OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

# THE SUPREME COURT

# OF THE

# UNITED STATES

CAPTION: JAYNE BRAY, ET AL., Petitioners V.

ALEXANDRIA WOMEN'S HEALTH CLINIC, ET AL.

CASE NO: 90-985

PLACE: Washington, D.C.

DATE: October 16, 1991

PAGES: 1 - 51

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - -X

JAYNE BRAY, ET AL., :

Petitioners :

v. : No. 90-985

ALEXANDRIA WOMEN'S HEALTH :

CLINIC, et al. :

- - - - - - - - - - - - - - - - - - -X

Washington, D.C.

Wednesday, October 16, 1991

The above-entitled matter came in for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

JAY ALAN SEKULOW, ESQ., Washington, D.C.; on behalf of the Petitioners.

JOHN G. ROBERTS, JR., ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae supporting the Petitioners.

JOHN H. SCHAFER, ESQ., Washington, D.C.; on behalf of the Respondents.



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

C O N T E N T S





ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We will hear argument on No. 90-985, Jayne Bray v. Alexandria Women's Health Clinic.

Mr. Sekulow.

ORAL ARGUMENT OF JAY ALAN SEKULOW

ON BEHALF OF PETITIONERS

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

In the Eastern District of Virginia, what would have been a State action for trespass or public nuisance has now become a Federal case through the application of the Ku Klux Klan Act of 1871 to the petitioner's antiabortion protest activities. The U.S. District Court for the Eastern District of Virginia now monitors State obstruction actions. This case should not be in Federal court.

The Fourth Circuit holding rests on two faulty legal premises. First, that opposition to abortion constitutes invidious discrimination against women, and that petitioners' activities violate the respondents' constitutional right to interstate travel. The interpretation of the lower courts goes a long way in making 1985(3) the general Federal tort law that this

Court has long counselled against.

There is redress available, and that is in the circuit courts of Virginia, for trespass, for public nuisance. And 12 State court of appeals have reviewed injunctions involving these type of activities. All of those courts of appeal have approved the injunctions which prohibited trespass and blockades, and basically word for word, comma for comma, with regard to the same substantive issue as the Federal courts here. And that is prohibiting trespass.

We think it is important to point out that the court operated under the assumption that opposition to abortion constitutes invidious discrimination against women. This despite the court's finding of facts. Judge Ellis said that it is indisputable that all the defendants share a deep commitment to the goals of stopping the practice of abortion and reversing its legalization. He stated that the defendants and their followers hope to prevent abortion, to dissuade women from seeking the clinic's abortion services, and to impress upon members of society the moral righteousness and intensity of their anti-abortion views.

The court, however, comes to an illogical conclusion of law that those purposes constitute invidious discrimination against women. Our position is that that



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

statement and that conclusion is wrong, and the Fourth Circuit should be reversed. The issue of the application of this act to the petitioner's activities has been reviewed by numerous Federal courts. And quite frankly, most courts have applied the act.

But we think the mistake that the lower courts have made is applying the act to an activity that is not within the scope of this statute as it relates to classifications protected. Certainly gender, in and of itself, could be and would be protected under this act. But here, the class has been defined not by gender, but rather by an activity; seeking abortion. There is no doubt that the opposition that the petitioners have in this case is not to women, but rather to the activity of abortion. The court's findings of fact are detailed on that. The court itself stated that the petitioners engaged in these activities to rescue fetuses. That's what the court below said. And the illogical conclusion that was made was that constituted some form of invidious discrimination against women.

QUESTION: Is it your point that a group who perform a particular activity cannot qualify as a group for purposes of the invidious discrimination necessary?

MR. SEKULOW: Your Honor, yes. Our point is that it doesn't focus on activity. To be a violation



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

within the scope of this act, it would have to be a violation of the -- animus, if you will, would have to be, in the petitioner's mind, against the class for who they are, not on something they want to do. And here, it was the activity of abortion --

QUESTION: Why is that? Why couldn't you oppose, let's say you have an animus against all people who oppose the -- oppose the war in Kuwait, or who opposed World War II, or whatever, why isn't that a group?

MR. SEKULOW: That's a group not defined by any mutable characteristics. It's not a group defined as a class by who they are. It's defining the class by something they want to do.

This Court, in Griffin, focused in on the animus that the petitioners' actions would have to be taken against the particular respondents because of who they are. And I think the analogy could be if in fact you had a group of individuals that blocked a polling booth, if you will, because blacks were voting, and they didn't want blacks voting. Well, there the animus is not against the activity of voting, it is against their race. That would clearly fall within this statute.

Also here, in order for there to be a violation of --

QUESTION: Well, suppose they're just interested



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

in a particular candidate and they don't want to see that candidate win and they know blacks are going to support the candidate. Their interest is to keep this candidate from being elected, so they block blacks from coming to the polls. What result then?

MR. SEKULOW: I think there it would still be focusing on the activity. The animus would be at the activity. Now if they --

QUESTION: And therefore no liability under this statute, that's your submission?

MR. SEKULOW: I would think in that case they would not be, although if they were letting whites in -- and I think under your hypothetical that they would be.

QUESTION: Well, not's play with the hypothetical too much. But it seems to me that the law often recognizes that it can reach a necessary or a direct consequence. And here the consequence of blocking the candidate, or in your case, blocking the access to the clinic, is to impact directly on the protected group.

MR. SEKULOW: If it is because of, in your hypothetical, who they are, in this case it would be black, they could be covered under the statute. But in this case, the classification that the respondents have designated, and the court below, has been women seeking



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

abortion.

And as the facts of this case establish, the opposition by the petitioners to the activity of abortion was not just aimed at women. It was aimed at everybody involved in the entire abortion process. These petitioners -- yes, Your Honor.

QUESTION: But of course your argument would -- would affect racial classifications as well. I mean, if there were a group trying to prevent integration of a public school, for example, and blocked access to the schools, by your argument, it wouldn't be covered.

MR. SEKULOW: No, I think it would be in that case, Your Honor, because the animus, Justice O'Connor, would be because they don't want, I would take it in that case, a particular racial group not in that school. And here, it is the entire incident of abortion that is the motivating factor that animates these petitioners. It is not men, it is not women, it is all involved.

QUESTION: But Counsel, supposing you had a class of women, all of whom want abortions. And assume they wore little pins or something so they could be readily identified. And supposing you blockaded the polls and said, don't let any women in who wear those pins. Would that be a class protected by the statute?

MR. SEKULOW: I don't think so, Your Honor,



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

because it would not be motivated by women, it was because of their activity of voting.

QUESTION: What in the statute, what language in the statute supports your -- your argument?

MR. SEKULOW: I think the term that would support it best is where the statute says that the purpose of depriving that class and then the equal protection of laws, equal privileges, and immunities has been interpreted by this Court as to require that invidious class-based animus aimed at the class. And here it is the purpose. What is the purpose that animates these petitioners? And it's not their opposition to women, it's their opposition to abortion.

QUESTION: It says the purpose of preventing or hindering the constituted authorities from so forth and so on. The purpose of preventing the people in the voting polls from letting them vote. That's not within the statute.

MR. SEKULOW: Well, that's the second part of the statute. This case has been brought on the first part of the statute. But even under the hindrance clause, there still has to be an invidious discriminatory animus.

But in this case, this Court's already viewed -- has viewed previously classifications based on pregnancy and has not come to the conclusion that those



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

constitute discrimination against gender.

Now it's true that Congress and the public in the Pregnancy Discrimination Act, amended, if you will, but here is still, even in the PDA, an exemption which does not require employers to fund abortion-related insurance needs. And I think that points to that Congress certainly was not acting with an invidious discriminatory animus in passing the exemption, the exception of PDA.

QUESTION: Of course, Mr. Sekulow, it's sort of hard to parse the statute too closely, isn't it, because even the requirement for any class-based animus is not to be found in this statute, is it?

MR. SEKULOW: The statute is not clear. The legislative history --

QUESTION: If there's any person or class of persons, and we've rather made up the requirement that there has to be a class-based animus.

MR. SEKULOW: I don't think it was made up by this Court. I think that the words, for the purpose, if you take the context of the whole, for the purpose of depriving that class. I think the -- and then the equal privileges and immunities, that's what this Court, looking at in the legislative history -- which I'm hesitant to bring up, but I will bring up -- pointed to.

QUESTION: It just doesn't say that classes. It



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

says any person or class of persons.

MR. SEKULOW: Yes, but it also says, Justice Scalia, purpose. And it also says the word, equal. And here, if in fact, since women are the only ones that can have abortions, and that's the position that the respondents have taken, there has been no denial of equality. Certainly in this case, where no one is permitted to get in.

This is not a situation where only women, black women can get in, or Hispanic women can get in, or some subclass. This is a situation where no one is permitted. It has broken up the class, if you will, not into women and men, but those involving the abortion process and those that are not. And here, there's been no denial of equality. And without a denial of equality, there cannot be a violation --

QUESTION: Well, by that argument, just because a mob tries to prevent both blacks and whites from entering an integrated school, you would say the statute wouldn't cover it. That's a very strange argument. And I don't think it's consistent with this Court's precedence.

What if we were faced with an inquiry on the facts of this case about the applicability of this provision in section 1985, or for the purpose of preventing or hindering the constituted authorities of any



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

State from giving or securing to all persons within the State the equal protection?

MR. SEKULOW: Our position, Your Honor, Justice O'Connor, would be that it would still would not apply because there still would have to be a class-based animus. And if you look at the purpose, the purpose was not to hinder.

QUESTION: Even though it doesn't say that at all.

MR. SEKULOW: That's correct. This Court has interpreted in Griffin, and in Scott --

QUESTION: Not that clause.

MR. SEKULOW: No, not that clause, but the wording, equal protection of the laws, is the provision on which this Court based its determination that animus was present. And here --

QUESTION: If we disagreed with you, is there evidence in the record that this was the necessary purpose and effect of the boycott?

MR. SEKULOW: Absolutely, Your Honor.

QUESTION: So that you'd lose.

MR. SEKULOW: No, no. Not that there was the -- no, excuse me. Not that it was, the purpose was to hinder the police. The purpose is in the record, and that is to prevent abortion, the entrance of women getting in.



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

If the hindrance argument was just going to be that police couldn't have done other things, well then any time someone has a ticket for speeding down an expressway, they would be deemed, quote, hindering police and in violation --

QUESTION: Again, I think you're confusing the ultimate purpose with the intermediate purpose, and I think both are covered by the statute.

MR. SEKULOW: And even if they were, Your Honor, even if they were, the animus is not towards women, it's towards an activity. And 1985(3), this section of the Ku Klux Klan Act, section 2, does not provide substantive relief itself. It is strictly a remedial statute. And the substantive right, which respondents have relied on, is the right to interstate travel. And clearly there we believe that there's no violation of interstate travel. There's no proof that the petitioners would have engaged in their activities to deny women their right to interstate travel. They did not ask what State they were from, they blocked all. Not for the purposes of interfering with interstate travel, but rather to prevent the activity of abortion.

QUESTION: But they did want to interfere with the interstate travel of those patrons of the facility that were from out of State, didn't they?



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. SEKULOW: That would have been a mere effect.

QUESTION: Well, maybe it was, but they did want those people not to get to the facility.

MR. SEKULOW: Yes, they wanted those people --

QUESTION: And they knew in advance at least some of them crossed the State line from the District or from Maryland, didn't they?

MR. SEKULOW: That's not established here at all.

QUESTION: You don't think they knew anybody came from outside of Virginia?

MR. SEKULOW: I will assume -- we can make that assumption. It would not change, in our opinion, Justice Stevens, the test of whether there was a violation of interstate travel.

The respondents have alleged that if there's any effect on interstate travel, no mere effect would constitute a violation. I think this Court's interpretation of interstate travel has looked more towards purposeful. And I think in Griffin, specifically, at the end of -- towards the end of the opinion, the Court looked at the interstate travel right and saying while private action against interstate travel is actionable, would be a constituted -- could constitute a violation,

the fact that interstate travel was prevented was not enough to be a violation of interstate travel.

The Court said what -- would go back now -- when this Court remanded it back down for determination, did these particular people intend to violate these rights. Did they mean to keep out-of-state people out solely? And in Griffin, there was an allegation that there was a distinction with the right to travel as it related to --

QUESTION: Why do you say solely? Supposing you close an airport. You could prove that 80 percent of the people were making just intrastate flights, you don't think that would come under interstate commerce, when 20 percent come from England or someplace?

MR. SEKULOW: It depends on the purpose for which in fact --

QUESTION: Then is it entirely on the subjective purpose of the people who close down the airport.

MR. SEKULOW: I think it is a subjective test, Your Honor. I think the animus has to be subjective. But even if it was an objective test, in the hypothetical that Your Honor's given, if they closed it down because of what they considered a traffic problem, or something else, that's where you have to take a look at what is motivating, what is animating these particular individuals.



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

And in the right to travel context, in Griffin, the allegation in the complaint was that these particular black people were not being treated equally with white people as it relates to interstate travel. And the Court, this Court said that we need to send it back down for further factual development, that maybe they did purposely mean to do this. And perhaps that fact and other evidence would constitute a violation of interstate travel.

But in this context, there is no evidence at all. It was a mere conclusion of law.

I'd like to reserve the rest of my time for rebuttal.

QUESTION: May I ask you one question before you do?

MR. SEKULOW: Yes, Your Honor.

QUESTION: I was looking at the complaint, and correct me if I'm wrong. Is it true that all of the defendants are nonresidents of Virginia?

MR. SEKULOW: That all of the defendants are non-residents? I believe that's correct, Your Honor.

QUESTION: So there would have been diversity jurisdiction in this case in any event. Wouldn't there?

MR. SEKULOW: I don't think there would have been because there was no allegation that there were damages in excess of $50,000.



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: I see.

QUESTION: Thank you, Mr. Sekulow.

We'll hear now from you, Mr. Roberts.

ORAL ARGUMENT OF JOHN G. ROBERTS, JR.

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE SUPPORTING THE PETITIONERS

MR. ROBERTS: Thank you, Mr. Chief Justice, and may it please the Court:

This case is not about whether respondents have a remedy for petitioners' tortious conduct. They do, in State court under State law. This case is about whether they also have, in addition, a Federal civil rights remedy for that same conduct.

QUESTION: They would have a Federal remedy, would they not, if they had made the $50,000 jurisdictional amount allegation?

MR. ROBERTS: Well, they would -- assuming --

QUESTION: Assuming he knows what the compliance is.

MR. ROBERTS: It would have satisfied the jurisdictional limit, and then could have sued under State law under diversity.

QUESTION: And there the findings are a violation of State law here, aren't there?

MR. ROBERTS: There are those findings. But

they --

QUESTION: And they could give the same remedy under State law, couldn't they?

MR. ROBERTS: Under State law. But they would not have had a Federal remedy.

QUESTION: The Federal court would have had a duty to do that.

MR. ROBERTS: Yes, assuming that requirements of diversity were met. They still would not have had a Federal civil rights remedy under section 1985(3). The reason is that section 1985(3) is not a general cause of action for the deprivation of Federal rights.

For example, there is a Federal constitutional right to carry a picket sign on a public sidewalk. If I come upon a picketer, and I don't think there should be such a First Amendment right, and I assault him, that interferes with his exercise of his constitutional rights. But my conduct is a simple assault redressable under State law. If I come upon a picketer and assault him because he's black, and I don't believe that blacks should have equal First Amendment rights, then my conduct would satisfy the class-based invidiously discriminatory animus requirement. It would have been based in part on who that person was, not simply what he was doing.

QUESTION: Mr. Roberts, in your hypothetical you



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

talk about one person. What if two or more persons engage in conduct that prevented somebody from carrying a picket sign?

MR. ROBERTS: That would be a conspiracy to deprive that person of constitutional rights.

QUESTION: And that would be covered, wouldn't it?

MR. ROBERTS: That would not be covered. Section 1985(3) is directed to the discriminatory deprivation of rights, not simply the deprivation of rights. That was the change that Congress made from the original bill that was introduced to the one they enacted. The original bill made it unlawful to do any act in violation of the rights, privileges, or immunities of another person. It would cover the picketer example.

The amended act, the one that was passed, focused on the discriminatory deprivation of rights. The deprivation of equal protection, equal privileges and immunities. And that, as this Court explained in Griffin, introduced the class-based animus requirement.

Now respondents' basic submission is that opposition to abortion is the same as discrimination on the basis of gender. That's wrong as a matter of law and logic. As a matter of law, this Court rejected that line of reasoning in the Geduldig case. There Justice Stewart,

writing for the Court, explained that a classification based on pregnancy was not the same as a gender-based classification, even though only women could become pregnant.

Accepting respondents' submission that opposition to abortion is the same as discrimination on the basis of gender, because only women can have abortions, would require overruling the rationale of Geduldig.

As a matter of logic, for a conspiracy to seek to deprive persons of the equal protection of the laws or equal privileges and immunities, the conspirators must seek to deny to some what they would permit to others.

QUESTION: Is Geduldig in tension with Johnson Controls?

MR. ROBERTS: I think not, Your Honor. Johnson Controls, in that case the basic problem was that fertile women were barred from certain jobs because of the danger exposure to lead would have to their offspring, while fertile men were not barred from those same jobs, even though it was shown that the same exposure could affect their offspring. Johnson Controls, as was noted in the majority opinion, was a gender classification. And therefore, it's fully consistent with Geduldig.

QUESTION: In other words -- all right.



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. ROBERTS: Here petitioners do not seek to deny to some what they would permit to others. They seek to prohibit the practice of abortion all together. Respondents, in their amici, bring up the analogy that opposition to women seeking abortions is just like a conspiracy against blacks seeking to vote.

If you examine the analogy closely, it breaks down. In the conspiracy against blacks seeking to vote, what animates it is opposition to a group on the basis of race. It is blacks that they do not want to vote. It's not opposition to the activity of voting. Here it is solely opposition to the activity of abortion.

As a matter of logic, you cannot deprive a class of equal protection or equal privileges and immunities with respect to a right that only that class can exercise. You can certainly conspire to deprive them of that right, but it is not a denial of equal protection or equal privileges and immunities.

Respondents also have no cause of action under section 1985(3) because the right for which they seek a remedy, the constitutional right to travel, is not implicated in this case. This Court has never found a violation of the right to travel in the absence of either discrimination between residents, on the one hand, and nonresidents, or newcomers, on the other, as in Doe v.



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Bolton, Shapiro v. Thompson, Dunn v. Blumstein, or an actual purpose to interfere with the right to travel as such, as in the Guest case.

Here, of course, petitioners' activities fall into neither of those categories. They do not discriminate between residents and nonresidents in blocking access to the clinics. And they do not seek to interfere with the sonstitutional right to travel as such. They don't seek simply to keep out-of-staters from coming in for abortions. That's an inaccurate description of the conspiracy in this case.

Respondents would find a violation of the constitutional right to travel based solely on two facts. One, some of the patients at these clinics come from out of State, and two, petitioners blocked access to the clinics. That unlimited vision of the right to travel would find a violation in every case, almost every case, for example, of a picket line, so long as some of the workers or customers were from out of State. This Court has never accepted such an unlimited view.

QUESTION: Mr. Roberts, if the evidence established that one of the purposes was to prevent or hinder local police from putting an end to the demonstration and the blockade, do you think that 1985(3) in that second clause would cover it?



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. ROBERTS: No, I don't, Your Honor. First of all, no such allegation was made in the complaint.

QUESTION: I said if that -- if the facts established that.

MR. ROBERTS: If the facts established that, I think that we would still be back to the class-based animus requirement. The prevent and hinder clause has, just as the immediately preceding clause, which is the one at issue in this case, the requirement that it be a deprivation of equal protection. This Court, in Griffin, interpreted that language in the clause at issue here to require the class-based invidiously discriminatory animus. And I think the word equal should carry the same meaning in the second clause. Particularly since it was added in the amendment process, just as the words equal were added in the immediately preceding clause.

To continue, there were no such findings in this case. And I also think it would be a difficult question whether under the facts that were alleged, you prevent or hinder State authorities when you simply are arrested. That's not preventing them from doing their job, that's allowing them to do their job. And what the prevent and hinder clause was directed to were the classic case of lynching, where there is affirmative disruption and interference with the State authorities. That's not



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

alleged and has not been found here.

QUESTION: Mr. Roberts, in this case are you asking that Roe v. Wade be overruled?

MR. ROBERTS: No, Your Honor, the issue doesn't even come up.

QUESTION: Well, that hasn't prevented the Solicitor General from taking that position in prior cases. Three or four of them in a row. Is it because you you're relying on Doe against Bolton here?

MR. ROBERTS: We are not relying on Doe against Bolton. We distinguish Doe against Bolton. I believe my brother is the one relying on it. And we distinguish it because that was an affirmative case of discrimination --

QUESTION: But you cited it a little while ago affirmatively.

MR. ROBERTS: I cited it for the proposition that this Court's right to travel cases have hinged on discrimination and between residents and nonresidents. And that's not at issue here. If, for example, as Justice O'Connor has explained, the right to travel is based on the privileges and immunities clause, then I think it becomes quite clear that it's not implicated. That clause states, to paraphrase, that a citizen of State A, when he moves into State B, or travels into State B, must have all the privileges and immunities of a citizen of State B.

QUESTION: Of course if your office prevailed in its suggestion that Roe against Wade be overruled, Doe against Bolton would go with it, will it not?

MR. ROBERTS: I'm not sure, Your Honor. Doe against Bolton is a discrimination case. Roe against Wade is an affirmative right case. I think that's a separate question. The right to an abortion is not implicated here. Neither of the lower courts relied on that ground alleged in the complaint. They relied solely on the constitutional right to travel, which, as I've indicated, is not implicated in this case.

QUESTION: It seems to me you've slipped a stitch here somewhere.

QUESTION: Mr. Roberts, did your answer to Justice O'Connor's question depend on the size of the conspiracy? For example, if you had a conspiracy of two people, only two people went to the clinic, you could answer quite plausibly as you did that they certainly were not conspiring to preclude the police from arresting them because they were easily arrestable and were arrested. If you have 2,000 who go to the clinic, and the point of the conspiracy is to act in this massive fashion, then isn't it more reasonable to analyze the conspiracy as, one, in effect, to preclude the enforcement of laws against trespass, against assault, and so on? And wouldn't your



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

answer be different if you consider the size?

MR. ROBERTS: If I may, the answer would be the same, Your Honor, because regardless of the size of the conspiracy, the class-based animus requirement continues under the prevent and hinder clause. And in this case there was simply no class-based animus, either under the first clause under which the respondents have relied, or the prevent or hinder clause.

Thank you.

QUESTION: Thank you, Mr. Roberts.

Mr. Schafer, we'll hear now from you.

ORAL ARGUMENT OF JOHN H. SCHAFER

ON BEHALF OF RESPONDENTS

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

The question posed in this case is whether or not a Federal court has jurisdiction to protect Federal rights when because of mob violence and mob action, local law enforcement authorities are unable to maintain law and order. It is precisely the situation for which the statute was written.

The analogy to the facts of 1865 to '71, say, when this statute was written, are striking. There, as here, you had conspiratorial mass action which was intended to and did frustrate the exercise of Federal



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

rights. Local law enforcement authorities --

QUESTION: Mr. Schafer, was any reliance ever placed in the courts below by your clients on this second clause of section 1985, for the purpose of hindering or preventing the constituted authorities from securing all laws?

MR. SCHAFER: This case, Justice O'Connor, was tried 9 days after the complaint was filed. And the complaint did not make a hinder or prevent claim. The evidence then developed it. In my judgment, that claim is good. Although courts below have not made findings on them, the Court may want to remand for findings on it. But the evidence established a hinder -- in my judgment -- a hinder and prevent claim.

QUESTION: Mr. Schafer, your position is that that hinder claim does not require any class-based animus.

MR. SCHAFER: No, I would say it does.

QUESTION: Oh, it does.

MR. SCHAFER: No, I agree with that. I agree with that. I would not consent that it doesn't -- I think Griffin --

QUESTION: Because otherwise, the question I was going to ask you, if it doesn't require class-based animus, then I suppose you would have had to apply that clause to the freedom riders who went to the South in



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

massive numbers violating trespass laws in the South, making it impossible --

MR. SCHAFER: Yes.

QUESTION: You wouldn't assert that it would apply to something like that?

MR. SCHAFER: As I read Griffin, I think the class-based animus is written into the statute by the equal protection and equal privileges and immunities clause. And I think that the evidence, as I say, the odd thing in this case is that under the Federal rules, we could amend our complaint today to accommodate the finding -- the facts that were developed in a Court below, and we don't even have to amend a complaint under the Federal rules to make that claim, because the Federal rules provide that if the evidence establishes a claim, the pleadings will be deemed to be amended to encompass that claim.

And I think that we do have that claim based on these facts. And these facts are basically, as I'm sure the Court knows, that the tactics of these people are to frustrate law enforcement. They don't announce in advance where they're going to set up their blockades of clinics, which clinics are going to be blockaded. They announce the dates, but they don't announce where, and so local police and authorities don't know where. And so suddenly



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

at some medical clinic someplace, there are hundreds and hundreds of people early in the morning around, blockading, and preventing ingress and egress from the clinic.

QUESTION: Well, Mr. Schafer, if section 1985 does extend to gender-based class animus, how can you pick out a subset of that class and say that's the class?

MR. SCHAFER: We don't do that, Your Honor. They keep saying we do that, but that's not what we do. Our contention is simply this; that when you target a right of a class and attempt to take away that class' constitutional right, you are discriminating against that class, the entire class. And the class here is not women seeking abortions as they keep arguing. The class is not defined by an activity or by an idea, or anything else. It's defined simply by the Constitution. All women have this right. These people want to destroy that right. And the way they do it is target the women who are exercising the right. But the losers, if they win, the losers are all women. All women. The right of all women is lost. And it's just like --

QUESTION: Excuse me, but that's not true. The losers are not all women. Surely the doctors who want to make a living performing abortion are deprived of their right to engage in that specialty. They are kept out of



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

the clinics, as well as the women, are they not?

MR. SCHAFER: Yes.

QUESTION: And does it not violate a right of theirs, or does it?

MR. SCHAFER: In my judgment, as Novotny shows, they have their own independent cause of action for violation of 1985(3).

QUESTION: I think that's right. So it is not directed just against the rights of women.

MR. SCHAFER: Well, the purpose, though, the whole effort is to take away the right to choose. Not the right of physicians to practice medicine.

QUESTION: The right of women to choose to have an abortion, but likewise the right of a physician to choose to give an abortion. I gather their animus against those who perform the abortion is the same as their animus against those who receive it.

MR. SCHAFER: Well, yes, Your Honor, Justice Scalia, I'm not at all sure that the doctors have a constitutional right to practice medicine, this kind of medicine. I don't really know. But the right that these people are targeting is a woman's right. They are trying to destroy a woman's right. And when you do that, just like in Johnson Controls, when an employer discriminates in the terms and conditions of employment between women



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

and men by saying to women who are capable of bearing children, you may not have certain jobs, that's a discrimination not against just them, it's a discrimination against all women.

And in Satty, when the employer says when you get pregnant, you're going to lose your seniority rights, that's not just a discrimination against those directly impacted by the discrimination, it's a discrimination against women.

QUESTION: Mr. Schafer, I have two questions that your answer raises. The first is if the doctors themselves and the doctors alone had brought action under the statute, I think you said a moment ago that they indeed would have a separate and independent cause of action to bring under this statute. Is that your position?

MR. SCHAFER: Well, I'm not sure they do. Novotny suggested he had one because of a violation of a Federal right. But here, he only -- under the words of the statute, they have a cause of action if they are denied any right or privilege of a citizen of the United States, or if they suffer injury by their person or property. And if they suffer injury by their person or property via a class-based discriminatory effort to destroy the abortion right, I suppose yes, they do. I



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

don't know why they wouldn't, offhand.

QUESTION: In other words, you could put them in the same position as the Republicans who were referred to as one of the class to be protected by the statute at the time it was passed. Kind of an ancillary category which essentially gets its foot in the door by being ancillary to a primarily protected category.

MR. SCHAFER: As I -- certainly as I read the legislative history, that was the intent there, as you, I guess suggest. And I do think that there's no -- I don't seen any readings in the words of the statute. I don't see that if that action were brought that it would be subject to a motion to dismiss by matter of course of this case.

QUESTION: I'm sorry. My second question goes back to Mr. Roberts' answer with respect to the applicability of Johnson Controls. His response was that the -- I think was that the class at Johnson Controls was the class of those who were fertile, and I guess in the broad sense of being able, being capable of engaging in the reproductive act. And the distinction was made between women in that category and men in that category. Do you think that's a proper answer to your claim that Johnson supports you?

MR. SCHAFER: I really don't. I don't think the



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Court put any emphasis on that. I just don't think -- I think the Court's analysis of Johnson Controls was that when you take this right away from fertile women, it's a discrimination against women and there's absolutely no --

QUESTION: Didn't the Court also point out that men were not required, in fact, to make this election that women were?

MR. SCHAFER: It had -- as I recall the opinion, one sentence referred to that fact, and I just don't know what the underlying facts were as to whether there was grounds for a distinction drawn between men and women in terms of the possibility of injury to a child or not. But certainly the Court's opinion overall placed absolutely no emphasis on that fact.

QUESTION: Was Johnson Controls a statutory case or a constitutional case?

MR. SCHAFER: It was a statutory case.

QUESTION: Title VII?

MR. SCHAFER: Title VII case, yes, as was Satty.

So that in order to make out our cause of action here, as this Court well knows as was stated in Griffin, we have to show that there were acts done pursuant to a conspiracy and that it was animated by an invidious discrimination. As I've tried to say, that when you target a right of women, you target all women, and that's



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

the invidious discrimination that we rely upon. We have never had any mention of that -- it's just as if, just like Griffin, the case in Griffin, when you targeted three African-Americans who were thought to have been working for civil rights for African-Americans, that was a discrimination against all African-Americans, when you targeted three of them.

QUESTION: Mr. Schafer, the courts below didn't rely on -- rely on the right to an abortion, but the right to interstate travel, as the Federal right or privilege that was taken away.

MR. SCHAFER: Yes.

QUESTION: What would be your response to the hypothetical that was given to opposing counsel, if there -- I think by Justice Stevens -- if there is picketing of an airport, let's assume the employees of an airport picket unlawfully, it's trespassory picketing or something, would they be suable under 1985(3)?

MR. SCHAFER: You have to show class-based animus in there someplace or other.

QUESTION: You would have to show class-based --

MR. SCHAFER: Animus against some group.

QUESTION: Okay.

MR. SCHAFER: And our position here is --



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: They would not be liable simply because they know that some people's interstate travel will be affected.

MR. SCHAFER: I think if you put a barricade against an interstate highway, you're not violating 1985(3), no.

QUESTION: Even if they do it to such a degree that the police cannot enforce the law?

MR. SCHAFER: Yeah, I accept the Griffin holding that this statute, as they argue, does require us to show a class-based animus -- class-based discrimination, not animus, discrimination. And as I say, I think we've shown it here when we show that women are the ones impacted by -- that women's right is the one that's targeted here, and when you try to take away that right, you're trying to take away a woman's right, and you are therefore discriminating against women, just as in Griffin when you tried to take away the civil rights of African-Americans, you were discriminating against African Americans, and you had a cause of action under 1985(3).

Any conspiracy that's animated by an invidious discrimination for the purpose of depriving equal protection of the law or equal privileges and immunities is actionable by anyone injured thereby or deprived of exercising any Federal right. We have -- I think of



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

those, as we've seen, of all those Griffin issues, the only two that are really at issue here are the discriminatory class-based animus and the travel right.

It seems to me worth at least noting that this Court is not yet directly confirmed that women are a recognizable class under this statute. Our position is that the class -- whatever class means in 1985(3), at least it means persons identifiable by immutable characteristics. Particularly those persons historically disadvantaged in our society. That includes women. We don't have to go, for purposes of this case, anything beyond that.

The Court in Novotny did assume without deciding that women are a class for purposes of this statute. And the dissent in Scott, four Justices noted that gender-based discriminations would form a class for the purpose of this statute. And all of the lower courts that have dealt with this issue and attempted to forecast this Court's finding have forecast that this Court would confirm that women are a class. But that's a predicate issue that's not put in issue here. It's not one of the questions posed in petition for certiorari. But it is a question, I think, in order to at least affirm, the Court is going to have to address.

Now the Government, of course, has relied upon



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Geduldig to say that targeting women seeking abortions is not an invidiously discriminatory action. And of course, our position is (a), our class is not just women seeking abortions, but all women; but (b), Geduldig and Gilbert are really distinguishable cases.

QUESTION: Would you explain to me why the class is all women and not just women seeking abortion? I must say I don't follow. I don't quite follow that.

MR. SCHAFER: Well, it's just that the effort here is to destroy the right to choose, to frustrate it, to prevent it being exercised, hopefully to eliminate it. Now when you do that, you're directly targeting a right of women, precisely the same as those persons who accosted those African-Americans on the highway in Alabama and went after them because of civil rights.

QUESTION: You could say you're depriving a right of human beings, too, if you want to go up to the next generality. But the fact is the narrowest class affected is simply, is pregnant women, not all women.

MR. SCHAFER: Today's pregnant women, but not tomorrow's. We're talking about a right.

QUESTION: Well, I think so as far as blocking the current entrance to the facility is concerned.

MR. SCHAFER: Yeah, but the purpose of this whole effort is, of course, to deprive the right of all



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

women, not just the women who happen to want an abortion on Thursday, November 8, 1969 -- 1989 in Falls Church, Virginia, but all women everywhere in this country. And it's a woman's right. I'm not sure I understand what Your Honor alludes to when he says higher right of all people. This is a right to choose which is peculiar to women, of course, because of their reproductive differences. But it's a woman's right that's being targeted.

And it seems to me that it's perfectly clear that when you target a woman's right, you're targeting women. You're discriminating against women. It doesn't matter that they profess their love and admiration for women, the effect of their acts, and the purposeful deliberate effect of their acts is to make ineffective a woman's constitutional right. Now if that isn't discrimination against women, it's hard for me to --

This is a statute that's aimed at the protection of rights. It doesn't legislate love or hate, or anything like that. It legislates for the protection of rights. It doesn't matter if we love the people who are targeted. The plaintiffs in these cases don't have to prove a subjective state of mind as to why they did these things. The plaintiffs simply have to prove that what they're trying to do is take away my rights and the effect of their action is to take away my rights.



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: Could a 65-year old woman bring this case?

MR. SCHAFER: She'd be a peculiar plaintiff to choose, certainly, but I don't know why not, I guess, representing -- particularly representing all women. But it's hard to see --

QUESTION: I mean, you have to answer that way, I suppose.

MR. SCHAFER: Yeah, I think that the Court would say, I guess the Court would say a woman who has no possibility of exercising the right probably doesn't have standing to maintain a cause of action. I don't know.

QUESTION: So this isn't a discrimination against all women.

MR. SCHAFER: Well, I think it is. I don't see why that destroys the discrimination against all women, because one woman can't sue. I mean, I suppose that the child right out of the womb can't sue, either, but again, it's a right that if lost that's going to impact her.

QUESTION: Or she might be the biblical character Sarah, too.

(Laughter.)

MR. SCHAFER: Now, tracking Griffin and Scott, then we do rely on the Federal right of travel, many times identified by this Court as a right or privilege of United

States citizenship. This right of travel formed the basis of the Griffin cause of action and was endorsed in the Scott decision. We track that in this case, and we more than tracked it. Here, the comparisons with Griffin are quite stark in our favor. And though, although counsel misrepresented to you, in my judgment, one of the holdings of Griffin, the fact is we do not have to prove an intent to destroy this right.

Griffin itself noted on the remand that among the things that the plaintiffs would have to prove on remand would be simply whether or not they intended to travel interstate. Then the Court went on to say, and you could also prove that the defendants tried to prevent traveling interstate. But one -- it was a disjunctive sentence, and one element of the sentence was that if you -- if you simply intended, if you prove you intended to travel interstate, you've established this right.

And that to me, makes a lot of sense because this is, as I say, a basic constitutional right. It should not depend upon the plaintiff being able to prove a defendant's subjective state of mind as to whether or not he cared about interstate travel or he didn't care about interstate travel; the effect is there. When the effect is to prevent interstate travel, or to make interstate travel useless, then it seems to me the travel right has



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

been established. And we've done that here.

QUESTION: Don't you go beyond Griffin when you characterize one possible sufficient proposition that it would be enough to prove that the conspirators would render the travel useless? Griffin didn't go that far, did it? Didn't Griffin require a proof either that the travel as such would be prevented or that individuals would be precluded from associating with those who did travel interstate?

MR. SCHAFER: Yes, I think that's right, Your Honor. But it seems to me that proving that travel would be useless is even more persuasive, if you will, than simply proving that the plaintiff might want to go -- travel interstate. The facts in Griffin were simply -- the allegation was they were just driving around on interstate highways to visit friends and to do errands. And it seems to me where you have a deliberate course of action, the purpose of which is to make useless interstate travel, which, as I say -- and that that travel is for the purpose, as opposed to Griffin, that travel is for the purpose of exercising a core constitutional right, the right to choose. If interstate travel isn't protected there, it's hard for me to understand what substance the travel right has.

QUESTION: Well, doesn't the answer lie in the

fact that to the extent that interstate travel would be rendered useless, so would intrastate travel be rendered useless. And Griffin, whether with precision or not, tried to center on the peculiarity of the inter, interstate travel and the right to exercise it.

MR. SCHAFER: I'm not sure I understand Your Honor's comment. But the fact that intrastate travel may or may not be impacted, it seems to me that's not relevant. The Government's plain wrong when it says that you don't violate the travel right unless you discriminate against intra, interstate travelers. There's nothing to suggest that in the case. Certainly nothing in Griffin to suggest that.

In Doe -- when I talk about frustrating travel by making the travel useless, I have in mind particularly Doe v. Bolton, where basically the Court said -- it said in effect, it didn't say it in these words, but people could not travel to Georgia to exercise their right to choose in Georgia, and the Court -- because Georgia wouldn't permit them to do so, and the Court said that's in violation of interstate travel. That's an impact on interstate travel, which is unconstitutional. And it seems to me the whole thinking there is that by the Georgia statute doing what it did, it just made that interstate travel useless, so nobody's going to engage in

it.

And that's what I'm talking about when I say that travel that is useless, as travel would be here if these people were allowed these blockades, it just -- it just is a violation of the travel right. And I would like, before I forget it, I'd like to --

QUESTION: Mr. Schafer, it isn't just that is a violation, it has to be for the purpose of depriving them of that privilege. That has to be the purpose. The purpose is to --

MR. SCHAFER: To deny equal protection of the laws, right?

QUESTION: For the purpose of the depriving, either directly or indirectly, any person under the equal protection, or of equal privileges and immunities under the laws.

MR. SCHAFER: Yes, that's right.

QUESTION: Now here we're talking about the privilege of interstate travel.

MR. SCHAFER: Yeah, right.

QUESTION: So it has to be for the purpose of depriving them of that privilege. Is that not right?

MR. SCHAFER: You can -- one purpose here was to satisfy -- the denial of equal protections is satisfied when you show a purpose to deny the right to choose, which

is the other right denied here. And that's the discriminatory -- that is a discriminatory violation.

Now in this case, you can also, if you want to say that you also have to show a purpose to implicate travel. I don't think you really should, but even if you do, we have findings here that these people did intend to prevent interstate travel. And as I say, our showing here of purpose, and there was a substantial volume of interstate travel involved here -- 30 percent of these patients come from outside the State. These petitioners knew that. And the Court said --

QUESTION: Suppose I kill somebody who I know is on the way to the railroad station, and he's going to be, you know, going to another State. Am I interfering with his right to interstate travel for the purpose of this provision? I mean, I know for a sure thing that if I kill him he's not going to be able to take the train and go to the next State. And he has a ticket in his pocket. I know that the effect is going to be to prevent that travel. Have I violated 1985(3)?

MR. SCHAFER: Is your purpose invidiously discriminatory? I mean is he -- is there -- no, without that, certainly not.

QUESTION: All right, let's assume it's invidiously discriminatory. Suppose I kill him because

he's black and I don't like blacks, and I kill him and also know that he has in his pocket a railroad ticket, and that I'm going to prevent him from going to another State.

MR. SCHAFER: We've thought about that, and I think that, of course, it's far beyond this case, but I suppose that you probably do have -- you probably have violated 1985(3). I'm not sure about that. I think you have.

QUESTION: I think for the purpose of depriving him of the privilege of interstate travel.

MR. SCHAFER: That's right.

QUESTION: Well, I don't know what the words for the purpose mean. I mean, language no longer means anything anymore if that was for the purpose of --

MR. SCHAFER: We have a finding here -- we have a purpose here -- we have a finding of purpose. I couldn't hear, I'm sorry.

QUESTION: I may be wrong on this, but isn't the finding that you rely on a finding of impact, i.e., a high percentage of people who come to this clinic traveled in interstate commerce and the defendants knew it. Isn't that a finding about impact, rather than a finding about -- certainly it's not a finding directly about purpose. Do you have anything more than that?

MR. SCHAFER: When the Court dealt with

necessary purpose for purposes of 1983, it said in Monroe v. Pape that the only intent you need to show for violation of 1985(3), of 1983, I'm sorry, is that a man intends the natural consequences of his acts. And if you think that you need a showing of purpose here, clearly you have that in this case.

QUESTION: I think your answer to my question is yes. What you are saying is the purpose finding is essentially an impact finding.

MR. SCHAFER: Yes, I think that's right, yeah. I wouldn't stand here and argue that these people care whether these people travel interstate or not. I'm not arguing that. It would be silly to argue that.

I have a very short time left. I want to say one thing. There's been a lot of talk from the other side that this is a State case and it belongs in a State court. It belongs in the Federal court, in our judgment, (a), because as I've tried to say, there's a Federal right that's being attacked here to the injury of a discrete class of people. But secondly, State law -- sure there's a trespass action, but would a young lady trapped in a car, bleeding in a parking lot outside of a medical clinic, unable to get in because of this action, would she have a trespass action? It's not her property that they're on. What kind of an action does she have? Does



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

she have some sort of interference with contract relationships argument? Pretty tenuous. And who does she sue? She doesn't know who's surrounding the car.

I think it's a very false premise to come in here and tell this Court that this is a mere State trespass action and it ought to go back to the State courts. Because there's no -- for a number of reasons, State courts cannot afford adequate relief here, one of which I just pointed out.

QUESTION: Mr. Schafer, can I ask -- I mean, the most important relief here, I suppose, and most significantly, was injunction. What's the authority for the issuance of the injunction, since as I read 1985(3), it only says that the parties may have an action for the recovery of damages?

MR. SCHAFER: I think 1343 is adequate support.

QUESTION: You're relying on 1343?

MR. SCHAFER: Yes, I am.

QUESTION: Do you know of any other instance where there's a statute that specifically says in only an action for damages it's parlayed into an injunction?

MR. SCHAFER: No, I can't cite one to Your Honor. Of course 1343 just says in terms of all actions brought under the civil rights statutes, and this is one, 1985(3) is one, the court has jurisdiction to award both

damages and equity relief. And I don't frankly feel that it's necessary to look further.

Again, a few words on the adequacies of State action. Federal injunctions, frankly, mean more than State injunctions. Federal injunctions are supported by more weight, by more marshals, by more people willing to make them work. We have amicus briefs here in this case where States are asking you to complement State enforcement activity with Federal enforcement activity. This is an exercise of complementary federalism. The States want Federal help.

Wichita showed that this summer. And there's no, it's just fallacious in my judgment to suggest to this Court that a State court can afford the kind of relief and the kind of protection of Federal rights that only a Federal court can do under this statute.

If there's nothing further, thank you, Your Honor.

QUESTION: Thank you, Mr. Schafer.

Mr. Sekulow, you have rebuttal. You have 4 minutes remaining.

REBUTTAL ARGUMENT BY JAY ALAN SEKULOW

ON BEHALF OF PETITIONERS

MR. SEKULOW: Thank you, Mr. Chief Justice, and may it please the Court:

Just a few points. With regard to the issue in Johnson Controls, the basis of the Court's opinion, or a significant portion of that opinion states that the bias in Johnson Control's policy is obvious. Fertile men, but not fertile women are given a choice as to whether they wish to risk their reproductive health. The Court went on further; first Johnson Control's policy classifies on the basis of gender and child-bearing capacity rather than fertility alone.

Respondent, and this is from the quote, does not seek to protect the unconceived children of all its employees. The petitioners in this case, seek to protect all unborn children through their activities. And the animus itself, or the motivation, is aimed at the entire process, all that involved with it.

With regard to the right to privacy, counsel, my brother in bar, submitted at trial that there is no State action that may stand or fall on it. So the right to privacy claim, we think, is without merit.

With regard to the issue of the right to travel, as Justice Scalia has said, it has to be purposeful because the statute in and of itself says that the activities have to be engaged in for the purpose of depriving a class, here described as women seeking abortion, their constitutional right to interstate travel.

So the purpose has to be clear. And my brother at bar conceded that there is in fact no purpose. That is, they do not seek to find a difference between out-of-town people and in-town people.

The last thing I'd like to say, Your Honor --

QUESTION: May I ask you a question?

MR. SEKULOW: Yes, sir.

QUESTION: And I'm not sure of the significance of it, but I notice one of the findings was that these rescues have been taking place in many places across the country and have been enjoined in New York, Pennsylvania, Washington, Connecticut, California, as well as the Washington metropolitan area. Does that have any relevance to the interstate aspect?

MR. SEKULOW: I do not think so, Your Honor, because again, I think we have to look at what this Court has said, plus the statute itself requiring purposeful action. And here it's clear there was not. And as the findings of fact point out, it was Judge Ellis' determination that the activities, if they were to have taken place, of the petitioners, would have had an effect on interstate travel, not that there was a purposeful violation of the right to interstate travel.

QUESTION: Do you think respondents can prevail in this case without relying on the interstate travel?

MR. SEKULOW: Do I think that respondents can prevail? No, Your Honor.

QUESTION: Why not?

MR. SEKULOW: Because their sole independent right that is at stake here is interstate travel. Plus they -- the interpretation respondents have given, Justice White, to the statute is pre the limiting amendment. That is they've eliminated the requirement of denial of equality. It's any constitutional action and that is not what is at stake here.

And with regard to the State action issue, the State claims, as Judge Ellis pointed out, a public nuisance can be brought by a private party in a State circuit court in Virginia, and in fact, they have been brought in Virginia circuit courts, and they have been issued.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Sekulow.

The case is submitted.

(Whereupon, at 11:02 a.m., the case in the above-entitled matter was submitted.)



ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

# 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:*

NO. 90-985 - JAYNE BRAY, ET AL., Petitioners V.

ALEXANDRIA WOMEN'S HEALTH CLINIC, ET AL.

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

BY Michelle Saunders

(REPORTER)