ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-495

TITLE RICHARD THORNBURGH, ET AL., Appellants V. AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, ET AL.

PLACE Washington, D. C.

DATE November 5, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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RICHARD THORNBURGH, ET AL., :

Appellants, :

V. : No. 84-495

AMERICAN COLLEGE OF :

OBSTETRICIANS AND :

GYNECOLOGISTS, ET AL. :

- -x

Washington, D.C.

Tuesday, November 5, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 o'clock a.m.

APPEARANCES:

ANDREW S. GORDON, ESQ., Senior Deputy Attorney General of Pennsylvania, Harrisburg, Pennsylvania; on behalf of the appellants.

KATHRYN KOLBERT, ESQ., Philadelphia, Pennsylvania; on behalf of the appellees.

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 first this morning in Thornburgh against American College of Obstetricians and Gynecologists.

Mr. Gordon, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF ANDREW S. GORDON, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. GORDON: Mr. Chief Justice, and may it please the Court, this appeal is from a decision of the Third Circuit, which in reviewing a preliminary injunction ruling struck down numerous provisions of Pennsylvania's Abortion Control Act.

The case presents a variety of questions. First, the Court must decide whether an appeal lies from a decision of a Court of Appeals which strikes down state statutes as unconstitutional but which remands for further proceedings on additional constitutional claims.

Next, the Court must determine whether the Court of Appeals' substantive rulings were consistent with this Court's recent decisions on the permissible scope of abortion regulation. And finally, even if the Court finds that the Court of Appeals properly applied the law to the limited record before it, the Court must decide whether it was appropriate for the Court of

Appeals to finally declare these provisions of state law unconstitutional before the state has been given a fair opportunity to present evidence in defense of the statute.

QUESTION: Mr. Gordon, just as a matter of curiosity, is Governor Thornburgh still a party to this litigation?

MR. GORDON: The parties did agree that he should be removed, but the District Court never entered an order on that, so technically I believe he still is a party, but he will be removed as soon as it is returned to the District Court and the District Court issues an order.

QUESTION: Well, the case comes up here in a posture with a high official of Pennsylvania as the lead name, and he vetoed all this legislation. It seems a little strange situation.

MR. GORDON: Well, if I may, he vetoed a prior bill. This particular statute he did sign, and he approved this statute. Now, before discussing the question --

QUESTION: But you are taking the position he still is a party?

MR. GORDON: There has been no order of dismissal issued.

QUESTION: Even though the parties have agreed that he should go out.

MR. GORDON: Yes. It is our understanding until the Court issues an order dismissing him that he is still a party.

Now, before reaching the questions presented to the Court this morning, I would like to sketch very briefly the procedural history of the case, which is relevant to the issues before the Court.

The statute was passed in June of 1982, and it was not until October that this lawsuit was filed. About one month later, the plaintiffs filed a motion for preliminary injunction, and they attached to this motion 40 detailed affidavits.

On November 18th of 1982, the District Court issued a procedural order to govern the hearing on the motion for preliminary injunction, and as a part of this order, the District Court directed the parties to agree on stipulations, and also prohibited any party from contesting any fact at the hearing unless that party had positive evidence to offer in support of that particular fact.

So, stipulations were agreed upon, but they were agreed upon solely for the purposes of the preliminary injunction hearing, and they were largely

drawn from the allegations of the complaint and the complainant's affidavits.

The District Court with one minor exception denied the preliminary injunction, and after lengthy consideration, the Court of Appeals struck down numerous provisions of Pennsylvania's statute.

First, the jurisdictional question. As I said, the question is whether or not an appeal lies to this Court from a decision of a Court of Appeals striking down some provisions of state law but remanding to the District Court for further proceedings on additional constitutional claims.

The appeal statute does not expressly require that to be appealable a decision of a court of appeals must finally dispose of all constitutional issues, and in fact --

QUESTION: You mean 1254 when you say that?

MR. GORDON: Twelve fifty-four two, that's right. In fact --

QUESTION: In other words, because Congress didn't say final judgment expressly, the inference is that Congress intended appealability even when there wasn't a final judgment?

MR. GORDON: I think it certainly permits that conclusion, but that is not our entire argument. We

don't base our entire argument on the omission of the word "final."

QUESTION: Well, to the extent you base your argument on it at all, what does that do with 1254(1), which allows cert, as you know, before or after rendition of a judgment or decree? Wouldn't that be superfluous if you were right?

MR. GORDON: No, I don't believe so; 1254(2) applies to a very narrow class of cases.

QUESTION: I am talking about 1254(1).

MR. GORDON: Well, I know, and 1254(1) obviously applies to the broader range of cases. I don't think the Court has ever held for cert that there need be a final order. I think it is entirely consistent, and in fact the original version of the statute enacted in 1925 from which 1254(1) and 1254(2) are derived were worded similarly and very broadly. Namely, both of those sections, and more particularly the predecessor of 1254(2), provided for an appeal in any case in a Court of Appeals if the decision was against the constitutionality of the state statute.

And certainly the decision under review here satisfies those general requirements. The decision -- the case was properly in the Court of Appeals, and the decision was against the constitutionality of the

statute.

QUESTION: Well, I know, but the question is whether there is a final judgment.

MR. GORDON: We don't argue that there is a final judgment in this case.

QUESTION: But you say it is nonetheless appealable under 1254(2).

MR. GORDON: Yes, we do.

QUESTION: I am wondering why you can't read 1254(2) as Congress intending the long time requirement of final judgment obtained here and that 1254(1) was simply an exception.

MR. GORDON: Well, we understand --

QUESTION: Why can't it be read that way?

MR. GORDON: Well, the absence of the word "final" permits a reading either way, but it is our position that the general rule of finality does not, cannot, and should not be followed when there are particular policies which are relevant to a specific statute, and which support the conclusion that non-final review should be permitted.

As to the particular statute involved in this case, namely 1254(2) --

QUESTION: Yes, but if we have to read 1254(2) as Congress telling us that you couldn't appeal anything

here except a final judgment, that controls us, doesn't it?

MR. GORDON: I am not sure that I understand your question. If you interpret it as requiring a --

QUESTION: A final judgment, then --

QUESTION: That is the end of it.

QUESTION: -- that is the end of it.

MR. GORDON: Then we request that the Court grant certiorari in this case. That is our alternative argument. As I was saying, in this particular statute, Congress was concerned about the effect on federal-state relations, which comes about when a federal court strikes down a state statute, and while the power to declare state statutes unconstitutional obviously is necessary if we are to preserve the federalist system, Congress believed that states should be entitled to enforce their laws absent this Court's decision of unconstitutionality. This policy --

QUESTION: Getting back, if I may, since I had to interrupt, now, as I understand it, there are apparently several provisions of this Pennsylvania statute still before the District Court, are there not?

MR. GORDON: That's right.

QUESTION: And as to the five -- there are five here, are there not?

MR. GORDON: Yes.

QUESTION: And as to those five, did not the stipulation of facts expressly reserve the right to make a record in the District Court so that our holdings could be, I gather, changed by subsequent factual developments?

MR. GORDON: That was certainly the intention at the time when that stipulation was entered into.

QUESTION: Why should we treat with these important questions now? Where do we actually get a true final judgment out of the District Court before we address them?

MR. GORDON: Well, the problem is that the Court of Appeals issued a final judgment as to these particular statutes in this case. There is no other way to interpret their decision other than it being a final declaration as to these provisions that we have brought before the Court this morning that they are unconstitutional, that they cannot be enforced, and that there is nothing that we could prove on remand or should be able to prove on remand that would change that result, so that is the difference.

QUESTION: Well, would you be satisfied if we simply said the Court of Appeals erred in entering a final judgment on those issues? It should have just

said the injunction was not an abuse of discretion?

MR. GORDON: No, we wouldn't be satisfied with that.

QUESTION: I wouldn't think you would be. So why are you making this argument?

(General laughter.)

MR. GORDON: Well, let me tell you why. I don't think that would really get us anywhere for this reason. Plainly, if the Court of Appeals held that the statutes are unconstitutional, they would have if they applied the proper standard of review at the time found that there was a likelihood of success on the part of the appellees on the merits, and it is our position that that conclusion was plainly incorrect.

QUESTION: So you would have attempted to come here anyway if the Court of Appeals had just said the preliminary injunction was all right?

MR. GORDON: Well, I am not certain that we would have.

QUESTION: Well, if you wouldn't, why should we do anything more than affirm them as to the preliminary injunction?

MR. GORDON: Well, the difference is this, First of all, that that isn't what they did, and it is clear, I would think, that if that is all this Court

does, then it would be an exercise in futility for us to go back to the District Court anyhow, because no District Judge is going to be able to look beyond the fact that the Court of Appeals reached the merits, and feels rather strongly, to say the least, that these provisions are unconstitutional.

As I was saying, this policy --

QUESTION: Mr. Gordon, for which of the statutes at issue here is there in your view a need for additional factual record before a final adjudication on constitutionality is proper?

MR. GORDON: Let me say that it is our position based upon the appellee's apparent conception that they have no additional evidence to offer that the Court may reach the merits and uphold these statutes based on this record. If the Court disagrees with our position on the merits --

QUESTION: Well, you take the position then that no additional factual record is necessary for the final decision on any of these statutes and their validity?

MR. GORDON: We take the position that the Court may uphold these statutes based on this record. However, if the Court concludes that the Court of Appeals properly applied the law to the limited record

before it in finding that there were problems with the statute, then we have evidence to offer on most of the provisions.

I would say probably the one exception is the second position requirement, where the only contest is whether or not you can read this particular statute as including an exception for an emergency. I don't think there is any additional evidence we have to offer on that provision, but on the others, I think there are additional justifications by way of facts that we can offer if the Court deems that necessary.

QUESTION: Do you take the position that abstention is appropriate as to any of the statutes to allow the state courts to interpret them?

MR. GORDON: I am not sure that it would be feasible. Pennsylvania has no particular certification procedure that we could use to get a ruling on the interpretation of these statutes, so I am not sure that extension would be a feasible alternative, and frankly, I don't understand absention to be the proper course when the statutes can clearly be interpreted in a constitutional manner, and that certainly is our argument.

QUESTION: May I ask, Mr. Gordon, did I correctly understand that the reservation to make a

further factual showing may be triggered by either party?

MR. GORDON: At the District Court level?

QUESTION: Yes.

MR. GORDON: Absolutely. In fact, it was done in this case. There was a reservation.

QUESTION: Well, I am speaking as to the five provisions before us. You have a stipulation as I understood it that expressly reserved the right to make a record in the District Court as to the five issue you have before us. Is that right?

MR. GORDON: As to those and all of the issues that were involved, yes.

QUESTION: Yes, and that reservation may be triggered without regard to what the Court may think by either party to the stipulation?

MR. GORDON: That was certainly our understanding when we entered into it. The difference at this level is that based upon the Court of Appeals decision, the appellees take the position they have nothing additional to offer, so there has been a change since we entered into that stipulation.

Now, just to finish up the jurisdictional point, it is our position that this interest that Congress recognized in the appeals statute is as surely

damaged by an interim decision such as this one as it is by a final one, and it requires that cases such as this one be appealed.

We request the Court to take jurisdiction over this appeal. The Court has recognized that a woman in appropriate circumstances is entitled to have an abortion free from state regulation. But at the same time the Court has held repeatedly that there is a permissible role for the states to play in ensuring the protection of maternal health and life.

In passing the statute under review here, the Pennsylvania legislature attempted to strike the balance which this Court has mandated in its decisions. In some respects, based upon subsequent decisions of this Court, the legislature misstepped, and so we conceded the invalidity of several provisions of the Act while we were still in the Court of Appeals.

But as to the provisions that we have brought to the Court this morning, the legislature clearly showed a proper regard for the rules which this Court has prescribed. For example, the Pennsylvania statute provides that a second physician should be present at abortions performed after viability.

Now, it is common ground among the parties that the state may require that a second physician be

present, and the parties also agree that there must be an exception to this requirement if an emergency prevents the attendance of a second physician. We differ only on whether this statute contains such an exception.

In our view, a view shared by Chief Judge Sikes below, the statute clearly provides for such an exception. It is a complete defense to any charge brought under the section of which the second physician requirement is a part that the abortion was necessary to preserve maternal life or health. This exception is plain. It is far plainer than the one which was found by the Court to be acceptable in the Ashcroft case, and so this provision clearly should be upheld.

Next, the informed consent requirement. The notion that patients are entitled to relevant information before submitting to a course of medical treatment is well accepted in the law. This doctrine of informed consent has been developed by the courts and the legislatures --

QUESTION: Mr. Gordon, it would help me a little bit if in your argument you would identify the sections you are talking about as you go along. I caught up on the other one, but it --

MR. GORDON: Okay. The informed consent

provision is Section 3205 of Pennsylvania statute. As I mentioned, the doctrine of informed consent has been developed by the courts and the legislatures to protect the patient, and the Court has recognized that this requirement may be extended to the abortion procedure, that women are entitled to know what will be done, the consequences of their choice, and the alternatives to abortion.

In fact, the Court has indicated more recently in the Affrin case and by way of a summary affirmance regarding Pennsylvania's prior statute that a state permissibly may set forth general requirements, categories of information which must be given to a woman to ensure her informed consent, and there is a very real need for this type of statute.

The Pennsylvania legislature specifically found and the evidence revealed that women, despite existing requirements for informed consent, are not always being provided with relevant information, and it has been reported that some clinics encourage women to undergo abortion by withholding information which might cause them to bear the child to term.

The Pennsylvania statute does not put words in the mouth of the counselor or the physician, and it describes only in general terms the information which

should be offered. It contains no parade of horribles, no statements of dubious validity, and it gives doctors and counselors the room they need to tailor the exchange to the needs of each individual patient.

These requirements hardly erect an unconstitutional obstacle to abortion. Next, the reporting requirements which are found in Section 3214 of Pennsylvania's statute. These reports which are described in the statute are easily completed, and there has been no showing that the minimal effort required to complete these forms translates into a restriction on abortions. The reporting of data on abortions plainly serves important health interests by advancing the study of this medical procedure, and there is no serious contest over the relevance of this information, much of which already is reported to federal officials.

Of course, if this information is to be of any value in research, it must be available to researchers who are studying this problem. And the statute adequately protects confidentiality by deleting the names of the patient and the doctor and providing severe penalties for unauthorized disclosure.

Next, Pennsylvania in Section 3206 of the statute has provisions which require minors to obtain parental consent or judicial approval for abortions.

Pennsylvania's statute clearly satisfies the general requirements which this Court has prescribed in this area. Now, appellees argued in the Court of Appeals that the statute is too general, and that it must be augmented by procedural rules.

In the absence of such rules, the Court of Appeals accepted this argument and enjoined the statute. Since that time, rules have been issued, and yet appellees continue their attack on the statute, an attack which in some respects is similar to the one they presented below, and in other respects has shifted focus to take account of the new rules.

But the essential question whether this statute is constitutional is still a live question. The specific inquiries have been altered somewhat by these new rules, but certainly the Court faces no insurmountable obstacle in addressing the appellee's facial complaints. All that is required in the way of procedure for a provision like this is that the minor be provided with an effective opportunity to obtain judicial approval, and these rules and the statute together provide as adequately as they can for quick, confidential proceedings.

They do not, as the appellees suggest, permit parental involvement in every case. The state courts

are given authority to appoint counsel, to appoint a guardian, but are left with their traditional discretion in these matters. This statute is plainly constitutional. It is an important provision, and it should be permitted to go into effect immediately.

The final provision of Pennsylvania's statute which is before the Court involves the choice of abortion technique or method which must be used during abortions performed after viability. This statute provides limited protection to the viable fetus. It requires that after viability the doctor used the abortion technique which is least risky to the fetus unless that technique would pose a significantly greater risk to the life or the health of the woman.

We do not argue that the state may require that a woman sacrifice her life or health to preserve the chances for survival of the fetus, and in our view this statute, by using the phrase "significantly greater risk," does no more than use a term which is familiar to physicians and researchers in this field, namely, a difference in relative risk that is statistically or scientifically meaningful.

In all research, statistical experts, medical researchers recognize that even under the best of circumstances, under the best design test, there may be

differences in relative risk which are not scientifically or medically meaningful, and this statute does no more than recognize this common understanding.

For these reasons and those outlined at greater length in our brief, the conclusions of the Court of Appeals were plainly incorrect, and they should be reversed. But even if the Court decides that the Court of Appeals properly applied the law to the limited record before it, it was inappropriate for the Court finally to declare these provisions of state law unconstitutional before the state has been given a fair opportunity to present evidence in support of the statute.

At the very least, the decision should be vacated and any order limited to a preliminary injunction.

I would like to reserve the remainder of my time for rebuttal. Thank you.

CHIEF JUSTICE BURGER: Very well.

Ms. Kolbert?

ORAL ARGUMENT OF KATHRYN KOLBERT, ESQ.,

ON BEHALF OF THE APPELLEES

MS. KOLBERT: Mr. Chief Justice, and may it please the Court, on at least 12 occasions since 1973 this Court has been called upon to define the scope of a

woman's fundamental right to choose abortion.

Only two years ago this Court decided Akron and Ashcroft, and forcefully reaffirmed the landmark case of Roe versus Wade. If this Court reaches the merits, the parties agree that the sound constitutional principles in Akron and Roe and all of the cases following it are controlling.

Before addressing the merits, however, I will first address the question of this Court's jurisdiction. Appellants concede that this case is interlocutory, that it arose as an appeal from the ruling on a preliminary injunction. Appellants also concede in their briefs that finality has always been the prerequisite to the mandatory appeal jurisdiction of this Court under Section 1254(2).

With no support and precedent, the Commonwealth asked the Court to reject a rule that has been an integral part of appeal practice throughout this century. Although Congress has narrowed the scope of the appeal statutes several times in the last 60 years, it has never modified Section 1254(2) to disturb the finality requirement.

If there is a need to change this finality rule, Congress can and will do so.

QUESTION: Well, does 1254(2) by itself speak

in terms of finality?

MS. KOLBERT: Your Honor, it does not, but in 1891, in a case called MacLeish versus Roth, this Court found that the absence of the word "finality" did not mean that finality was not required. This Court applied the finality rule to appeal statutes, and Congress knew that when passing this Section 240 which was the predecessor to Section 1254(2).

Since that time, this Court has specifically applied finality to the Section 1254(2) and this Court has never treated from those rulings. The importance of the finality rule is really very well demonstrated by this case. Given its piecemeal nature, it is very possible that this case could come before the Court at least twice and possibly three to four times if appellant's argument is to hold weight.

QUESTION: Would it then have been enough if the Court of Appeals had said because of possible doubts about constitutionality it would simply enter the preliminary injunction and let events take their normal course?

MS. KOLBERT: Your Honor, we believe that the Court of Appeals could have easily done what it did, which is reach facial constitutionality of the five provisions which it held unconstitutional, because as a

matter of law the District Court had applied both the wrong standard and there was no possible way to construe the statutes in a constitutional manner, but yes, we were before the Court of Appeals asking for the vacation of denial of the preliminary injunction, and that would have been fine for us at that time.

QUESTION: Undoubtedly when lawyers go in to get a TRO or even at the preliminary injunction stage they aren't ready always to litigate constitutionality on a complex matter, are they?

MS. KOLBERT: No, and we were not, Your Honor. This case came up before the Akron and Ashcroft cases were decided. We believed that this Court was -- at that time that the Court was about to rule very conclusively on these matters, and had asked for a preliminary injunction until this Court ruled on those cases and the Court of Appeals could then -- at that point it was in the District Court, but then the Court of Appeals held the matter until this Court ruled and could apply the rulings of these courts on this question.

QUESTION: Did you urge the Court of Appeals to rule finally on the constitutionality?

MS. KOLBERT: Yes and no, Your Honor. The first time that we were before the Court of Appeals, we

urged them to await this Court's rulings in Akron and Ashcroft. On the second time that we appeared before them, we did feel that the rulings in Akron and Ashcroft were conclusive as to the facial validity of several of the provisions.

QUESTION: Well, if there is no appellate jurisdiction, that doesn't mean there wouldn't be jurisdiction by certiorari.

MS. KOLBERT: That is correct, Your Honor. However, the policies that underlie the finality rule, that is, the policies of minimizing the docket of the Court and the policy against piecemeal review would also apply.

QUESTION: We have never held that finality is required in certiorari jurisdiction.

MS. KOLBERT: No, Your Honor, but there are some requirements of certiorari jurisdiction which are not met here. There is no conflict in the circuits in these matters. Although it is a significant issue, it will be before this Court on mandatory --

QUESTION: That has been enough to get certiorari here in many, many cases.

MS. KOLBERT: That is correct, Your Honor. However, in this case, there is no doubt the case will return to the Court under its mandatory appeal

jurisdiction when the matter has been finally resolved. We are not saying the Court should never hear these questions, only when --

QUESTION: But at least we would have to determine to deny certiorari.

MS. KOLBERT: This Court would only have to determine --

QUESTION: Well, they ask us to treat it as certiorari, if there is no appellate jurisdiction, so we would have to deny.

MS. KOLBERT: You would have to deny certiorari. That is correct. In the event --

QUESTION: Ms. Kolbert, in the reply brief that your opponent filed, they point out the Walters case where it came up on a preliminary injunction. Do you have any comment on the applicability of that case?

MS. KOLBERT: Your Honor, this Court has long distinguished Section 1254(2) from Section 1252, which was the Walters case, and in fact 1252 does contain explicit language that allows both appeals from final orders and appeals from interlocutory orders.

We believe that the appeal provisions have been treated differently, basically because in the Walters situation there was an appeal from a finding that a federal statute was unconstitutional.

In the event that the Court reaches the merits, I would like to address the post-viability provisions that are before the Court, and then discuss the reporting and informed consent provisions. Appellees rely on our briefs for the parental consent and the second doctor requirements.

Pennsylvania makes it a felony to perform a post-viability abortion unless it is necessary to protect a woman's life or health. This prohibition is not at issue here. What is at issue is additional standards, additional standard of care requirements and choice of abortion methods that are imposed on a very small class of women who have life or health-threatening problems that force the termination of pregnancy at this late stage.

Post-viability abortions are extremely rare. They are performed on women who desperately want to have their children, but unfortunately, due to some kind of underlying medical disease or pregnancy-related disease are forced to terminate the pregnancy.

Under threat of criminal sanction, the Pennsylvania statute requires two things. First, it requires the physician to use the standard of care that he would use as if the fetus were to be born prematurely rather than being aborted, regardless of the

consequences to the woman's health.

Second, the physician must use the abortion technique most likely to result in a live born fetus unless that technique would cause a significantly greater medical risk to the woman. Now, as found by the Court of Appeals, the significantly greater language on its face directly intrudes upon the ability of a physician to give his primary allegiance to his patient, that is, the woman, and forces the physician to trade off the woman's best medical care in order to only marginally increase the chance of fetal survival.

The Commonwealth concedes that such a tradeoff is impermissible, but they ask this Court to delete the word "significantly" in order to cure the constitutional problems. To do that, to delete the word "significantly," this Court would be forced to rewrite the statute, and we do not believe that the Court can do that.

But the statute, even if the word "significantly" were deleted, contains other problems. It requires doctors to compare risks of differing abortion methods that are impossible to compare. For example, a physician could use a prostaglandin method or a saline method on a woman who had diabetes or who had hypertension or combined, which is frequently the case.

Each method carries approximately the same risk of mortality in a mathematical sense. The prostaglandin method, however, will increase the risk of stroke, and the saline method would increase the risk of uncontrolled diabetes.

What the doctor is required to do here is to compare those two risks, to say is the risk of stroke a significantly greater medical risk than the risk of uncontrolled diabetes, and it is that comparison that is impossible to make, especially without consulting his patient as to which risk she is likely or wanting to accept.

The question then becomes as a result of the statutory language, the vague language, and the impossibility of the judgment that the doctor is required to make what is going to happen. It is our belief that criminal sanctions are likely to produce one of two results.

Either the physician will not provide medical care in these circumstances for fear of criminal liability or the doctor will use the technique which is the most fetal saving to the detriment of women's health, and it is that problem, putting the doctor making these judgments, that is problemmatic.

Moreover, and I think this is an important

point, the prostaglandin method or the saline, in choosing between the two methods, although the prostaglandin method is a little less fetal toxic than the saline method, that does not change the fact that both methods are extremely likely to cause the death of a fetus.

So that to inject that criteria as a critical factor in deciding which method to use makes no medical sense and therefore puts the -- and puts the physician into threat of criminal sanction.

Like the statute found -- also like the statute found invalid under the Colautti decision, the standard of care requirement which is independent of the choice of method requirement contains no life or health exception. It therefore compels the physician to treat a woman already suffering from serious health problems as if she were perfectly healthy.

For example, steroids often given to women in the late stages of pregnancy when they go into very premature labor in order to increase fetal lung capacity and improve the chance or the likelihood of fetal survival, this kind of treatment is contraindicated to women who suffer severe diseases, and in fact would be contraindicated for many of the women who are needing this kind of treatment, who are needing the abortion in

the first instance.

The statute, however, has no exception for the life or health of the mother, and therefore requires the physician to provide medical care in a manner that is contrary to his best judgment. For these reasons, the standard of care and the choice of method requirements must be found unconstitutional.

Turning to the reporting requirements, the reporting requirements contained in the Pennsylvania Act are unprecedented in their scope. They under pain of criminal sanction again require physicians to report over 40 different types of information, including the basis of the physician's own medical judgment about each individual woman who obtains an abortion.

In addition to the separate reports that must be filed, these reports must be open for public inspection and copying, particularly in this area where public disclosure is likely to result in an increase of violence, intimidation, and harassment directed against providers of abortion services, and thereby chilling the exercise of constitutional rights both to the woman and the physician. The reporting requirements cannot withstand scrutiny.

These reports go way beyond those found constitutional by this Court in Danforth, recordkeeping

requirements that were characterized there as approaching impermissible limits. Given these burdens, the Commonwealth must show that there is a compelling state interest to justify the reporting requirements. This they haven't done and they cannot do. In fact, the Pennsylvania Department of Health's past practice has shown that patient care may suffer if abortion providers and women are subjected to increased levels of harassment.

Indeed, when required to justify the reporting requirements and the public disclosure requirements of another section of this Act that was before the District Court on remand, the Commonwealth did not assert a public health interest at all. Rather, they argued that such disclosure was justified because it advanced first amendment rights of protestors.

Even the Centers for Disease Control which in their briefs the Commonwealth acknowledges to be the leading public agency in the collection of health data is able to use aggregate reports that adequately protect the confidentiality of both the doctors and the women involved.

QUESTION: May I ask a question? Have any malpractice suits made use of information in these public reports?

MS. KOLBERT: Your Honor, the reports have not yet become public. As a result of the Court of Appeals injunction on these provisions and a subsequent injunction by the District Court as to other provisions, the reports have not become public, and earlier Pennsylvania law which I may say satisfied the CDC requirements for health data kept the reports totally confidential. So, to my knowledge, in Pennsylvania no malpractice claims have been used.

There have, however, been a number of cases around the country where women's identities have been disclosed through reports, either in hospitals or through information that has been collected by opponents of abortion outside abortion clinics. For example, opponents have taken pictures of women entering clinics, copied down license plate numbers, and tried to track down individual women.

As a result of that, there have been many suits that have been brought, not many, but several suits that have been brought to try to sue the opponents of abortion for those practices.

QUESTION: You say these reports have not been made public. I assume they aren't even being -- they probably aren't even being kept, are they, with the injunction in effect?

MS. KOLBERT: The reports at issue here are not being kept. The reports under Section 3207 and 3214F which were the subject of the lower court proceedings after remand which involved corporate identification and the number of abortions performed per trimester are being kept but they are under order to be no public disclosure.

The reporting requirements, as I said, therefore must be held invalid, and I would like to turn quickly to the informed consent requirements in the Act. The Court of Appeals decision finding the informed consent provisions of the Pennsylvania law unconstitutional must be affirmed. To do so, the Court need only apply the Akron decision.

During the course of this litigation, after the Court decided the Akron decision, the Commonwealth conceded the unconstitutionality of both the 24-hour waiting period and the doctor only counseling requirements which are contained in Section 3205, the very provision that is before this Court.

Because the section is not severable, like the ordinance in Akron, the entire informed consent provisions must fall. The specific informational requirements, however, are invalid in their own right for the same two equally decisive reasons that this

Court condemned the Akron ordinance.

First, the information is designed not to inform a woman but to persuade her to withhold her consent altogether. And second, the statute prohibits the physician from specifically tailoring the informed consent dialogue to the needs of the patient.

Now, counsel for the appellants this morning said, well, the doctor is free to tailor the information. The statute does not say that anywhere within it, and that under the ruling in Akron is an equally decisive reason for striking down these provisions.

This statute requires --

QUESTION: May I ask before you go on, is the physician required to advise the woman that the father will support the child?

MS. KOLBERT: Yes, he is, Your Honor. It is either the physician or a counselor, a designated agent. That appears in the second set of requirements in the Act.

QUESTION: In view of statistics as to the number of unwed mothers that have children, what does an unwed mother understand when she is told that the father of the child will support --

MS. KOLBERT: Your Honor, it is our view that

to tell the woman that the father is liable for support, given the national crisis in the collection of child support enforcement orders that Congress has recognized, and the difficulty in the collecting of support may in many cases be misleading, but in addition to inform that, to use -- to provide that information to certain women, such as a rape victim who must be informed that her assailant is liable for the support of her child if she carries the pregnancy to term can be extremely cruel and traumatic in that situation, and may force her to relive that trauma.

It is those very situations that that information may not be appropriate at different times. It is our view that the statute must allow the physician to tailor the information to the specific needs of this patient, and he can't do that, or the counselor can't do that given the mandates of the provision.

The statute, as I said, is both cruel and inaccurate in some situations, and misleading, and also requires the provision of irrelevant information which can harm the health of the woman in certain instances. Let me give you another example.

Informing a woman that there are unforeseeable risks to an abortion is an inaccurate statement given that abortion is the most studied medical procedure in

American medicine today, and can only be intended by the legislature to arouse unwarranted fears of the woman.

In addition, it is irrelevant to provide information such that medical assistance payments are available or information that the state strongly urges the woman to contact particular agencies and consult private social agencies that are run by opponents of abortion in situations where the woman needs the abortion in order to protect her life.

In those circumstances not only is it irrelevant, but it could be harmful to the woman's health, and the facts in the record do show that. Accordingly, the informed consent provisions must be held in invalid.

In conclusion, the Pennsylvania Act constitutionally infringes on the rights of women in consultation with their physicians to make critical decisions about abortion and to interfere with women's ability to control their own lives and health. It has been argued to this Court that the controversy surrounding the abortion issues requires a retreat from the principles both espoused by this Court in Rowe and reaffirmed most recently in Akron, yet it is precisely this controversy that compels a clear and unwaivering dedication to those sound and fundamental principles.

This Court's steadfast adherence to Rowe and Akron is the only way to guarantee the protection of the cherished individual liberties at stake. Accordingly, FOE has asked this Court to dismiss this case for lack of jurisdiction, or in the alternative to affirm the ruling of the Court of Appeals.

CHIEF JUSTICE BURGER: Do you have anything further, counsel?

MR. GORDON: No, Your Honor, I have nothing further.

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

(Whereupon, at 10:45 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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

#84-495 - RICHARD THORNBURGH, ET AL., Appellants V. AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, ET AL.

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

BY Paul A. Richardson

(REPORTER)