ORIGINAL

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

NEIL F. HARTIGAN, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, ETC., ET AL., Appellants	)	
v.	)	No. 85-673
DAVID ZBARAZ AND ALLAN G. CHARLES, ETC.	)	

PAGES: 1 through 50

PLACE: Washington, D.C.

DATE: November 3, 1987

Heritage Reporting Corporation

Official Reporters
1220 L Street, N.W.
Washington, D.C. 20005
(202) 628-4888

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v. : No. 85-673

DAVID ZBARAZ AND ALLAN G. CHARLES, ETC.

Washington, D.C.

Tuesday, November 3, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

APPEARANCES:

MICHAEL J. HAYES, ESQ., Deputy Attorney General of Illinois, Chicago, Illinois; on behalf of the Appellants.

COLLEEN K. CONNELL, ESQ., Chicago, Illinois; 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 REHNQUIST: We'll hear argument this morning in Case Number 85-673, Neil F. Hartigan v. David Zbaraz.

Mr. Hayes, you may proceed whenever you're ready.

ORAL ARGUMENT OF MICHAEL J. HAYES, ESQ.

ON BEHALF OF APPELLANTS

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

This case comes before you today and presents two issues regarding the constitutionality of certain provisions of the Illinois Parental Notice of Abortion Act.

Does the Act's twenty-four parental consultation period unduly interfere with the right of an unmarried, unemancipated minor to make her abortion decision?

Secondly, does the judicial alternative to parental notice found in Section 5 of the Act provide a constitutionally sufficient framework to provide an expeditious confidential appeal from Circuit Court opinion adverse to the minor?

Also, this Court has postponed consideration of its jurisdiction to hear this appeal and directed that it be considered with the merits. I shall initially address the jurisdictional issue.

Most recently, this Court has made it clear that jurisdiction under Section 28 USC 1254, Part 2, is appropriate

where, as inn this case, the order appealed from is final and there are no facts to be developed at trial.

This case falls squarely within those elements of Section 1254.2 jurisdiction. The 7th Circuit order from which we appeal is clearly final. No further action to be taken by the lower court will be had on any question of fact or law presently within this case. There is no additional relief the Plaintiff can receive. There is no relief that the Defendant can receive from any adverse ruling of the 7th Circuit.

The District Court cannot reverse the holding of unconstitutionality of the twenty-four hour period, parental consent period, nor can it reverse the holding of unconstitutionality as the exceptions to that period found in Section 7 of the Act.

Neither can the District Court reverse the 7th Circuit on its finding that the existing judicial by-pass provided in Illinois law is constitutionally insufficient to meet the requirements of this Court.

The Court has, therefore, issued final orders on the unconstitutionality on the twenty-four parental consultation period, Section 5 of the Act. Excuse me. Section 4 of the Act and on the exceptions thereto in Section 7.

It has also issued a final order that the judicial by-pass procedures found in the Act provided by the Illinois legislature are unconstitutional.

The only conceivable action on remand is hypothetical and contingent upon the some day possible activity of a party not before the Court. The Act has been permanently enjoined and the statute was held constitutional inoperative. We contend that clearly makes the order of the 7th Circuit final.

Jurisdictional statutes should be strictly construed, but they should be applied in a practical rather than a hyper-technical fashion. Such an --

QUESTION: Mr. Hayes, didn't the 7th Circuit reserve judgment as to a part of the matter pending in the promulgation of rules by the Supreme Court of Illinois?

MR. HAYES: Your Honor, it could appear that way, but a practical look at the opinion and a close reading of it clearly indicates that the statute that the legislature passed with its by-pass procedures coupled with the rules that exist in Illinois under our Supreme Court rules for appellate practice were held to be constitutionally insufficient as they exist.

They did indicate that the case would go back in any event the Supreme Court ever passed the rules in the future. They might then consider having the District Court look at those, but as the case came before the 7th Circuit from the District Court, it is clear that everything that was there was held to be unconstitutional on those three issues that I've mentioned.

QUESTION: May I ask, what is the status of the rule-making procedure proceeding before the Illinois Supreme Court? I assume it's in progress.

MR. HAYES: The rule-making procedure, as far as I know, Justice Stevens, has not been underway.

QUESTION: Has anybody initiated that or taken any action to get that work done?

MR. HAYES: Excuse me?

QUESTION: Has it been initiated? Has anybody proposed rules?

MR. HAYES: Not to my knowledge. It has not been initiated.

QUESTION: Who is responsible for initiating it, do you suppose?

MR. HAYES: Well, initially, the Supreme Court, of course, would have authority to initiate on their own through a committee to draft rules and to review the rules. I suspect the Bar Associations and I suspect any individual could probably initiate it.

QUESTION: How about the Attorney General of the state? Has he done anything about it?

MR. HAYES: The Attorney General of the state has not petitioned the Supreme Court to implement rules, to add additional rules. It's been the position of the Attorney General of the state that the existing rules provide the

constitutionally sufficient framework required for a judicial by-pass.

QUESTION: What about his position as to whether the statute itself is operative if those rules are never promulgated? I mean, it might well be constitutional to apply the statute without the rules, but it might also be contrary to the intent of the Illinois legislature.

Has anyone Illinois court spoken about that?

MR. HAYES: They have not, Justice Scalia. It's the intention or the position of the Illinois Attorney General's office that should the injunction be vacated and a Court of Appeals decision be reversed, that that statute, much like the statutes that were involved in Ashcroft and Bellotti could go into effect with the rules that exist, and that if additional rules and fine-tuning needs to be done, certainly the Supreme Court will be assumed to follow the edicts of this Court and provide that fine-tuning.

QUESTION: That's a question of legislative intent, though, isn't it?

MR. HAYES: As to whether the Supreme Court --

QUESTION: As to whether the Illinois legislature intended this statute to be implemented if the rules provision never went into effect, if the Illinois Supreme Court never adopted the emergency rules that it anticipated.

MR. HAYES: No, I disagree, Justice Scalia.

First of all, I believe that the legislative intent was to ask the Supreme Court of Illinois to pass additional rules as necessary, as they found to be necessary, to provide a constitutional framework for which this judicial by-pass --

QUESTION: I don't think you're disagreeing. I'm just saying that it is ultimately a question of what the Illinois legislature intended.

MR. HAYES: That's correct.

QUESTION: And the Attorney General asserts the legislature intended one thing, but, ultimately, that's a question to be answered by the Illinois courts, I take it, isn't it?

MR. HAYES: That's correct. The only --

QUESTION: The same courts that have refused to promulgate the rules thus far.

MR. HAYES: Well, Justice Scalia, they have not had an opportunity to have a viable statute in front of them to promulgate rules. I think it's not correct or illogical to ask the Supreme Court of Illinois to go into a rule-making process for a statute that has never had one day of operative effect because of the intervention, we contend, improperly of the Federal District Court in entering the injunction.

So, this case is precisely the type of case that Congress intended this Court to review on appeal under 1254.2.

The 7th Circuit expressly held provisions of an

Illinois law unconstitutional. The ruling of unconstitutionality has interrupted a program which the 7th Circuit recognized as promulgated to further significant state interest of the state of minors and of parents.

The order of the 7th Circuit requires the Illinois Supreme Court to expend time and resources in order to get a ruling on an effective statute and those are the types of comity concerns that 1254 was passed to prevent. To allow a state statute to be reviewed, we contend that if this case or this order is held not to be final, the comity concerns 1254.2 was intended to foster would be thwarted.

The Court clearly, in our opinion, has jurisdiction to hear this case. Additionally, however, should this Court determine now to grant review under 1254.2, we would ask it to exercise its discretionary authority to hear this case under a petition for writ of certiorari, Section 2103.

There are important issues of public policy involved in this case and that review by this Court will be significant in assisting Illinois in this statute and in others and other states who are confused and unclear because of the decisions in this case in the regulation of these areas, as to what are the boundaries that their statutes must stay within.

QUESTION: Mr. Hayes, do you think, moving from the question of whether we have jurisdiction to hear the appeal, is it clear that the District Court had proper jurisdiction to

entertain this suit in the first place?

As I understand it, the suit was brought with respect to a statute that envisioned the promulgation of emergency rules by the Illinois Supreme Court, and the suit was brought before those rules had ever been issued, and the District Court jumped right in to create the situation that you describe, which, in your words, is deterring the Illinois Supreme Court from ever issuing those rules since they are rules governing a statute that's been declared unconstitutional.

MR. HAYES: Justice Scalia, I would agree with you that -- I think that's the problem with the Appellees' suggestion that this case isn't ripe because if it's not ripe for review under 1254.2 because the Supreme Court didn't pass some rules and those rules have never existed, that same argument means that it wasn't ripe at the District Court level, and that the injunctions that were entered were improperly entered.

That's another reason why I think the Court has to find finality here, and that the argument raised on appeal to this Court that because of that possibility of rules existing, some day in the future, it destroys the ripeness for appeal and reviewing this case, that same argument taken to its logical extreme in the other hand would destroy the justiciability of the case in the first instance in the trial court.

QUESTION: Does that mean, Mr. Hayes, that there need

not have even be a lawsuit filed, the statute would not have had any legal effect until the rules were promulgated? Is that your position?

MR. HAYES: Oh, on the contrary, Justice Stevens.

QUESTION: Then, why wasn't it ripe for adjudication? If it did have legal effect right away, why wouldn't it have been ripe for adjudication?

MR. HAYES: I agree it's ripe for adjudication.

QUESTION: I mean, at the time of the District Court's decision.

MR. HAYES: I agree then and I agree now, and I don't believe, first of all, that the statute's operation, as I'll discuss later when I get to the by-pass procedure, requires in Illinois, as a constitutional basis, the passage of additional rules. I believe that the framework in the statute and the existing rules that we have provide the necessary framework for the by-pass procedures and the standards set for those procedures by this Court.

I also believe that the legislature in the Illinois was not trying to make a judgment, a legal judgment that the Court would make in Illinois, as to whether more rules were necessary. They left that in the section of the statute to the Supreme Court. They directed that the Court make sure that there is expeditious and confidential appeals, but they left that question squarely to, and appropriately under the Illinois

constitution, the discretion and incision of the Illinois Supreme Court.

QUESTION: Did either the District Court or the Court of Appeals here make a finding that this statute could be implemented whether or not the Supreme Court of Illinois ever issues those rules? Is that a finding made?

MR. HAYES: They did not. In fact, I think --

QUESTION: But you're telling us that that's essential to the jurisdiction here.

MR. HAYES: Pardon me. I don't quite understand the question.

QUESTION: As I understand your position, it is an essential element of the jurisdiction that this statute is operative without the Illinois Supreme Court rules.

MR. HAYES: That's correct.

QUESTION: And, yet, neither of the Courts below has made a finding that that's how the statute should be interpreted, which is a question of Illinois law, but nobody has made any finding to that effect yet.

MR. HAYES: They have found that it was the intention and the Plaintiffs allege that it was the intention of the Illinois officials, namely the Attorney General of the state, to enforce the statute upon its becoming effective as it existed, and that because there was not what they believed to be necessary additional specificity in the rules of the Supreme

Court, the Court enjoined it from going ahead. So that the threatened action of having the statute effective was enough in the Plaintiff's view and in the Court's rule to get jurisdiction to enjoin the statute.

As to the constitutionality of the provision in the statute for the twenty-four hour period of parental consultation, the Court below, the 7th Circuit, acknowledged that the state has significant interest in promoting parental consultation in a minor's abortion decision, and in protecting the right of a parent to be involved in that decision.

The interest as to the child is based upon the recognized presumption that minors aren't able to make decisions in an informed and mature manner on very important subject matters, such as the abortion decision.

The state significant interest also takes into account its ability to protect the constitutional right of the parent to supervise, direct, nurture and properly control the upbringing of their children. Thus, the Court in the 7th Circuit recognized that by requiring minors to give notice of their impending abortion decision to their parents, the statute and the state were validly promoting the interest and preserving the state's interest in family structure, its obligation to protect minors from their own immaturity, and also protecting the rights of individuals as parents to have a say-so and consult with their minor children in a very

important family personal matter.

After acknowledging these important issues, however, and recognizing that notice was intended to foster that important consultation, 7th Circuit struck as unconstitutional a short twenty-four waiting period after notice, indicating that the type of a wait was too burdensome on the minor's abortion decision. That result is illogical and not supported by any precedence in this Court.

Notice without time for a meaningful consultation is meaningless. The Court recognized the important significant benefits of parental consultation on the one hand and the need for parental involvement in the minor's decision, and then said there is no time for the parent to be heard and importantly for the minor to hear the advice of the parent. There was no time for consultation to occur.

The Court reached this incorrect position by relying on a series of cases that struck waiting periods for an adult woman seeking to have an abortion. Waiting period for adults who have freely given consent have been held to unjustly interfere with the woman's abortion decision, even when the state said, well, we wanted to provide time for the woman to reflect on her decision.

That's not the case when the twenty-four waiting period is designed to provide consultation time for the parent and the minor child. Although the Court below recognized that

the state may have a significant interest promulgated by a statute which regulates a minor, but that same interest would not be protected by that same statute applied to an adult, it refused to apply that standard.

It failed to apply the principles to this case and instead applied the standard for adults to a statute aimed solely at unmarried, unemancipated minors. It is obvious that the twenty-four hour waiting period is more burdensome on the minor's decision than would be no period. That restriction is entirely justified, however, to protect and promote the significant interest recognized by this Court and the minor to have the consultation with his parent and by the parent to have the consultation time with the minor.

The state is not obligated to pass legislation to promote its legitimate state interest and then leave that interest, the success of that interest to chance. Rather, it is justified, we contend, in selecting means that attempt to guarantee that the good intentions of the statute do occur.

We believe that the twenty-four hour waiting period, a very short time for consultation after notice, clearly outweighs any burden or risk or interference with a minor's abortion decision.

QUESTION: Can I ask you a question about how this statute would work without the Supreme Court rules? It has a provision in it for a guardian ad litem, as I understand it,

for the minor who comes in and asks for judicial by-pass of the consent provision.

MR. HAYES: That's correct.

QUESTION: Who pays the guardian ad litem's fee?

MR. HAYES: There are no costs to the minor. The state, either through the county or through the state appropriations system, will provide the services of the guardian ad litem and a court-appointed attorney as well.

QUESTION: Is that set out in the statute or is that -- what's the source of that?

MR. HAYES: Yes, it is set out. It's directed to be provided to the minor.

QUESTION: At state expense?

MR. HAYES: That's correct.

QUESTION: I see. Thank you.

MR. HAYES: In drafting and passing the Parental Notice of Abortion Act, the Illinois legislature elected to include a judicial alternative to notice. The judicial alternative found in Section 5 of the Act is intended to allow a minor who believes she is informed enough and mature enough to make her own decision without parental consultation and guidance or a minor who believes it's in her best interests not to notify her parents, to waive or by-pass that notice provision.

The waiver of notice provisions are found in Section

5. They provide that a minor can proceed in court on his own. A guardian ad litem will be appointed. An attorney will be appointed. The proceedings will be confidential and anonymous. The decision will be rendered within forty-eight hours from the filing of the petition. The standard that's set forth in the statute leaves the court only two findings, provides two bases for the review to the judge. That the person is mature and informed enough to make her own decision and that notice to the parents is not in her best interests.

Those were taken right from the constitutional decisions of this Court.

The Court also -- the statute also requires the Court to make written findings and provide a confidential record, expedited confidential appellate process is provided for in the statute, and only the minor can appeal the decision of the Circuit Court. Of course, as I mentioned, there will be no fees. So, the economic burdens that may have been argued and applied in this case are taken away by the statute.

QUESTION: May I just be sure? Are you -- when you say that there are no fees, is it the no filing fees in Sub-Section (h) of Section 5 that you rely on for that?

MR. HAYES: Yes. There are no filing fees. In addition, --

QUESTION: And what is the source of the statement no attorneys fees?

MR. HAYES: It's the -- our belief that the legislature intended in this Act when they provide that a guardian ad litem will be appointed and that the Court --

QUESTION: So, that's your instruction of the general legislative intent rather than any specific finding in the Act?

MR. HAYES: That's correct.

QUESTION: I hadn't found it.

MR. HAYES: Correct. In reviewing the provisions of this judicial alternative to parental notice, the Court of Appeals recognized that all the cases they relied on to require by-pass alternatives have been consent statutes, not notice statutes.

The Court required alternative procedures in those cases because a parent could veto or, as a blanket veto, block the minor's abortion decision.

Illinois has elected to promote the significant interest fostered by parental involvement in the minor's abortion decision through notice and not consent. Assuming, however, that the same alternative procedures are constitutionally mandated in a notice only statute, as has been required by the Court in Ashcroft, the Illinois statutory provisions as they exist are constitutionally sufficient as a framework to meet the standard for alternative procedures set out in Ashcroft.

In enacting Section 5, Illinois has elected to

provide a by-pass procedure for parental notice that provides each of the characteristics this Court has declared necessary in Ashcroft. The Court provides for an alternative by having an expeditious court proceeding, respects the anonymity of the minor, --

QUESTION: Mr. Hayes, can I ask you one other question about the statute?

MR. HAYES: Certainly.

QUESTION: What is the reason for notice to both parents? Why isn't notice to one parent sufficient?

MR. HAYES: Illinois has decided that by choosing a two-parent notification statute that, as we know from our cases, both parents have a right to raise and nurture and guide their child. It's not a right that is established just for one parent. We know very clearly that whether it be the mother or the father, each together and perhaps separately are entitled to --

QUESTION: Does that shed light on the state's interest in being sure that the child is having the benefit of sympathetic advice and so forth?

MR. HAYES: It certainly does because if you view the statute only looking from the benefits to the child, there's another purpose that this Court has recognized and our statute provides, and that's the right of parents. Parents, it must be remembered, have the --

QUESTION: You have to rely on that right to justify notice to both parents. You don't rely on just the best interests of the child for that reason.

MR. HAYES: No. Both parents also applies to best interests for the child, as I pointed out. The child has a right to expect, both the father, the mother, perhaps bringing different perspectives to the decision, different considerations, to receive that input and involvement in the process.

But, in addition to that, both parents have a constitutional right, we contend, to make those decisions and help nurture their child. The Act also provides appropriate standards for waiver. It removes, as we talked about earlier, as I mentioned earlier, all economic considerations.

This Court has required no more when it's approved the parental consent statute in Ashcroft. The Court of Appeals held Section 5 constitutionally insufficient because it did not with great specificity contain each and every provision for implementation.

Further, the Court held too much was left to judicial discretion, particularly on appeal, and I point out that's although in the opinion itself, the Court recognized and held that under Supreme Court rules that exist, the minor has an unquestionably good opportunity for expeditious appeals. Right in their decision, but, yet, they find there's more required,

more specificity on implementation.

This Court has not required such detail and specificity when reviewing a statute such as this one, especially when it's been attacked before enforcement as faciously unconstitutional. The statutory alternative has been approved. It provides a framework in which a by-pass procedure can work to facilitate an expeditious and confidential appeal.

Appellants contend that Illinois provisions relative to waiving the parental notice requirement provide just such a framework. As in Ashcroft, there is no reason for this Court to believe that Illinois courts will disobey or ignore the constitutional mandates in implementing this by-pass procedure.

The edicts of this Court as to what is constitutionally required will certainly limit or shape the discretion of Illinois courts to the extent it may exist. This is especially true in a case, as here, where the statute was enjoined prior to its effective date.

The Illinois legislature, out of respect for the state constitutional provision requiring separation of powers, requested that the Court promulgate any rules it found necessary to ensure the proceedings under this Act are handled in an expeditious and confidential manner. The legislature's request clearly evidences their concern that a statute which advances such significant interests be implemented as this Court directs.

What additional rules, if any, need be implemented will await this Court's ruling on whether the existing statute and rules provide a constitutionally sufficient framework to provide expeditious and anonymous judicial alternatives to notice.

We respectfully request this Court to reverse the decision of the 7th Circuit Court of Appeals, that the twenty-four hour consultation period is unconstitutional --

QUESTION: Mr. Hayes, --

MR. HAYES: -- with its exceptions.

QUESTION: -- excuse me. I was just wondering. Is there any other medical procedure in Illinois that has a rule like this?

MR. HAYES: There is no other medical procedure. There are the standard procedures in Illinois for parents to consent to surgical procedures and medical service for their minor children. There is a statute, as pointed out in the briefs, that allows pregnant minors to consent to surgical procedures.

QUESTION: That's what I was questioning about. Is there nothing other than that one citation?

MR. HAYES: That's correct.

We would also ask --

QUESTION: I don't understand what that means. Suppose you have a minor who wants to have some kind of

elective surgery, let's say a facelift or sterilization, whatever you like.

MR. HAYES: I would require parental consent.

QUESTION: It would.

MR. HAYES: Consent. That notice. Consent.

QUESTION: Consent.

QUESTION: Of both parents?

MR. HAYES: I believe one would be sufficient.

QUESTION: One would be sufficient.

MR. HAYES: In the judicial alternative, we would ask also that the Court reverse that decision of the 7th Circuit.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Hayes.

We'll hear now from you, Ms. Connell.

ORAL ARGUMENT OF COLLEEN K. CONNELL, ESQ.

ON BEHALF OF THE APPELLEES

MS. CONNELL: Thank you, Mr. Chief Justice, and may it please the Court:

Mr. Hartigan has not met his burden of establishing either obligatory or discretionary jurisdiction to review the issues he now raises nor has he satisfied the burden of showing that the Illinois statute is carefully enough drawn to achieve a significant state interest without burdening the exercise of fundamental right.

There is no jurisdiction here under Section 1254

because the 7th Circuit did not enter a final order declaring the Illinois statute invalid as repugnant to the Constitution.

Starting, first, with the finality portion, the 7th Circuit's decision remanded this matter to the District Court for further proceedings. Likewise, the 7th Circuit did not declare the statute unconstitutional. Instead, as Mr. Hartigan recognized in his jurisdictional statement to this Court, the 7th Circuit specifically reserved the issue of the Act's ultimate constitutionality.

The reason the 7th Circuit reserved the issue of the Act's constitutionality was because the 7th Circuit found that the statute by its own terms was incomplete. It was incomplete because the statute specifically sets out a desire by the Illinois General Assembly for a judicial by-pass for any young woman who cannot tell either both of her parents or one of her parents about her pregnancy and her desire to have an abortion.

Now, this incomplete statutory scheme is really at the root of the jurisdictional efficiency that we have here. The statute itself in Sections 5(f) and 5(g) specifically say that a confidential and expedited appeal shall be available as the Illinois Supreme Court provides by rule.

In the next provision of the statute, the General Assembly respectfully requests the Illinois Supreme Court to promulgate any rules necessary.

Mr. Hartigan's counsel misstates the statute when he

contends that the statute calls for the Illinois Supreme Court to promulgate any rules that it thought were necessary. The statute doesn't say that. The statute says any rules and regulations necessary to ensure that proceedings under this Act are handled in an expeditious and confidential manner.

QUESTION: But what if the Illinois Supreme Court thinks the present structure of Illinois rules in the appellate courts is adequate to accomplish that and, so, nothing more is necessary? What if they've looked at it and they've so concluded?

MS. CONNELL: Your Honor, the existing Illinois rules are not adequate.

QUESTION: Well, you tell us they're not. Now, maybe you're right, but what if I'm an Illinois Supreme Court Justice and I disagree with you, and I think what we've got now is perfectly okay? What would I have to do? Nothing.

MS. CONNELL: Your Honor, there's been no indication that that is what the Illinois Supreme Court thinks. Further, Your Honor, there is --

QUESTION: Well, it certainly has. They haven't taken any action. I assume that they respect the General Assembly when the General Assembly asks them to do something they think is necessary. I don't think -- you know, they're just defining another branch of the state government, are they?

MS. CONNELL: No. Well, Your Honor, I don't think

that the Illinois Supreme Court is perhaps intending any disrespect for the Illinois General Assembly, but the Illinois Supreme Court is a separate branch of Illinois government, under the Illinois constitutional scheme, and it can act or decline to act for any variety of reasons, Your Honor, and what has happened here really is, I believe, a stalemate between the Illinois General Assembly on the one hand, which wants this statute, and which wants a judicial by-pass system with rules, and that the Illinois General Assembly wants additional rules, Your Honor, cannot be in question because after the 7th Circuit decision, both Houses of the Illinois General Assembly past a resolution calling again for the Illinois Supreme Court to promulgate those rules.

And that rules are necessary, just briefly, is apparent just because the most obviously, there are no rules, for example, in the Illinois system governing confidentiality.

QUESTION: That is a question for the Illinois Supreme Court under the statute. It says such rules as are necessary.

What puzzles me is why does this incompleteness of the statute trouble you now but it did not trouble you when you brought your suit?

MS. CONNELL: Well, Your Honor, it has always troubled us. The reason that we sought to enjoin the statute, Justice Scalia, is because Mr. Hartigan, although conceding in

the District Court that the statute clearly anticipated additional rules, wanted to enforce that statute without the rule.

QUESTION: You have gotten then -- you have been successful below. You have a final order that prevents him from enforcing the statute without the rules, don't you? He cannot now do what he wanted to do, enforce the statute without the rules. The injunction that's now in existence prevents him from doing that.

MS. CONNELL: Your Honor, the injunction prevents the enforcement of the statute, but it does not, as required by Section 1254, declare the statute unconstitutional. Instead, it leaves open an opportunity for the Illinois Supreme Court to promulgate the rules that the legislature specifically requested.

QUESTION: If that opportunity is ever accepted by the Illinois Supreme Court.

MS. CONNELL: If that opportunity --

QUESTION: It's entirely possible that the Illinois Supreme Court never adopts its rules and forever, nonetheless, should it adopt that course, this Attorney General is restrained from doing what he wants to do on the ground that to do that under the statute, as he interprets it, is unconstitutional. Isn't that the situation?

MS. CONNELL: Your Honor, if the Illinois General--

excuse me. If the Illinois Supreme Court chooses not to act, that is an independent decision by a state body of government, and with respect to Mr. Hartigan being forever barred from enforcing the statute, that is because the statute as designed, as written, calls for rules, and the General Assembly, when it passed the statute, was aware of the fact that the Illinois Supreme Court's action was needed before there could be such rules.

QUESTION: He asserts it doesn't require rules. He asserts he can enforce it without the rules. You have a judgment that says you cannot enforce it without the rules period. Now, why isn't that a final determination that the statute as he interprets it is unconstitutional?

MS. CONNELL: Your Honor, it is not a ruling below that satisfies the jurisdictional requirements of this Court because even though it may be a final decision with respect to whether the statute is incomplete, Your Honor, it is not a final ruling that the Act itself is unconstitutional.

Indeed, as I indicated earlier, Mr. Hartigan, in his jurisdictional statement, conceded that the 7th Circuit did not strike the statute down. It reserved --

QUESTION: Ms. Connell, don't you think that we would at least have jurisdiction if we granted certiorari to review whether the injunction was properly issued below?

MS. CONNELL: Justice O'Connor, I think that the same

constraint that caution against the exercise of obligatory jurisdiction also counsel against the exercise of discretionary --

QUESTION: The question -- Ms. Connell, the question is whether we have jurisdiction to grant certiorari, not whether we ought to grant it. That was Justice O'Connor's question. What's your answer to that?

MS. CONNELL: Mr. Justice Rehnquist, I think that with respect to the questions that Mr. Hartigan now raises, if this Court were to decide to grant certiorari jurisdiction, there would be a substantial risk perhaps of issuing an advisory opinion because the issues that Mr. Hartigan asks review on of whether this statute requires rules, when, in fact, the -- excuse me. Of whether the statute is constitutional without rules is taken care of by the fact that the statute itself asks for rules.

QUESTION: That would be a reason why the Court should not grant certiorari, but I think all we require jurisdictionally to follow up on Justice O'Connor's question is that a case be in the Court of Appeals, and there's no question this case was in the Court of Appeals, is it?

MS. CONNELL: That's right, Your Honor. No question about that. But, again, to reiterate, I think that the standards that this Court has adhered to consistently since the decision in Ashwander, clearly the doctrine of necessity,

counsel against the exercise of jurisdiction here.

We have a Court of Appeals which was being sensitive to the comity concerns expressed by this Court in a multitude of decisions, saying we are not going to reach the constitutional issue prematurely. We are not going to strike down the statute before we provide the Illinois Supreme Court an opportunity, a continuing opportunity to fulfill its constitutional role and to promulgate rules that might bring the statute in compliance with the Constitution.

QUESTION: How much time did you give the Supreme Court to adopt those rules before you filed suit?

MS. CONNELL: Your Honor, --

QUESTION: That's a very simple question.

MS. CONNELL: Your Honor, approximately eighty-eight days, my recollection.

QUESTION: And about how long does it take a state to adopt -- your state to adopt its rules?

MS. CONNELL: Your Honor, the --

QUESTION: How many years?

MS. CONNELL: -- answer is that it varies because --

QUESTION: That's right.

MS. CONNELL: -- the --

QUESTION: If we had those rules, we could decide the case very easily, couldn't we?

MS. CONNELL: Yes, Your Honor.

QUESTION: But you jumped the gun, didn't you?

MS. CONNELL: No, Your Honor, we didn't jump the gun because had we not filed for injunctive relief in the District Court, Mr. Hartigan and his co-defendant, Mr. Daley, who is a representative of all the states attorneys in the State of Illinois, were prepared to enforce that law without the rules that the statute requested, even though, as Mr. Hartigan conceded, rules were clearly anticipated by the statute itself.

Now, the consequences of --

QUESTION: Mexican stand-off.

MS. CONNELL: Some kind of stand-off.

QUESTION: Well, what rule of this Court do we deal with that, with a Mexican stand-off?

MS. CONNELL: Your Honor, I think that that stand-off is an issue really to be resolved by the Illinois State constitutional systems and the Illinois state government. If the Illinois General Assembly does not want to persist in its desire for judicial by-pass, which needs action by an independent branch of the Illinois government, then the Illinois General Assembly can amend the statute to substitute perhaps an administrative by-pass which this Court has indicated might be appropriate in its Bellotti decision or it might try a host of different alternatives to achieve its desired parental involvement.

The Illinois General Assembly hasn't done that.

Instead, it reiterated its desire for the statute to go as written with rules when the Illinois Supreme Court --

QUESTION: Ms. Connell, shouldn't the District Court in the first instance either have abstained to let the Illinois courts decide whether the statute could go into effect by its own terms without Supreme Court rules or determine whether as a matter of state law the statute could go into effect by its own terms and then act accordingly?

MS. CONNELL: Your Honor, I think that the District Court was really faced with the issue of eminent enforcement of this statute and the issue at that point then became a federal issue of whether this skeletal statute without the rules requested provided an adequate framework within the context of Bellotti and Ashcroft that provided the young woman with an assurance --

QUESTION: Well, proceeding in that fashion has just created a stand-off, as has already been pointed out. So, I wonder whether it isn't appropriate to look at whether the injunction was properly issued.

MS. CONNELL: Your Honor, I think the injunction clearly was properly issued and, again, I would say that certainly the 7th Circuit decision which vacated the decision that the Act was finally and completely unconstitutional really struck that balance that you're concerned about because it said, look, if we don't continue the injunction, this Act will

go into effect and it will be enforced because it had the enforcement agencies of the state in court before it saying it would be enforced.

So, it had to provide some sort of interim relief, and to have abstained, Your Honor, in the classic sense of that doctrine would have left the young women here without any protection of their fundamental rights and with the enforcement of a statute that was incomplete in its own terms and did not provide the confidential and expeditious judicial by-pass that the General Assembly intended.

QUESTION: You're right, you're right, Ms. Connell. The prosecution would have failed in state court, wouldn't it, or any sort of action would have failed in state court because, in your view, the legislature did not intend the statute to go into effect without rules in the Supreme Court of Illinois, and the first time the -- the state attorney general or Mr. Daley walked into state court to do something about this, the state courts would have told him that.

MS. CONNELL: Your Honor, I have no assurance of that, and --

QUESTION: Well, then, you must be in some doubt about your construction of state law, if you feel you have no assurance of that.

MS. CONNELL: Your Honor, the problem is that they were threatening to enforce it and for this law to even be

threatened to enforce would have provided a substantial chill to the physicians who are also plaintiffs in this action and who would, given the serious criminal penalties attached to a violation of the statute, been chilled and would not have performed the abortion for the young woman and would not have allowed them to effectuate their fundamental right.

QUESTION: But you can't have it both ways, Ms. Connell. If you want to attack a statute which you interpret as being a statute that allows you to go forward without the Supreme Court rules, then it seems to me, fine, if you want to attack the statute as being that kind of a statute, then it seems to me you have to take the unpleasant part of that, which is when that statute is struck down, there is jurisdiction here to review the striking down. But you want to have the one without the other. You want to strike it down as being what you now say it is, a statute that can't go forward or that can go forward without the Supreme Court rule, but then you come here and you say, no, actually, nothing is really happening.

MS. CONNELL: No, Your Honor, it's not that nothing has really happened. It's that the 7th Circuit's decision, which did not declare the statute unconstitutional, left the state an opportunity to render it constitutional.

QUESTION: It declared your statute unconstitutional, the one you asserted this statute was, namely a statute that allows the Attorney General to go forward without the Supreme

Court rules, otherwise there wouldn't have been any jurisdiction in the District Court.

MS. CONNELL: But, Your Honor, with all due respect, it's not my statute, it's the State of Illinois' statute, and that statute does request rules, and, really, without those rules, not only --

QUESTION: But you didn't say that in the District Court. Your whole theory in the District Court was the state is going to go ahead without these rules and that is what the statute says and such a statute is unconstitutional. Your theory in the District Court was not enjoining the Attorney General from going ahead because he's violating state law; your theory is he may well be in compliance with state law and that law is unconstitutional.

MS. CONNELL: No, Your Honor. Our concern was that Mr. Hartigan's desire to enforce this statute in its incomplete form, regardless of whether it violated state law or not, would have violated the Federal Constitution because it would not have provided the requisite assurances that a young woman could pursue a judicial by-pass in an expedited and in a confidential manner.

Your Honor, just to move into the merits, it's that problem of incompleteness which really shows why the 7th Circuit's decision was correct. The statute below --

QUESTION: I'll let you move into the merits, Ms.

Connell. I think that's fair.

MS. CONNELL: Thank you.

QUESTION: Let me just ask this because -- is it correct that the Court of Appeals' opinion held that the statute without the rules does not provide either an expedited or a confidential method of review and, therefore, is both unconstitutional without that and it also fails to comply with the intent of the legislature because those two requirements, confidentiality and expedition, are both statutory requirements and you contend they're also constitutional requirements? The 7th Circuit agreed with you, so their decision is both, on what the statute means without the rules and what its constitutional status is.

MS. CONNELL: Yes, Your Honor, absolutely.

The fact that the Illinois statute does not provide and cannot provide any guarantees of an expedited and confidential appeal raises very serious constitutional problems under the Federal Constitution.

Just briefly, the Illinois statute does not provide any assurances that a young woman can make an appeal and preserve the privacy interests that this Court has found to be part of her fundamental rights. There are no provisions anywhere in the statute itself or the existing Illinois appellate rules which provide any guidance or any provisions for a young woman to keep her identity confidential. There are

no provisions for filing with her initials. There are no provisions for filing using a Jane Doe pseudonym.

So, to compare this case with the Ashcroft statute, which did provide for the specific filing of the young woman's petition with her initials, this one does not provide the necessary assurances of confidentiality.

Now, the lack of any assurances that the privacy will be protected is completely at odds with this Court's decision, including most recently the decision in Thornburgh, where the Court held that the Constitution demands that such an intensely private decision, such as the decision to end a pregnancy, must be protected in a manner that assures the young woman's privacy.

Likewise, there is no provision in the statute itself or in the existing Illinois rules that provide any assurances of an expedited appeal, and that's critical and it's a critical deficiency because, as this Court is well aware, time is absolutely of the essence in the abortion context.

Now, the problem with the Illinois system is that the timing of the entire appellate process is left to the complete and unfettered discretion of the personnel at the various levels of the Illinois appellate system. Our experience shows us that long delays will occur even if an appeal is expedited under any of the existing Illinois rules.

Now, Defendant, Mr. Hartigan, trots out Rule 311 in

his supplemental reply brief as a way in which a minor might have a chance or possibility of an expedited appeal. Now, the problem with Rule 311, as Mr. Hartigan recognizes in Footnote 10 of his supplemental reply, is that it provides a possibility of expedition only if, only if the Illinois Appellate Courts don't apply it as written.

To not apply the rule as written provides the young woman no guidance. It certainly does not provide even the framework of expedition that this Court has required in Ashcroft and Bellotti and in other decisions in this area.

Now, the problem with the rule is also exacerbated by the --

QUESTION: Ms. Connell, let's assume a rule without any by-pass provision, a rule that requires notification of the parents absolutely and one day after that notification for the parents to speak with the child about the abortion.

What cases of ours say that that is unconstitutional?

MS. CONNELL: Your Honor, I think this Court answered that decision in Bellotti in the context of compelled parental notice to parents when their daughter was seeking to invoke a by-pass around parental involvement and the parental consent, and this Court ruled that the privacy interests of the young woman was protected even to the extent that she should be allowed to seek judicial review or to seek an alternative to parental involvement without even notification to her parents,

Your Honor.

This Court reiterated its concern --

QUESTION: Does this apply for other minor personal operations? Let's say a sterilization. Suppose you have a thirteen year old who decides that she wants to be sexually active and doesn't want to have to worry about the problem of having abortions later and decides she wants sterilization, would the same constraints apply?

MS. CONNELL: Your Honor, in Illinois, if the young woman is pregnant and desires sterilization after the pregnancy, then, when she's pregnant, she has the complete ability under Illinois statutory law to make any decisions concerning her pregnancy or any medical procedures surrounding that pregnancy without parental involvement.

QUESTION: I'm talking about a non-pregnant young woman.

MS. CONNELL: If the young woman is not pregnant, then the involvement of only one parent is needed, Your Honor.

QUESTION: Is that -- and the consent is needed, isn't it, not just notification, but actual consent?

MS. CONNELL: Yes, Your Honor. Unless the minor has been found to be emancipated or is married.

QUESTION: Is that constitutional?

MS. CONNELL: Your Honor, the right of sterilization to a minor is something that's not been ruled on by this Court,

and I suggest that it does not present precisely the same constitutional issues as the abortion issue because the right to or the desire to be sterilized is an issue that can be deferred until the minor reaches her age of majority.

By way of contrast, the --

QUESTION: Not if she wants to be sexually active until that point.

MS. CONNELL: Your Honor, if she wishes to be sexually active, there are other alternatives as well, including the use of contraceptives which are not permanent, such as sterilization, and under Illinois law, a young woman can get contraceptives without either notification to or consent of her parents.

The problems with the Illinois system are not limited to the fact that there are no specific rules setting the time frame for the appellate procedure. Mr. Hartigan is incorrect when he suggests that only the young woman can appeal from a lower court decision concerning her -- denying her petition to have an abortion.

Under the Illinois rule, a guardian ad litem is appointed and under Illinois law, as cited at page 22 of Plaintiff's supplemental reply brief, that guardian ad litem has a right, indeed, even an obligation, to go to the Appellate Court if his construction of the young woman's best interests or maturity is at odds with the young woman's argument.

Further, when such a guardian ad litem is provided for, there is no provision in the Illinois statute which provides for the payment of the guardian ad litem's fees. Section 5(h) of the statute only deals with the filing fees. It does not deal with the guardian ad litem fees, and under other provisions of Illinois law, most pertinently the divorce code, the guardian ad litem fees that are appointed for the children in a divorce, the guardian ad litem fees are paid for by the parents.

Now, the problems that --

QUESTION: What about attorneys fees for the --

MS. CONNELL: No mention of that either, Your Honor.

QUESTION: So, you basically disagree with your opponent on who pays these expenses?

MS. CONNELL: Absolutely.

QUESTION: I notice the statute requires a confidential record of the evidence be maintained. I suppose you have to have a court reporter, too.

MS. CONNELL: Yes, Your Honor.

QUESTION: You have to pay the court reporter, too.

MS. CONNELL: No provisions for that nor is there any provision, as another indication of the problem of the statute, for the court reporter to expedite the transcript, and under other provisions of the Illinois appellate procedure, the court reporter has forty-nine days in which to complete the

transcript and prepare the record, Your Honor.

Briefly, the problems with the lack of specificity in the Illinois rules are that it will result in long delays. Our experience tells us that the delays of two months are not uncommon, even in a situation of a so-called expedited appeal, where a seventeen year old minor with terminal illness claimed that forced medical care was contrary to her religion.

Now, the consequences of delay in the abortion context are manifest and they're not contested, even by Mr. Hartigan. The medical community is unanimous in its condemnation of a delay, a mandatory delay, after an informed decision has been made.

Now, the reason for that is that mandatory delay of even a few short days or a week result in statistically significant increases in the complications and in the mortality rate faced by young women who are electing to effectuate a constitutional --

QUESTION: Ms. Connell, the premise of this statute is that an informed decision has not been made until the young woman talks with her parents.

MS. CONNELL: Your Honor, I think that that is not the --

QUESTION: Just speaking with a doctor who may not have her interests as much in heart as her parents do is not enough. Isn't that a reasonable assumption for the legislature

to make?

MS. CONNELL: Your Honor, this Court has held in the past that the legislature cannot presume that every minor is incapable of giving informed consent, and, indeed, in the earlier section of the Illinois statute that I cited, a pregnant minor with respect to all provisions of medical care is presumed mature under the Illinois Code.

Now, the problem with this mandatory delay in that it will result in medical harm in exchange for really nothing. The state has not shown how any purpose can be achieved by this statute. There was no showing below that this mandatory delay will result in more consultation and better consultation or in an informed decision.

QUESTION: The delay only applies if she wants to avoid giving notification to the parents.

MS. CONNELL: No, Your Honor. The delay attached --

QUESTION: If she's willing to give notification to the parents, I thought it's just a twenty-four period.

MS. CONNELL: But that's still a delay, Your Honor, and as indicated by the record and indicated by the briefs of Appellees, the mandatory twenty-four hour period often stretches into a much longer period. Indeed, as this Court recognized in striking down a similar mandatory delay period in the Akron decision, and, Your Honor, the problem with this is that it assumes, contrary to the evidence in this case, and

contrary to all other evidence, that no young woman ever voluntarily consults her parents.

That's the additional problem with this statute. Even for a young woman who tells her parents, who consults with them and they reach a family decision that the abortion is in her best interests, that family cannot effectuate their decision without the mandatory state-imposed delay because under the terms of the statute, the physician must notify the parent and it's both parents, and then wait the twenty-four period, unless the young woman and her family are willing to submit themselves to one of two additional requirements, each of which result in an additional and undue burden on the young woman's fundamental right.

Very quickly, those additional burdens would either require both parents to accompany the young woman to the abortion facility or the doctor's office, or require the young woman's parents to sign before a Notary a statement that they have been informed of their daughter's pregnancy, they've been informed of her desire to end the pregnancy, and that they do not object to the waiver of the mandatory waiting period.

As the District Court found and as the 7th Circuit affirmed, such an additional requirement is no exception at all, but is really an additional burden because that requirement is really tantamount to publication, especially in small towns, of the young woman's abortion decision.

In conclusion, the state statute here is incomplete and this Court does not have the jurisdiction. However, should this Court reach the issue on the merits, the Illinois statute does not achieve its stated purposes. It imposes a knowing risk of additional medical harm in return for nothing more than speculative hope, which the state did not prove below, of increased or better consultation.

The risk of this over-broad statute, which applies across the board, is simply too great. It cannot be sustained under previous decisions of this Court and the 7th Circuit's decision finding that in its incomplete form, it cannot be enforced, should be affirmed.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Connell.

Mr. Hayes, you have four minutes remaining.

ORAL ARGUMENT OF MICHAEL J. HAYES, ESQ.

ON BEHALF OF THE APPELLANTS - REBUTTAL

MR. HAYES: Thank you, Mr. Chief Justice.

Appellees make significant argument about the fact that in their view the Illinois legislature has commanded that additional rules be instituted before the statute can meet the standards that the legislature was attempting to meet, namely those in the Ashcroft --

QUESTION: Mr. Hayes, let me just interrupt. It is clear that the Illinois legislature has commended and expedited a confidential appeal.

MR. HAYES: That is correct.

QUESTION: And is it not also true that the 7th Circuit upheld that the statute without the rules as a matter of Illinois law does not provide for either of those things?

MR. HAYES: No, I don't believe that it did. The 7th Circuit, as I pointed out in my opening argument, recognized that surely a minor has an opportunity for an expeditious appeal with the present Illinois Supreme Court rules. They recognized that right in their opinion.

What they went on to say is that's not good enough here. We want more specificity. We contend that in a facial attack on our statute and our existing rules as they applied to form this by-pass, you cannot apply as Appellees have done and as applied to argument, that we know a case, we had an experience where. Well, if those occur and maybe they will occur ultimately, those are improper standards to apply in a statute and a statutory scheme that has been attacked as facially unconstitutional prior to its --

QUESTION: I read their opinion, maybe not on the expedition, but I read their opinion as saying that the present Illinois statutory scheme and rules do not provide the kind of confidentiality that is necessary, either to meet the word in the statute or to meet what they regard as the constitutional requirements.

MR. HAYES: Justice Stevens, the difference between

the confidentiality provided in Illinois and that which was recognized and provided in Missouri and Ashcroft is that the statute said a minor can use their initials. Our statute said the minor may proceed in a confidential and anonymous fashion and we have a court tradition in Illinois clearly recognized that in many cases cited in the briefs that the courts allow the use of pseudonyms.

QUESTION: You may be right, and the Court of Appeals may be wrong. All I'm suggesting is I think the Court of Appeals concluded that the confidentiality requirement was not satisfied under the existing State of Illinois law.

MR. HAYES: They first found that the confidentiality requirement and the expedition of appeal were necessary in a pure notice statute, and then, having found that, held that our statute did not meet the, in their opinion, standards set forth in Ashcroft as providing a constitutionally sufficient framework to allow for confidentiality and expedition.

QUESTION: But you agree, do you not, that confidentiality and expedition are essential?

MR. HAYES: They are essential to the by-pass procedures that were outlined and articulated by Ashcroft --

QUESTION: Do you agree that the Illinois legislature -- it was the intent of the Illinois legislature that there be an expeditious and confidential procedure?

MR. HAYES: I do.

QUESTION: Okay.

MR. HAYES: Again, we would ask this Court to consider fully the issue of the constitutionality of the twenty-four hour parent parental consultation period to allow what has been recognized as a very important and significant role for both the minor, a right of the minor to hear and a right of the parent to have input in to a very important decision the minor will make, to allow some time for that to occur.

We would also this Court --

QUESTION: But you ask it of both parents?

MR. HAYES: We do ask it of both parents.

QUESTION: Suppose the father is on military duty in Viet Nam?

MR. HAYES: The statute provides very clearly that if it's unreasonable to reach that parent, then the parent -- then the parent that is present and reachable is sufficient.

QUESTION: Suppose he's on business in Honolulu?

MR. HAYES: That's really a question of whether it's reasonable to reach him or not, I would suspect. If it's so far that they can't get ahold of him, there is always the opportunity to begin a by-pass procedure with the mother or the present parent along with the child that, of course, would very quickly the judge and the Circuit Court would obviously grant that.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Hayes.

The case is submitted.

(Whereupon, at 10:56 o'clock a.m., the case in the above-entitled matter was submitted.)

REPORTER'S CERTIFICATE

DOCKET NUMBER: 85-673

CASE TITLE: Neil F. Hartigan v. David Zbaraz

HEARING DATE: November 3, 1987

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Supreme Court of the United States, and that this is a true and accurate transcript of the case.

Date: November 3, 1987

Margaret Daly

Official Reporter

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