, I -- but you didn't file a formal appeal from that aspect of --

MR. SEGEDY: Yes, Your Honor.

QUESTION: You appealed from some ruling.

MR. SEGEDY: There are numerous questions in the case, Your Honor.

QUESTION: Yes, I should say there are.

(General laughter.)

MR. SEGEDY: Even more than there are now.

QUESTION: Well, did you appeal from the judgment against you in the district court?

MR. SEGEDY: Yes, Your Honor.

Your Honors, the --

QUESTION: Did you appeal from the parental consent for minors ruling?

MR. SEGEDY: Yes, Your Honor.

QUESTION: Well, I take it you appeal from a judgment, and then you may assign errors or points to be relied on in the court of appeals.

MR. SEGEDY: The questions presented --

QUESTION: Yes, questions presented.

QUESTION: There might be two, or there might be seven or eight under that one judgment.

MR. SEGEDY: Correct, Your Honor.

I would point out to the Court, if the Court has concern about that, under the O'Bannon case, which deals with this question with respect to the raising of a question and the waiver, that the respondents in this case, Dr. Seguin and Mrs. Black, may raise those questions under Rule 21.4, I believe it is, and that is exactly the situation we have here, as in the O'Bannon case, where the dispute was between HEW and the Department of Welfare.

The City of Akron submits that the major thrust of this legislation is not burdensome on the choice of the pregnant woman, but is rather choice-enhancing. And the city would also submit that under the facts of this case, and it is very important

that the record be viewed very -- very carefully, that as the physician relationship, physician-patient relationship diminishes, the state's interest in protecting that relationship increases.

And what this record shows is that there is no physician-patient relationship. A primary example of that would be that the woman signs her informed consent form prior to the time that she ever sees a physician, and that is undisputed and clear in the record.

The Sixth Circuit struck down the informed consent provision on the basis of it impacting upon the first trimester of pregnancy. However, this Court has upheld informed consent in Planned Parenthood versus Danforth -- excuse me, in Planned Parenthood versus Danforth, in principle, by a general informed consent, and likewise in Franklin versus Fitzpatrick, by summary affirmance, and by implication in H.L. versus Matheson by way of a footnote approving a detailed informed consent provision.

Again, the city would submit that there is this compelling interest of the state in the choice of the woman, that is, her fundamental constitutional right, and the city may protect that choice by ensuring that there is a physician-patient relationship, as the Court envisioned in Roe versus Wade.

This provision creates no burden on the woman's decision, and it provides flexibility for the physician. We would point out to the Court in 1870.06(c), it is provided that the physician shall provide such other information as he deems is relevant to the woman's decision.

It is charged that the provision is one-sided, that is, the information goes toward possibly what might lead her not to decide to have an abortion, but the purpose for that is looking at what is the danger of risk of non-information, which way does that risk go, toward the physician underinforming toward abortion or toward going to term?

In 1870.05(b), the Court struck down the parental consent provision. As we pointed out to the Court already, there was no woman or no minor at all who challenged this provision, only the abortion clinics and Dr. Bliss.

QUESTION: Where did Dr. Bliss reside?

MR. SEGEDY: In Cincinnati, Ohio.

We would point out to the Court that this provision provides the judicial alternative that this Court referred to in Bellotti 2. We would point out to the Court also that this provision applies only to minors who are under 15 years of age.

QUESTION: May I ask, is it a fact that under Ohio law, the court that has jurisdiction is the juvenile court, and that also under your law the juvenile court would have to inform the parent in every case?

MR. SEGEDY: Your Honor, we would submit that that is not true. Under the supremacy clause, the juvenile courts of the City of Akron would recognize this Court's decisions with respect to parental notification and parental consent.

QUESTION: Does the statute on its face require the notice?

MR. SEGEDY: The rule, the juvenile rule provides for information or notice to be given to the parents.

QUESTION: To the parent, and you are saying that in light of decisions of this Court, that would be invalidated?

MR. SEGEDY: Your Honor, we would submit, first of all, that the juvenile court could disregard that provision as applied to a pregnant minor seeking an abortion. However, that would also raise the question of whether or not it is permissible for the city to somewhere draw a line and say that it is reasonable to assume that a minor is not mature enough to make the

abortion decision.

The City of Akron feels that 14, 13, 12, 11-year-old girls are simply not mature enough to make that decision.

QUESTION: But you do have the alternative of an independent decision-maker --

MR. SEGEDY: That's correct, Your Honor, through the juvenile court, and the purpose of the juvenile court under the Ohio statutes, in 2151.01, the very first statute, is to protect the minor.

QUESTION: But under Bellotti 2 and Matheson, certainly the view that at least four Justices expressed, notice to the parent required as a matter of law would present a difficulty for your case, would it not?

MR. SEGEDY: If that were the case, Your Honor --

QUESTION: Yes.

MR. SEGEDY: -- for minors under 15. However, the Ohio statutes were not challenged. They were not litigated. The effect of those statutes were not challenged in this lawsuit, so there is really no way of knowing exactly what the effect would be as applied other than viewing the statutes on their face.

QUESTION: You mentioned the young age

involved here. Is it part of your position that Danforth, the Danforth holding on parental consent does not apply to people under 15?

MR. SEGEDY: Your Honor, in Planned Parenthood versus Danforth, this Court noted that not all minors, regardless of age or maturity, are capable of consenting to an abortion, and I think that it is possible for the state to make a determination at some point that parental consent may be required.

QUESTION: Are you arguing in this case that Danforth does not apply in the ages below 15?

MR. SEGEDY: No, Your Honor.

QUESTION: You are not.

MR. SEGEDY: As a practical matter, we are almost always dealing with immature minors, minors of 14, 13, 12. Now, there are certainly minors who might be 14 who have the maturity of a 35-year-old, and likewise 35-year-olds who have the maturity of a 12-year-old, but it would seem that the state can draw a line somewhere, just as it does for virtually every other purpose, such as voting, which is a very fundamental right, as to maturity.

If a person would submit that he is mature enough to vote at age 17, I don't think that person would get too far with the constitutional argument. And

we would submit that the same kind of line can be drawn by the City of Akron with respect to the maturity of minors.

If it please the Court, at this time I would save some time for rebuttal.

CHIEF JUSTICE BURGER: Very well.

Mr. Solicitor General.

ORAL ARGUMENT OF REX E. LEE, ESQ.,

ON BEHALF OF THE CITY OF AKRON

MR. LEE: Mr. Chief Justice, and may it please the Court, I would like to address the issue of the standard of review. One way to view the cases now before the Court is that they are simply the next in a series of cases in which over the past decade the Court has developed a rather detailed body of federal constitutional rules dealing with abortion.

Under that view, the Court's task today is to consider about a dozen separate provisions of state and local law and declare each of them either constitutional or unconstitutional. The result will be that the outline of applicable federal constitutional rules is longer and more detailed. We would then await the next round of abortion cases two or three years down the road, and another after that.

The approach that we urge is different, but

consistent with this Court's precedents. It involves two steps. The first is a recognition that as Mr. Segedy has said, a decade of this Court's abortion decisions have now established that not every abortion regulation is governed by the compelling state interest test, but only those that unduly burden the woman's decision whether to have an abortion or not.

The second step would be to declare that in making that key determination, ultimately a judicial determination, concerning which practices do and which do not unduly burden the abortion decision, the Court should be mindful of four things.

The first is that most of the questions dealing with the undue burden issue have substantial factual components. These cases are illustrative. Does the 24-hour delay requirement lead, or does it not, to a better informed decision? Comparative safety of hospitals and non-hospital facilities. And you could go right down the list.

By the time that a lawsuit brings the total issues into court, the competing arguments concerning these factual components have already been addressed and resolved by a legislature which, for reasons discussed in our brief, is better qualified as an institution to deal with factual issues than is a court.

And to the extent that the issues are non-factual -- this is my second point -- they involve a blend of constitutional law and also policy. The resolution of these two kinds of issues, constitutional law on the one hand and public policy on the other, are the core functions of courts on the one hand and legislatures on the other.

So that the real question in these cases is this: in those areas of overlap between legislative authority and judicial authority, such as abortion cases are, cases which necessarily involve both the making of policy and also declaring constitutional law, should the courts regard the process as one of policy-making or legal decision-making, or is there some room for accommodating the two, for recognizing that what is really involved is a combination of the core functions of both branches?

We believe that there is, and that the accommodation comes about in the following fashion.

First, at the end of the day, the ultimate decision must be made by the courts, but in exercising this ultimate and awesome power, the courts must be mindful that the kinds of competing considerations that enter into its decision have already been taken into account by a representative legislative body exercising

its own responsibility to make policy decisions.

QUESTION: May I ask you this question?

MR. LEE: Yes.

QUESTION: Supposing the record of the Akron proceedings, and I am not familiar with it, show a total failure to consider the question of maternal health. Supposing that is in the record before us now. Would your argument still apply?

MR. LEE: The argument would still apply, though there might be another consideration that would come in at that point. There is an intermediate position, that at that point it might be proper for the court in extreme cases to take that into account in determining whether or not to defer.

Now, in fact, as Mr. Segedy has said, and as the record in fact discloses, this is a good example of a legislative body that did its job the way it should, by hearing both sides of those issues. And it did reach these very issues of which we are talking about. The comparative safety of hospitals and non-hospital facilities, for example; the extent to which the 24-hour delay period does or does not lead to a more informed decision.

There is a closely related consideration, and it is that a root message of Roe v. Wade and its progeny

is that the constitutional inquiry related to abortion involves balancing. This Court's decisions are replete with observations, such as that in Maher, that, and I am quoting, "Roe v. Wade can be understood only by considering both the woman's interest and the nature of the state's interference with it."

One of the similarities between courts and legislatures is that both from time to time engage in the balancing process. One of the differences is that legislatures do it better. Balancing by its very definition is virtually synonymous with policy-making, choosing between competing values, and the optimum balance almost always depends on issues of fact.

To the extent, therefore, and this is the accommodation of which I spoke, the judicial balancing is required, as it is under this Court's decisions, considerations of judicial efficiency and also separation of powers are best served by judicial recognition of the fact that the same balancing process or almost the same has already been undertaken by an institution of government which is better qualified to perform the function and within whose institutional bailiwick balancing lies at the very center.

Different states and political subdivisions will approach these problems and strike their respective

balances in different ways. Some will adopt laws diametrically opposed to others. But as Justice Brandeis reminded us several decades ago, and as this Court quoted in the Maher case, the diversity that results from state and local authority to attack a common problem in different ways, even opposing ways, is part of the genius of a federal system of government.

QUESTION: Mr. Solicitor General, are you asking that Roe v. Wade be overruled?

MR. LEE: I am not, Mr. Justice Blackmun.

QUESTION: Why not?

MR. LEE: That is not one of the issues presented in this case, and as amicus appearing before the Court, that would not be a proper function for us.

QUESTION: It seems to me that your brief in essence asks either that or the overruling of Marbury against Madison.

MR. LEE: Neither. Neither. And the reason is, as I have just stated, the ultimate decision at the end of the day concerning these matters is a judicial decision, but all I am pleading for is a recognition that both with respect to issues of fact which necessarily pervade each of these decisions that is made, and also with respect to their factual non-components, that the Court at least take into account the fact that

these same kinds of issues have already been faced by a legislature with superior fact-finding capabilities, and have been resolved.

The Eighth Circuit --

QUESTION: May I ask one other question?

QUESTION: Of course, that was true with Marbury against Madison also.

QUESTION: Would you apply the same standard of review where there is the legislative history that you have in Akron as you would in Virginia where there is no legislative history?

MR. LEE: Yes. Yes. With regard to the argument, Justice Blackmun, that that is the same standard that was -- the same circumstances that existed in Marbury, There is a difference. As I say, we are not urging that Roe v. Wade be overruled. There are portions of -- but that is an issue. That is an issue for another day. But there is a constitutionally significant difference between the kind of yes or no answer as to whether abortion is or is not prohibited by the Constitution that was involved in Roe v. Wade and the subsequent filling in of the rather factually-oriented details, and more precise and specific details that have characterized the decisions since that time.

We simply submit that after a decade of this Court's decisions which have raised the question that is before the Court as to whether it is compelling state interest that applies across the boards or whether we have now reached the point that it is only the undue burden, that rather than having these cases come back year after year after year, with the list of applicable federal constitutional rules becoming longer and longer and longer, that the time has now come to apply those principles that the Court has so well developed in other areas dealing with substantive due process to this area of the law which also rests on substantive due process, and at least to take into account the fact that another governmental decision or another governmental body also charged with the responsibility of facing these same kinds of questions has faced them, and that they have resolved them.

A final consideration is that to whatever extent a public policy issue is constitutionalized, all but one of the competing points of view are eliminated as acceptable alternatives. One of the cornerstones of a free society is that the search for truth is enhanced by permitting full and uninhibited discussion of public issues by leaving those issues exposed for a time to the legislative process and public discussion.

The point is not, therefore, that courts should stay out of controversial issues. It is, rather, that since the power that the Court brings to the issue is, as Justice Brandeis again pointed out, and Justice Holmes in his dissent in Abrams, to remove it from public debate. It is a power that the Court should exercise sparingly.

Thank you.

QUESTION: Mr. Lee, did you write this brief personally?

MR. LEE: Very substantial parts of it, Justice Blackmun.

CHIEF JUSTICE BURGER: Mr. Landsman?

ORAL ARGUMENT OF STEPHAN LANDSMAN, ESQ.,
ON BEHALF OF AKRON CENTER FOR REPRODUCTIVE HEALTH

MR. LANDSMAN: Mr. Chief Justice, and may it please the Court, the Akron ordinance before the Court today requires that when any woman seeks an abortion in the City of Akron, she and her physician must comply with at least 14 separate and distinct requirements before the procedure may be performed. If she is a minor or she seeks a second trimester procedure, the number is far greater.

All the ordinance requirements must be satisfied. None can be avoided, regardless of the

woman's personal circumstances or her medical condition. Any deviation from even one requirement will expose the physician to up to six months in jail, a $1,000 fine, and potential loss of license.

I would like to begin my argument with a discussion of the constitutional standard applicable in this case, and then turn to the various sections of the ordinance, beginning with the informed consent script and the 24-hour delay, the ban on clinical second trimester procedures, and the minor's veto.

In Roe versus Wade, this Court held that a woman had a fundamental right, in consultation with her physician, to choose whether to terminate a pregnancy. As this Court indicated in Roe and reiterated as recently as Harris versus McRae, regulations restricting this fundamental right are presumptively unconstitutional.

In order to sustain abortion regulations, the state has a heavy burden. Either it must show that those regulations do not restrict the woman's decision, as this Court identified in the Danforth case, or if the plaintiffs demonstrate that a regulation imposes a cognizable burden, then the regulation be supported by a compelling state interest and be narrowly drawn to support only that interest.

QUESTION: Didn't the Court make it clear in Roe that the right is not an unqualified right?

MR. LANDSMAN: That's correct, Your Honor. It is in consultation with her physician.

QUESTION: Only that limitation?

MR. LANDSMAN: Your Honor, with respect to further steps, one would have to ask what particular stage of the pregnancy we are at and a variety of other things.

QUESTION: Do you suggest that the use of that language, that it is not unqualified, doesn't mean that it isn't qualified by some state interests?

MR. LANDSMAN: Your Honor, this Court clearly indicated that it is qualified by state interest of --

QUESTION: Not just what the doctor tells her.

MR. LANDSMAN: That's correct, Your Honor. The compelling interest in maternal health becomes a state interest that can be effectuated in the second trimester, as this Court indicated in Roe. And the concerns for viability certainly add viability.

The Solicitor General and the defendants do not challenge this Court's determination that the right to choose is fundamental. However, they would have the Court stand the burden of proof rule in fundamental rights cases on its head, and force the plaintiff to

show in each and every case an undue burden.

It would not appear that the state has any responsibility under the test suggested by the Solicitor General and the defendants. This proposal would undercut Roe's finding of fundamentality. It would make all restrictive abortion regulations presumptively constitutional, and place the onus on the plaintiffs in each and every case to show their undue burdensomeness.

Besides directly undercutting Roe's declaration of fundamentality, the undue burden test creates other problems as well. As the Solicitor General admits in his brief at Page 10, the undue burden test is one of breadth and ambiguity. It is essentially a standardless and ad hoc test.

In Gertz versus Robert Welch, this Court considered and rejected a similar ad hoc test in the First Amendment area, because this Court felt it would lead to unpredictable results, uncertainty of expectations, and would render this Court's supervisory powers impossible to be enforced.

The Solicitor General has an alternative solution. He suggests that the judiciary defer in any fundamental rights case where a legislative policy choice is arguably at stake. It is a rule as old as Marbury versus Madison that the courts must apply the

relevant constitutional standards rather than defer to a coequal branch on that issue.

There are a variety of reasons for this rule. Perhaps most important, any other choice would undermine the enforcement of fundamental constitutional rights by allowing impassioned majorities to restrict liberty interests. It would also render impossible the task of developing a coherent body of constitutional principles.

Justice O'Connor asked Mr. Segedy what interest does the state rely on in this case. I would cite to the Court the questions presented for review in this case. Akron relies on one and only one interest in its questions, whether the state's interest in maternal health and well-being is such that it may regulate abortion. There is no other state interest being advanced, at least pursuant to the questions presented on which certiorari was granted.

The first section I would like to consider was enacted under the rubric of informed consent. Both of the two parts of this section that were held unconstitutional were held to impinge upon the woman's right to choose whether to terminate her pregnancy. The first of these two forces the attending physician, on pain of incarceration, to recite in each and every case, without exception, seven scripted statements, including

Akron's assertion that human life begins at the moment of conception, and a fetal description promoting that view, as well as a variety of medically inaccurate assertions about the abortion procedure and risks.

The second of these two sections forces the attending physician in each and every case, or face jail, to recite individualized risk and technique information. The plaintiffs proved that the proposed requirements directly and substantially interfere with the abortion decision and its effectuation by robbing the woman of independence in the abortion decision-making process and by straightjacketing her physician.

Plaintiffs proved that both sections deprive each woman of control of the abortion decision-making process, first by compelling her to hear an array of prescribed materials that she can never direct her physician not to recite. Both the woman and her physician may indeed face prosecution if the scripted materials are not recited before every abortion in Akron. There is no exception under any circumstances whatsoever.

The second way in which the decision-making process is burdened is that it requires the woman to consider misinformation, and the record demonstrated

that it was misinformation, that is likely to interfere with her decision-making capacity rather than assist her in making a considered choice.

The third way in which these materials interfere with the decision-making process is that they force her physician to be the bearer of what plaintiff's expert described as potentially inflammatory information, turning the physician into the adversary rather than the advisor of the woman. The sections are clearly slanted against abortion. There is not one word in them that is favorable to the abortion choice, and they treat women as irrational decision-makers who must be forced to reconsider their choice of an abortion.

QUESTION: Mr. Landsman, how do you respond to the argument that in the abortion clinic setting, the danger is of one-sided information of the other kind, and the statute is intended to equalize the scales?

MR. LANDSMAN: Your Honor, there is absolutely no evidence in this record that the information provided by the clinic is at all one-sided. Rather, it is an hour-long discussion of the risks and of the procedure and of the options. In fact, in this record, the district court found that where a woman indicates ambivalence, the physician will not proceed with the abortion. The whole process is to help.

QUESTION: Is it not true that at least insofar as people who are motivated by economic incentives, that there would be at least arguably a risk of one-sided presentation by the person who has an interest, a financial interest in having the abortion performed?

MR. LANDSMAN: Again, there is simply no evidence in this record that that is the case, Your Honor.

QUESTION: When you say the record, do you include the record of the discussions before the Akron legislative body, whatever it was, that adopted the ordinance?

MR. LANDSMAN: No, Your Honor. Those materials were never presented by the defendants in this case in any way to assist them in defending this ordinance. They chose not to put any of those materials in the record.

QUESTION: Are they a matter of public record?

MR. LANDSMAN: Your Honor, I believe that there are tapes of those proceedings. Now, I --

QUESTION: They were not presented to the lower court by either side?

MR. LANDSMAN: That's correct, Your Honor. They were not presented.

QUESTION: I see.

MR. LANDSMAN: Well, when you try to clear a registration statement with the SEC, they insist that the issue of put in all of the bad news in effect, and simply leave it up to the issuer to put in good news if he wants to, but the SEC's only concern is with the disadvantages of the thing. Do you see that as being much different from this statute?

MR. LANDSMAN: Your Honor, ironically, I believe that the good news of abortion, the safety of the technique and so forth, may in fact not be possible for the physician to say, because the seven scripted statements must be spoken, and it is unclear whether the physician can indeed contradict those statements where they are incorrect or provide material that corrects their misimpressions.

If it is indeed the case, and it is unclear, as it was unclear in the Colautti case, the physician may have his mouth absolutely sealed by this statute and be forced to speak only one side of the question.

QUESTION: Did any of your -- Do you represent the doctor in the case?

MR. LANDSMAN: Yes, that's correct, Your Honor.

QUESTION: Did he ever try to comply with the statute, or was this just a declarative --

MR. LANDSMAN: Your Honor, this was enjoined before it was ever to be enforced. Both the district court --

QUESTION: Counsel, did I understand you to say that in each of these clinics, there was an hour-long consultation with the patient prior to the abortion?

MR. LANDSMAN: At a minimum, there is an hour-long consultation between a counselor or a registered nurse and each patient, but in addition --

QUESTION: Not the physician?

MR. LANDSMAN: The physician had informed consent discussions with each patient, as the district court held, for a minimum of, I think the record says five minutes, before any further procedures are done. He consults with each patient. He discusses with each patient her choice, asks if she has any questions --

QUESTION: In five minutes?

MR. LANDSMAN: Your Honor, approximately five minutes in each case. And further amount of time, and of course as much time as is necessary for those who indicate ambivalence, and a recommendation.

QUESTION: Is the one-hour discussion conducted by a registered nurse?

MR. LANDSMAN: Your Honor, in at least two of

the clinics the informed consent section of that discussion is with a registered nurse. In the third clinic, it is with masters of social work counselors.

QUESTION: Is it one on one, or is it conducted in groups, as in a clinic we had here from Boston a few years ago in Bellotti, where there would be six or eight women of varying ages with varying problems? Do your clinics do it on an one on one basis?

MR. LANDSMAN: The record indicates that both are done, Your Honor.

QUESTION: Sir?

MR. LANDSMAN: That it is done both on a one on one basis and that it is done in a group setting.

QUESTION: In groups.

MR. LANDSMAN: Now, part of the time is spent individually with each woman, especially when the informed consent is signed, but part is spent in a group setting, although some women may just get the individualized counseling.

Both the district court and the court of appeals found that plaintiffs had proven that the script requirements of 06(b) placed the physician in a straightjacket in the practice of medical care. They block any effort on his part to exercise clinical

judgment. Each and every word must be spoken to each and every patient. There is no emergency exception for this provision.

The court of appeals found that the plaintiffs had proven that Section 06(c) imposes the same sort of straightjacket on the physician. The details required there can never be omitted.

In response to this evidentiary showing of burden, the defendants were unable to justify their requirements with proof of its compelling nature. Rather, the defendants conceded in the court of appeals and at least in one of their briefs in this Court, that various subsections of the informed consent are unconstitutional. The district court found that the defendants could not prove that various materials in their script were indeed true.

Further, all of defendant's experts agreed that despite Akron's blanket requirement, physicians must be free to refrain from giving each patient all details.

Finally, one of defendant's experts described the informed consent approach he uses to obtain the consent of hospitalized psychotics to experiments with psychoactive drugs. Akron treats women seeking abortions as less capable of giving informed consent

than the defendant's expert treated these mental patients.

The defendant's proof failed to satisfy the constitutional standard required by this Court. Rather, defendants have attempted to impose an unconstitutional straightjacket condemned by this Court in Danforth and to rob the woman of an independent decision-making capacity.

The next section of the ordinance that I would like to analyze is Section 1870.07. It mandates that every woman make two separate trips to the abortion clinic by imposing a delay of no less than 24 hours between the signing of the informed consent form and the performance of the abortion procedure.

This section was held unconstitutional by the court of appeals. The court of appeals found, and the defendants do not deny, that the two-visit delay requirement was designed to force every woman to go through a cooling off period after signing an informed consent form. The purpose of this, say the defendants --

QUESTION: Do you think it would have been appropriate and constitutional if the cooling off period as you describe it was before the signing of the consent?

MR. LANDSMAN: No, Your Honor. I don't believe that such a requirement would have been constitutional.

The purpose of this cooling off period was, as the defendants have said in their brief, to have each woman mull over the scripted information provided by Akron, in other words, to reconsider in light of the misleading and inflammatory materials Akron presents her decision. In essence, this was an effort to dissuade her from the choice she had made and indicated in her signed consent.

This requirement treats women as if they are not to be trusted to know their own minds or to make rational decisions, despite the fact that over half of the women who come to the Akron clinic have borne children previously, and over three-quarters have been professionally counseled either by a physician or another health care professional, before they ever arrive at an Akron clinic.

QUESTION: Mr. Landsman, supposing we were to agree with you on Subsection (b), that the information was one-sided and therefore that violated the Constitution, and what remained was just hay that said there had to be something signed as an intelligent consent. Then would (c) still be bad?

MR. LANDSMAN: Your Honor, would the waiting period still be bad?

QUESTION: Yes.

MR. LANDSMAN: Yes.

QUESTION: If you just had a waiting period from --

MR. LANDSMAN: Your Honor, the waiting period would still be unconstitutional.

QUESTION: And why would it be bad if you didn't have a one-sided presentation in the interval?

MR. LANDSMAN: Because it imposes a significant number of burdens on women seeking abortions without, as the court of appeals said, any medical basis therefore at all. The evidence showed --

QUESTION: Well, but they don't argue medical basis for this. They argue an ability to make a correct decision, is in effect their argument. Can you say that is a totally irrelevant interest, or --

MR. LANDSMAN: Your Honor, I believe that the appropriate standard is, does it conform to a compelling state interest, and is it narrowly drawn to meet that interest? First of all, as the evidence demonstrated, it is incredibly burdensome. It forces delays not of 24 hours but, as the evidence showed, at least two days, and in many cases up to seven days.

QUESTION: Well, that is because you are not open seven days a week.

MR. LANDSMAN: No, Your Honor, it is more because of the privacy concerns of the women involved, and because --

QUESTION: Well, but is it not correct that neither of these clinics is open seven days a week?

MR. LANDSMAN: That is absolutely true.

QUESTION: They are open two or three days.

MR. LANDSMAN: That's right, Your Honor.

QUESTION: So if someone comes in at 5:00 o'clock on Friday afternoon, say, isn't there a danger that the person will be told, come back Monday?

MR. LANDSMAN: But that is only a small part of the problem, because for each woman, she has family obligations, and she has employment obligations as well.

QUESTION: Well, for instance --

MR. LANDSMAN: It is not a matter of clinic convenience. It is really a matter of human necessity. If you are going to lose your job, well, you are going to wait those two or three extra days. You can't avoid it. It is --

QUESTION: You can't say that every person who is asked to wait 24 hours is going to have these serious

adverse consequences.

MR. LANDSMAN: Your Honor, a substantial number. In fact, lodged document number 17 indicates that difficulties of a substantial sort were faced by 70 to 80 percent of women in Tennessee who were forced to wait a minimum of 24 hours.

QUESTION: In Tennessee.

MR. LANDSMAN: That's correct, Your Honor. That was --

QUESTION: This is Akron, Ohio.

MR. LANDSMAN: The evidence in our case is precisely the same, Your Honor, that because of familial concerns, because of employment concerns, as well as the medical efficiency concerns, these delays are not going to be 24 hours in almost any case. They are going to be from two to seven days. And the health risks involved in the two to seven-day delay were shown by the evidence here to be very serious.

Additionally, Your Honor, an item we have not at all touched on is the cost factor involved. Now, by compelling women to come and visit these clinics on two separate occasions, what we are requiring them to do is to make two trips across the state of Ohio in order to get an abortion.

Three-quarters of the women who seek abortions

in Akron do not live in the City of Akron. Many come from as far away as Columbus, Ohio, and various cities and towns in West Virginia. The cost factor involved in two trips to Akron will raise the cost of abortion tremendously. The alternative, of course, is to rent lodgings in Akron, and to wait the appropriate amount of time or more.

The 24-hour delay requirement also will impact on those who have employment by forcing them to miss work; those who have families, by forcing them to pay extra child care expenses and so forth.

And, of course, underlying all this is the feeling of the woman that she wants to have privacy in this choice. If you go to a clinic on one afternoon, it is easy to rearrange your schedule to do so, but when you have to go back again a second time, it becomes an issue that raises substantial questions, and privacy may very well be breached in this matter as well.

QUESTION: How do you think this compares, if that is the right term, with the rather repeated disclaimers in the holdings of the court that the court was not endorsing abortion on demand? When you challenge a 24-hour delay, aren't you almost suggesting that abortion on demand is the order of the day?

MR. LANDSMAN: I think not, Your Honor. What

we are saying is that every regulation enacted by a state that clearly burdens the woman's choice, as this does with respect to cost, with respect to risks, and so forth and so on, must be justified by a compelling state interest. And in this case, Akron has presented nothing even approximating a compelling state interest, and that makes this statute, this ordinance section invalid.

The defendant's response to the showing of burden was a concession, first of all, that the 24-hour delay does impose a restriction on a woman's access to abortion. That is at Page 47 of their brief to this Court. The court of appeals found that the defendants produced absolutely no evidence to justify their delay in the abortion setting. That is at Page 17-A of the appendix.

In the appendix submitted to this Court with the factual materials of this case, defendant's proof in defense of the 24-hour delay requirement amounted to approximately four sentences spoken by one expert witness who does not provide any surgical care or require a waiting period when he seeks the informed consent of psychotic in-patients with respect to experimental procedures.

This quantum of evidence fails to satisfy the appropriate constitutional standard. Because time is of

the essence in the abortion decision, as this Court noted in Doe versus Bolton, and defendant's abject failure of proof, this section is unconstitutional. Seven courts of appeals and eleven district courts have reached precisely the same conclusion, and struck down waiting periods of varying lengths.

Further, the blanket delay requirement is not narrowly drawn. As concurring Judge Kennedy in the court of appeals indicated, you can never get out of the 24-hour delay requirement where it is medically contraindicated, or where previous counseling has been had, as it has in three-quarters of the cases in Akron, or where the cost increases are overwhelming.

The next section of the ordinance I would like to address is Section 1870.03, which bans second trimester abortions in clinics and requires their performance be confined to JCAH accredited hospitals exclusively. This is the only section of the ordinance before the Court today that was upheld in the Sixth Circuit.

The plaintiffs proved, and the Sixth Circuit found, that the JCAH hospital requirement directly and substantially interferes with the effectuation of the abortion decision. The circuit court found that the section forces 10 percent of Akron women seeking

abortions to travel to places as far away as Michigan to obtain abortions, or, alternatively, to choose such dangerous alternatives as self-abortion or illegal abortion.

The court of appeals also found that this requirement raises the cost of abortions for Akron women from between $300 and $550. For those women who cannot travel or do not have sufficient funds, as the court of appeals indicated, those who are generally young, poor, or black, the section deprives them of any, and I quote here, "real opportunity to obtain an abortion."

Plaintiffs proved not only the burdensome nature of this JCAH requirement, but that there was no medical justification for it. The overwhelming scientific evidence in this case indicates that second trimester abortion procedures are safer than childbirth. Similarly, voluminous evidence indicates that such procedures may be performed safely in freestanding out-patient clinics.

This evidence has led amicus, American College of Obstetricians and Gynecologists, to specifically endorse second trimester abortions in freestanding clinics up to 18 weeks of gestation. They thereby joined the American Public Health Association and the Planned Parenthood Federation of America.

QUESTION: Can an out-patient clinic in Akron or in Ohio generally be licensed in the sense that they can be licensed in the first case?

MR. LANDSMAN: There is no significant licensing provision from the state of Ohio.

QUESTION: Only traditional hospitals can be licensed as --

MR. LANDSMAN: That is correct, Your Honor. There is no alternative, and Akron specifically proscribes any alternative but a JCAH requirement in this particular case.

QUESTION: Counsel, you referred to the standards of the American College that allows abortions up to age 18 weeks. The College standards refer in that connection to freestanding surgical clinics. Would such a clinic be acceptable -- Well, I will put it this way first. Would the clinics you represent qualify as of now under the standards of the American College?

MR. LANDSMAN: Your Honor, from the record as we have it here, one of the plaintiff's experts examined the clinics. His testimony was in this case that at least the one clinic that he examined was properly equipped and staffed to handle second trimester abortions in light of ACOG's standards. Now, that was before --

QUESTION: In light of the College standards, did you say?

MR. LANDSMAN: That's right. That's right. But that was --

QUESTION: That is a freestanding surgical clinic?

MR. LANDSMAN: I am not entirely sure of all of the requirements that --

QUESTION: Would those requirements include a governing board, an administrative supervisor, a physician, a registered nurse, specify very elaborate equipment?

MR. LANDSMAN: Your Honor, I believe that those requirements do specify a number of special considerations.

QUESTION: Yes, but my question -- You brought up the College standards. Do your clinics comply with those standards?

MR. LANDSMAN: Your Honor, I am not sure that the clinics comply in each and every regard, but it is my belief that without any difficulty they could come into compliance with those standards if they were allowed to do so.

The defendants offered virtually no evidence in support of the clinic ban that they imposed. They

offered virtually no evidence other than the American College's now repealed standard of 1974. In the appendix provided to this Court, the defendants do not cite a single sentence or a single line in support of the ban they would impose.

In the Danforth case, this Court invalidated the Missouri regulation prohibiting the use of saline amniocentesis because saline abortions were commonly used nationally, safer than childbirth, and their prohibition would force physicians and patients to more dangerous alternatives. The Akron situation is identical.

Further, in Doe versus Bolton, this Court rejected a JCAH hospital requirement for abortions including second trimester procedure. Akron's JCAH requirement is identical to Bolton's, and is similarly not narrowly drawn.

The next section of the ordinance I would like to address is Section 1870.05(b), which mandates parental or judicial consent with respect to the abortion of every minor less than 15 years of age. This requirement was held both by the district court and the court of appeals to impose a blanket veto on the abortion decision of every minor under 15. First --

QUESTION: In Ohio, if a 12 or 13-year-old

girl goes to a hospital or to a doctor and he diagnoses that she has an acute appendix problem which requires surgery, will a hospital permit the surgery without the consent of the parents?

MR. LANDSMAN: Your Honor, the testimony in this case with respect to obstetrics and gynecological care is that obstetricians and gynecologists in Akron and throughout the state, as a matter of fact, will provide such care without the parents' permission.

QUESTION: An appendectomy?

MR. LANDSMAN: Your Honor, there is no evidence in the record with respect to appendectomy.

QUESTION: I am asking as a question of law.

MR. LANDSMAN: As a matter of law, I do not know the answer, Your Honor. I believe that a variety of procedures -- There is a case in Ohio, Lacey versus Lare, which says that with respect to medical care requested by minors, that minors can generally agree to that care, especially if it is an elective procedure, without the approval of parents. In that case, it was some facial cosmetic surgery. That is the information that I have.

Now, with respect to anything beyond that, I am just not sure what the status of the law would be, Your Honor.

Now, this section, we submit, is not properly before the Court today. The defendants did not appeal the adverse ruling of the district court; thereby waived any claim with respect to this matter. They cannot --

QUESTION: You said that the defendants didn't appeal the ruling of the district court. Am I wrong in thinking that the way you take a case from the district court to the court of appeals is to file a notice of appeal?

MR. LANDSMAN: That's correct, Your Honor.

QUESTION: Did they file a notice of appeal from the judgment?

MR. LANDSMAN: Yes, they did, Your Honor.

QUESTION: Are you saying, then, in effect, that they didn't argue this to the court of appeals?

MR. LANDSMAN: No, in order to perfect an appeal, you have to identify the questions presented. The questions presented by Akron did not include any question with respect to this matter.

QUESTION: So although they appealed the judgment, they didn't put this as a question presented in their brief.

MR. LANDSMAN: That's right. They did not perfect this appeal.

QUESTION: The parties -- they were parties to

the case, though, in the court of appeals?

MR. LANDSMAN: Your Honor, they did appeal on other matters. That is correct.

QUESTION: And they argued it in the court of appeals?

MR. LANDSMAN: Your Honor --

QUESTION: And they were permitted to argue it.

MR. LANDSMAN: They were permitted to argue, but they did --

QUESTION: And the court of appeals did not object to their being there?

MR. LANDSMAN: Mr. Chief Justice, may I answer?

CHIEF JUSTICE BURGER: We will resume at 1:00 o'clock.

(Whereupon, at 12:01 o'clock p.m., the Court was recessed, to reconvene at 12:59 o'clock p.m. of the same day.)

AFTERNOON SESSION

CHIEF JUSTICE BURGER: Very well.

ORAL ARGUMENT OF ALAN G. SEGEDY, ESQ.,

ON BEHALF OF CITY OF AKRON - REBUTTAL

MR. SEGEDY: Mr. Chief Justice, and may it please the Court, I would like to briefly discuss with the Court some of the points that are shown in the record with respect to the operation of the abortion clinics in Akron.

First of all, the abortion clinics are commercial enterprises that are owned by laymen, operated for profit. They run ads in the newspaper in which they advertise the finest medical care, the best medical care, safe and legal.

When the woman goes to the abortion clinic, she is not going to her physician or any particular physician. She in fact has no idea who the physician is going to be at the abortion clinic. She is counseled by lay persons, and many times these counselors have no training. One counselor, for example, had some experience as a respiratory therapist.

The counseling is done in group sessions 85 percent of the time, and the record shows also that the counseling is done with minors mixed in groups with adults in this group counseling session. One of the

clinic counselors, as is shown in the Joint Appendix at Page 247 through 258, testified that all of the information contained in 1870.06(b) is not only irrelevant but harassing.

The record shows that the patients are often given tranquilizers on standing physician orders before they ever sign the informed consent forms, before they ever see the physician. Doctor C, one of the doctors testifying under a pseudonym, testified that he in fact treats his patients, his private patients, differently than he treats the patients in the abortion clinics. Dr. B testified that he never attempts to judge the maturity of a minor.

QUESTION: Why do these doctors testify under a pseudonym?

MR. SEGEDY: Your Honor, I believe it was because they were afraid of harassment or such. I believe they filed affidavits to that effect in order to have that status.

What the record clearly shows inevitably is that in every case the woman signs the informed consent form prior to the time that she sees her physician, and she spends about five to ten minutes with the physician, including the surgical procedure.

The physician essentially at most, according

to this record, will ask the woman if she has any questions. Contrary to what Mr. Landsman stated to the Court, Section 1870.06(b) does not hamstring the physician. He is not required, or not prevented from providing whatever information he would like to provide in addition to what is contained in that provision. In fact, he can dispute that information with a patient if he so chooses, but he is expressly directed by 1870.06(c) to provide this other relevant information.

Mr. Justice Powell, in reference to your question about notice to parents, I would point out to the Court that notice in this situation under Ohio law, if notice would be given, would only be after the minor has gone to court, and would be under the protection of the court, and this would in effect be putting the abortion practice in compliance with the other medical treatment in terms of treating minors.

Dr. Seguin, one of the defendant intervenors who is also a pediatrician, testified that this is the standard practice, to go to the juvenile court if a minor needs medical attention, and the first consideration is always to protect the minor, which is also the consideration of the juvenile court under Ohio law.

The second trimester hospital requirement was

upheld by summary affirmance by this Court in Gary-Northwest versus Orr. The testimony that took place in the trial of this case, and that is why I pointed out to the Court there was a real lawsuit here with real witnesses and real evidence, the testimony showed by numerous physicians, including Dr. Schmidt, who was then the outgoing president of the American College of Obstetrics and Gynecology, that all second trimester abortions should be performed in a hospital. That likewise met the ACOG standards that were in effect at that time.

With reference to the current ACOG standards that just came out this year, they do not say that it is simply safe to do second trimester abortions outside of a hospital. They say that up to 18 weeks, they may be done in a freestanding surgical facility.

In regard to Justice Powell's questions, the abortion clinics are not freestanding surgical facilities, and do not comply with their requirements.

CHIEF JUSTICE BURGER: Your time has expired now, counsel.

MR. SEGEDY: Thank you, Your Honor.

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

(Whereupon, at 1:04 o'clock 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:

CITY OF AKRON, Petitioner v. AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL #81-746 & AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL v. CITY OF AKRON - # 81-1172

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

BY Dixie Hammond

(REPORTER)