OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, ET AL., Petitioners v. ROBERT P. CASEY, ET AL., ETC.; and ROBERT P. CASEY, ET AL., ETC., Petitioners v. PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, ET AL.

CASE NO: 91-744; 91-902

PLACE: Washington, D.C.

DATE: April 22, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, ET AL., Petitioners v. ROBERT P. CASEY, ET AL., ETC. and ROBERT P. CASEY, ET AL., ETC., Petitioners v. PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, ET AL.

No. 91-744

No. 91-902

Washington, D.C.

Wednesday, April 22, 1992

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 9:58 a.m.

APPEARANCES:

KATHRYN KOLBERT, ESQ., New York, N.Y.; on behalf of Planned Parenthood, et al.

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ERNEST D. PREATE, JR., ESQ., Attorney General of Pennsylvania; on behalf of the Respondent Robert P. Casey, et al.

KENNETH W. STARR, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States as amicus Curiae, supporting Casey, et al.

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PROCEEDINGS

(10:00 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 91-744, Planned Parenthood of Southeastern Pennsylvania v. Robert P. Casey; 91-902, Robert P. Casey v. Planned Parenthood of Southeastern Pennsylvania. Ms. Kolbert.

ORAL ARGUMENT OF KATHRYN KOLBERT

ON BEHALF OF THE PETITIONERS

MS. KOLBERT: Mr. Chief Justice and may it please the Court:

Whether our Constitution endows Government with the power to force a woman to continue or to end a pregnancy against her will is the central question in this case. Since this Court's decision in Roe v. Wade, a generation of American women have come of age secure in the knowledge that the Constitution provides the highest level of protection for their child-bearing decisions.

This landmark decision, which necessarily and logically flows from a century of this Court's jurisprudence, not only protects rights of bodily integrity and autonomy, but has enabled millions of women to participate fully and equally in society.

The genius of Roe and the Constitution is that it fully protects rights of fundamental importance.

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Government may not chip away at fundamental rights, nor make them selectively available only to the most privileged women.

If the right to choose abortion remains fundamental as established in Roe v. Wade, the strict scrutiny standard is applicable, and as this Court found in Akron and in Thornburgh, Pennsylvania's onerous restrictions must fall.

Should this Court abandon strict scrutiny, as urged by the Commonwealth and the Solicitor, not only might Pennsylvania's egregious intrusions on privacy stand and a century of this Court's privacy decisions may also be dismantled. Equally disturbing, should this Court remove fundamental protection for the abortion right, women might again be forced to the back alleys for their medical care with grave consequences for their lives and health.

The Commonwealth argues that this Court may overrule Akron and Thornburgh and abandon strict scrutiny and nevertheless preserve Roe's central meaning. While politically expedient, this view is certainly not based upon this Court's privacy jurisprudence. Every other brief filed in this case agrees that the protection offered by Roe's heightened scrutiny lies at the core of this important decision. To abandon heightened review is

to overrule Roe.

This Court has repeatedly held that the doctrine of stare decisis is of fundamental importance to the rule of law. Fidelity to precedent ensures that our law will develop in a principled and intelligible fashion, and that our guiding rules are founded in law rather than in the proclivities of individuals. Accordingly, this Court has established that departure from precedent must be supported by some special justification, but no special justification exists here.

Only 9 years ago in Akron, this Court invoked the doctrine of stare decisis and expressly reaffirmed Roe v. Wade. Only 3 years later, in Thornburgh, a case that is virtually identical to that before this Court today, this Court again found especially compelling reasons to reaffirm Roe and to find Pennsylvania law unconstitutional under the standard of strict scrutiny.

Nothing has changed since that time. Indeed, millions of women continue to rely on the fundamental rights guaranteed in Roe v. Wade. The medical conditions that led this Court to create and establish these fundamental rights remain the same. This case, the statute, the parties, are nearly identical to those in Thornburgh.

Never before has this Court bestowed and taken

back a fundamental right that has been part of the settled rights and expectations of literally millions of Americans for nearly two decades. To regress now by permitting States suddenly to impose burdensome regulations, or to criminalize conduct, would be incompatible with any notion of principled constitutional decision-making.

Roe is both soundly based in the Constitution and sets forth a fair and workable standard of adjudication. From as early as 1891, this Court has recognized that the rights of autonomy, bodily integrity, and equality are central to our notions of ordered liberty. Roe lies at the heart of those interests.

While pregnancy may be a blessed act when planned or wanted, forced pregnancy, like any forced bodily invasion, is anathema to American values and traditions. In the same way that it would be unacceptable for Government to force a man or a woman to donate bone marrow, or to compel the contribution of a kidney to another, or to compel women to undergo abortion or forced sterilization, our Constitution protects women against forced pregnancy. If anything, because forced pregnancy will jeopardize a woman's life or health, the constitutional protections ought to be greater.

The Solicitor tries to draw a distinction between constitutional protection against forced abortion,

which he agrees is fundamental, and constitutional protection against forced pregnancy, which he maligns, but once this Court removes fundamental status from the abortion right, there is no logical stopping point.

Fundamental status for all reproductive rights, decisions about birth control, pregnancy, sterilization, even high technology around reproduction, may also be jeopardized. Particularly where there is no bright line between abortion and some methods of birth control, the fundamental right both to prevent pregnancy and to end pregnancy may be at stake.

Our Nation's history and tradition also respects the autonomy of individuals to make life choices consistent with their own moral and conscientious beliefs. Our Constitution has long recognized an individual's right to make private and intimate decisions about marriage and family life, the upbringing of children, the ability to use contraception. The decision to terminate a pregnancy or to carry it to term is no different in kind.

Both the Solicitor and some Commonwealth amici argue that the Constitution only protects private decision-making within families. It is true that the rights of privacy have been recognized in the familial context. For example, in Griswold the Court found unconstitutional the Connecticut statute that prohibited

married persons from using birth control and in Loving this Court found invalid a Virginia statute that prohibited the marriage of interracial couples.

Nevertheless, this Court has never limited the notions of privacy recognized in these cases as only arising or belonging to married couples. Indeed, in Eisenstadt and in Carey this Court specifically rejected this view.

Nor can this Court alter its historic recognition of privacy and deny women fundamental freedoms because, as the Solicitor argues, the woman is not isolated in her privacy. Surely if the Government cannot require individuals to sacrifice their lives or health for others or for other compelling purposes, it cannot require women to sacrifice their lives and health to further the State's interest in potential life.

QUESTION: Ms. Kolbert, you're arguing the case as though all we have before us is whether to apply stare decisis and preserve Roe v. Wade in all its aspects. Nevertheless, we granted certiorari on some specific questions in this case. Do you plan to address any of those in your argument?

MS. KOLBERT: Your Honor, I do. However, the central question in the case is what is the standard that this Court uses to evaluate the restrictions that are at

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issue, and therefore one cannot --

QUESTION: Well, the standard may affect the outcome or it may not, but at bottom we still have to deal with specific issues, and I wondered if you were going to address them.

MS. KOLBERT: Yes, I am, Your Honor, and I would like in particular to address the husband notification provisions, but the standard that this Court applies will well establish the outcome in this case for a variety of reasons.

This Court has already found that under the principles of Roe v. Wade the bulk of the Pennsylvania statute is unconstitutional. There is no question that this Court struck down as unconstitutional under strict scrutiny the bias counseling provisions and the 24-hour mandatory delay both in Thornburgh and in Akron, the case in 1983, and therefore this Court must examine first the question of what's the appropriate standard before determining the constitutionality of those other provisions.

The Court cannot alter its historic recognition of privacy and deny women fundamental freedoms, as I was speaking, because as the Solicitor argues, there is the presence of the fetus.

Surely, if the Government cannot require

individuals to sacrifice their lives or health for human beings who are born for other compelling purposes, they cannot do so for purposes of protecting potential fetal life.

And if this Court is to reduce the presence of a constitutional right merely because of the presence of the fetus, other childbearing decisions, whether they be the right to carry the pregnancy to term or make other childbearing decisions will be particularly affected.

Particularly here, as this Court noted in Roe where there is widespread disagreement in both a philosophical and a religious sense about when life begins, this Court cannot sanction one view to the detriment of women's lives and health; nor can the state of the law in 1868 define or determine constitutional rights for all future generations.

This Court must look generally to whether a right is reflected in our Nation's history and traditions rather than at whether the activity was illegal at the time of the adoption of the Fourteenth Amendment. Relying exclusively on what 50 States have legislated in determining the scope of liberty would imperil numerous freedoms such as rights recognized by this Court in Brown, Bolling, Griswold and Loving.

This Court has also recognized as --

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QUESTION: Ms. Kolbert, on this last point, I am not sure what you suggest we look to. You say we should not look to what the practice was in 1868. Should we look to what the practice was at the time of Roe or what the practice is today? That is, what the States would do, left to their own devices?

MS. KOLBERT: Your Honor, I believe that you have to look very generally at whether the Nation's history and tradition has respected interests of bodily integrity and autonomy and whether there has been a tradition of respect for equality of women. Those are the central and core values --

QUESTION: But not to abortion in particular?

MS. KOLBERT: Well, this Court is -- if the Court was only to look at whether abortion was illegal in 1868, that is at the time of the adoption of the Fourteenth Amendment, it would be placed in a very difficult situation because at the time of the founding of the Nation, at the time that the Constitution was adopted, abortion was legal.

QUESTION: Pick 1968, I gather you wouldn't accept 1968 either though.

MS. KOLBERT: Well, we think that the Court ought to look generally at the principles that this decision protects. That while it is important to look --

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and I would not urge you to ignore the state of the law at different periods of our history, it is only one factor in a variety of factors that this Court has to look to in determining whether or not something is fundamental.

And fundamental status in this instance derives from a history of this Court's acknowledgement and acceptance that private, autonomous decisions made by women in the privacy of their families ought to be respected and accorded fundamental status.

Certainly, the anomalous posture of the fact that abortion was legal at the time of the founding of the Constitution and then illegal at the time of the adoption of the Fourteenth Amendment would place this Court in a very difficult position, that is, rights may be guaranteed under the Fifth Amendment and not the Fourteenth, merely because only the exact state of the law in 1868 is the factor that the Court accepts.

QUESTION: This is not an antiquarian argument you are making. You would have made the same argument in 1868. I think you would have said the mere fact that most States disfavor abortion is no justification for this Court's saying that it is not therefore included within it. You would have made that same argument in 1868.

MS. KOLBERT: I would, and that is the argument that this Court has made in many instances in rejecting

exactly the state of the law prior to the granting of fundamental status.

That is, this Court, if we were only to look at whether State legislatures prohibited activity in determining whether or not an activity is fundamental, many of the most precious rights that we now have: rights to travel, rights to vote, rights to be free from racial segregation would not be accorded status because in fact, State legislators have acted to inhibit those rights at the time of the adoption of the Fourteenth Amendment.

QUESTION: Some of those are mentioned in the Constitution like racial segregation.

MS. KOLBERT: Your Honor, this Court has recognized that the rights at issue here, that is, the rights of privacy, the rights of autonomy flow from the liberty clause of the Fourteenth Amendment which is also mentioned in the Constitution.

The debate centers on what is the meaning of that term liberty, and we think that the precedence of this Court that began at the end of the 19th Century and have proceeded from this Court to the very present, would logically and necessarily include fundamental rights to decide whether to carry a pregnancy to term or to terminate that pregnancy.

QUESTION: I don't question the importance of

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your arguing that there is a fundamental right, as you have done; however, there is a fundamental right to speech and we hear any number of arguments in this case on time, place and manner. I don't think our decision on parental notice in the Akron case is necessarily inconsistent with a fundamental right.

But one way of our understanding this fundamental rights and their parameters, their dimensions is to decide on a case-by-case basis, and you have a number of specific provisions here that I think you should address.

MS. KOLBERT: The critical factor is whether, as a result of its fundamental status, this Court will accord the standard of Roe, that is, strict scrutiny because under that standard there is no dispute among the parties. Under that standard, the bias counseling provisions, the 24 hour mandatory delay have been found unconstitutional, and significantly, this Court has also gone so far as to say that the husband consent requirements, very similar to the husband notification requirements at issue in this case, have also been found unconstitutional --

QUESTION: I am suggesting that our sustaining these statutory provisions does not necessarily undercut all of the holding of Roe v. Wade.

MS. KOLBERT: It is our position, Your Honor,

that if this Court were to change the standard of strict scrutiny, which has been the central core of that holding, that in fact, that will undercut the holdings of this Court and effectively overrule Roe v. Wade.

To adopt a lesser standard, to abandon strict scrutiny for a less protective standard such as the undue burden test or the rational relationship test, which has been discussed by this Court on many occasions, would be the same as overruling Roe for it is the beauty of Roe, the protections of Roe flow from the fact that this Court gives, upon a proof that particular State regulations interfere with the right.

Roe establishes and creates a burden on Government to come forward with a compelling purpose.

QUESTION: Well, if you are going to argue that Roe can survive only in its most rigid formulation, that is an election you can make as counsel. I am suggesting to you that that is not the only logical possibility in this case.

MS. KOLBERT: Our position is that Roe, in establishing a trimester framework, in establishing strict scrutiny, and in also establishing that the rights of women and the health interests of women always take precedent over the State's interest in potential life.

Those hallmarks of Roe are central to this case,

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and are central to continuing recognition of the right as fundamental. Should the Court abandon that --

QUESTION: But did the Court hold that, even after viability of the fetus in Roe?

MS. KOLBERT: What the Court --

QUESTION: Do you think that was a correct characterization of Roe's holding that you just gave, that the woman's interest always takes precedence? Is that true under Roe, in the latter stages of pregnancy?

MS. KOLBERT: Your Honor, under Roe, after the point of viability, that is the point when the fetus is capable of survival, the State is free to prohibit abortion but only so long as it is necessary, only so long as the woman's health interests and life interests are not at stake.

That is, potential fetal life is a recognized value, is a recognized State interest after the point of viability; but when in conflict, when the woman's health interest is in conflict with those State interests and potential life, those women's interest, the women's interest in health take precedent.

Now admittedly, the question of viability and the viability line is not as present in this case as it has been in many of the other cases that this Court has seen before here. That is, all of the restrictions that

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are issue in Pennsylvania attach in pregnancy at the very beginning of pregnancy, and therefore, the State's interest in protection of fetal life really does not into play.

The real issue is whether or not these health interests, that is whether or not the State's interest in protecting a compelling interest in health are present. And frankly, this Court need only look to the record, that is, need only look to the findings of the district court to determine that this statute in no way furthers women's health interests.

That in fact, what this statute does is cause a detriment to women's health, submit her to increased dangers as a result of delay, as a result of interference with the doctor/patient relationship, as a result of permitting third parties who would injure individuals who are required to give husband notification, that those interests in health are not furthered in any respect.

The Commonwealth attempts to present the restrictions at issue here as reasonable. For the woman who as a result of mandatory husband notification provisions will be beaten, or will see her children beaten, the restrictions are not reasonable. For the woman who must travel 200 miles on two and three occasions as a result of the act's mandatory delay, the restrictions

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are not reasonable. For the woman who has become pregnant as a result of marital rape, obtaining information from her doctor that her husband may be liable for child support is both cruel and oppressive. They are not reasonable.

To find these restrictions reasonable, this Court would have to ignore the facts placed in evidence in this case which demonstrate that the restrictions were not enacted to improve women's decision making or health care.

After listening to the testimony of ten witnesses, including those proffered by the Commonwealth, the district court made 387 findings of fact and repeatedly concluded that the Pennsylvania restrictions will interfere with the ability of physicians to provide quality medical care and will delay and discourage the performance of abortion to further no legitimate State interest.

In particular, the lower court found that the mandatory husband notification provisions will have dangerous and potentially deadly consequences for battered women, likening force notification in a battering situation to providing the husband with a hammer with which to beat his wife.

QUESTION: Was the husband notification provision the one that the court of appeals held

unconstitutional?

MS. KOLBERT: It was, your honor.

QUESTION: And it upheld the balance of the act, is that correct?

MS. KOLBERT: That's right. The district court found, as well, that bias counseling provisions transform the physician from the impartial counselor mandated by accepted medical standards into a partisan proponent of the State's ideology. And mandatory delay will increase both the expense and medical dangers of abortion, yet furthering no legitimate State purpose.

There is no serious contest about the effect of this law. Nor can there be, for under rule 52 the district court's findings are not clearly erroneous. Nor did the fact that this is a facial challenge require petitioners to prove that the statute cannot be constitutionally applied to any person.

This Court had repeatedly found statutes facially invalid after looking at facts like those present here. For example in Hodgson, this Court relied extensively on district court findings to strike down Minnesota's two parent notification statute with no bypass, despite the fact that that statute had never yet been in effect. The extensive record here demonstrates that the harms are not speculative nor remote, nor is this

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a worst case scenario.

The Court should not demand an unwanted child or a woman maimed by an illegal abortion as proof that strict scrutiny is applicable. Pennsylvania women should not be the guinea pigs in the State's experiment with constitutional law. To find otherwise would totally eviscerate the strict scrutiny standard of review, and would prevent Federal courts from scrutinizing legislative findings, a central role in the process of judicial review.

Let me turn now to -- specifically to the husband notification provision. There is little doubt that these provisions violate the fundamental right of privacy, marital integrity and equality. Beginning as early as Danforth, this Court recognized that a husband cannot arbitrarily veto the childbearing decisions of his wife.

Like the Missouri law at issue in Danforth, State mandated communication between husbands and wives violates the autonomy of married women to make personal and private decisions, particularly here where a married woman is often the survivor of martial rape and where the penalty for transgressing her husband is likely to be physical violence against her or her family members. Government has the obligation to respect her private

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decisions, not to involve her husband.

The solicitor dismisses the import of the State-imposed harm and believes or claims that the Constitution is not intended to remedy them. But this approach seriously ignores that women will be seriously maimed and that harms will be invoked, and it is a callous disregard for their lives and health.

While it may be desireable for husbands and wives to share intimacies in their daily life, the concepts of this Court developed in the principles of marital integrity ensure that the Government cannot decree for those couples how that communication should occur. To decree and direct family life is more destructive of family integrity than permitting families to resolve their differences on their own terms.

The husband notification provisions also violate principles of equality. These are provisions that apply to women and women alone. Imposed notification is -- gives a benefit only to men, and as such they violate the dictates of the equal protection clause. The legislative scheme that assumes that husbands are capable and authorized to make all independent decisions but wives are not, reflect an outmoded common law view that women, once married, lost their legal identities to their husbands.

In the days before Roe, thousands of women lost

their lives and more were subjected to physical and emotional scars from back alley and self-induced abortions. Recognizing that, this Court established Roe and established fundamental protection for women's childbearing decisions. We urge this Court to reaffirm those principles today, to adopt the rulings of this Court in Akron and Thornburgh that used the Roe strict scrutiny standard, and affirm in part and reverse in part, the judgment of the court of appeals.

I would like to reserve 3 minutes for rebuttal, if there's no further questions from the court.

QUESTION: Very well, Ms. Kolbert. General Preate, we'll hear from you.

ORAL ARGUMENT OF ERNEST D. PREATE, JR., ESQ.

ON BEHALF OF ROBERT P. CASEY, ET AL.

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

This Court granted certiorari on the question of whether five sections of our Pennsylvania Abortion Control Act are constitutional. It is the position of Pennsylvania that each of the five provisions is constitutional under the analysis that was applied by this Court in Webster; that, further, Roe v. Wade need not be revisited by this Court except to reaffirm that Roe did not establish an absolute right to abortion on demand, but

rather a limited right subject to reasonable State regulations designed to serve important and legitimate State --

QUESTION: Mr. Attorney General, I'm not so sure that's so important. Roe itself said that --

MR. PREATE: That's correct.

QUESTION: That this does not provide for abortion on demand. Have you read Roe?

MR. PREATE: Yes, I have.

QUESTION: Thank you.

MR. PREATE: In our view the accommodations of the woman's right and the State's legitimate interest in the unborn child is best served, short of overruling Roe, by employing the undue burden standard for reviewing State abortion regulations. However, as we argue in part 2 of our brief, if our statute cannot be upheld under the undue burden standard, Roe, being wrongly decided, should be overruled.

I will now address the specific provisions of our statute and start with the requirement of spousal notice, which was the only aspect of our law that the court of appeals found unconstitutional.

It's important to remember, and perhaps more important in this context than any other, that the petitioners brought this action as a facial challenge to

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the statute. In this kind of a challenge it's enough for the petitioners to show -- it's not enough for them to show that the act might be unconstitutional as applied to someone in some hypothetical, worst-case scenario. Rather, the petitioners must show that the statute could not constitutionally be applied to anyone. We asked, have they met that burden, and we submit that they have not met that burden. This is a spousal notice provision, it is not a spousal consent statute.

QUESTION: Now, the provision does not require notification to a father who is not the husband, I take it --

MR. PREATE: That's correct, Justice O'Connor.

QUESTION: or notice if the woman is unmarried.

MR. PREATE: It only applies to married women.

QUESTION: So what's the interest, to try to preserve the marriage?

MR. PREATE: There are several interests. The interest, of course, in protecting the life of the unborn child.

QUESTION: Well then, why not require notice to all fathers? It's a curious sort of a provision, isn't it?

MR. PREATE: It is that, but the legislature has made the judgment that it wanted its statute to apply in

this specific instance because it wanted to further the integrity of marriages.

QUESTION: Would you say that the State could similarly require a woman to notify anyone with whom she had intercourse that she planned to use some means of birth control after the intercourse that operates, let's say, as an abortifacient? Could the State do that? I mean, it would be the same State interest, I suppose.

MR. PREATE: The State interest would be the same, but I think that would be problematic. I'm not --

QUESTION: And why would it be problematic, do you think?

MR. PREATE: I think that with regard to applying a statute to all women, that it might create severe obstacle, an absolute obstacle to their obtaining an abortion.

QUESTION: I don't understand.

MR. PREATE: The undue burden standard, as I understand it, is that whether or not the regulation would impose such an absolute obstacle, not whether it would deter or inhibit some women from obtaining an abortion.

QUESTION: Well, we're talking about the provision for notification in this case under the statute to the husband, and I'm just asking whether a different type of State regulation would have to be upheld under

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your standard.

MR. PREATE: Well, if the State had posited its interest as protecting the life of the unborn then utilizing the rational basis standard, then I would submit that it could legitimately require that kind of notification to all people.

In this instance, however, we have a different statute. We have a statute that provides exceptions where exceptions are appropriate, and there are five of them: medical emergency, where the husband is not the father of the child, where the husband cannot be found, where the pregnancy is the result of a reported sexual assault, or where the woman in her judgment believes it's likely that she will be physically abused.

Now, petitioners have produced some testimony and made some argument, essentially through one expert, about battered wives, but the testimony was that some unknown number were rendered so helpless by their battering husbands that they were incapable of checking off a line on the form, the spousal notice form.

We can agree that these women are indeed cruelly burdened, but they're not burdened by the statute, and that's the compelling point. They're not burdened by the statute, but by the circumstance, and the tragic circumstance, of their lives. We're looking at the

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statute to see if the statute imposes the obstacle. If there is a battering husband that's interposed in there, that's a different story.

QUESTION: What's our standard on a facial challenge, whether there's a substantial likelihood of the harm?

MR. PREATE: No, I think you have to ignore what the petitioners have posited, which is a worst-case analysis scenario, and you have to look and see if it could be constitutionally applied and value-tied to anyone, and we submit that in this particular instance the record reflects that right now, in Pennsylvania, 50,000 abortions, 20 percent of those women are married and 95 percent of those women notify their husbands.

Therefore, only 1 percent of the women are not, in Pennsylvania, notifying their husbands now, and the act's not even in effect. There is no broad practical effect in the Pennsylvania statute to prohibiting abortion for those women.

If the act goes into effect, some of those 1 percent of women will then have to notify their husband, and the result will be they will resolve their difficulties amicably. There will be some who will then take the exception, because they don't want to notify their husband. They may be battered, there may be a

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spousal rape, there may be -- they can't find their husband.

So what we're doing is reducing that set of women down to several subsets and the petitioners' burden in a facial challenge is to establish, you see, that there's a broad practical impact. They have not met that burden.

QUESTION: No, but General, may I ask you a question. Is it not true, therefore, that the only people affected by the statute, this very small group, are people who would not otherwise notify their husbands?

MR. PREATE: I'm not sure I got all of that question, Justice Stevens.

QUESTION: Well, you've demonstrated that the public interest is in a very limited group of people, the few women who would not otherwise notify their husbands, and those are the only people affected by the statute.

MR. PREATE: That is correct.

QUESTION: Everyone in that class, should we not assume, would not notify her husband but for the statute.

MR. PREATE: That is correct. Now, in that 1 percent, not everyone would want to notify, and there are exceptions.

QUESTION: They would not without the statute.

MR. PREATE: They would not without the statute,

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but there are exceptions, several of them -- four.

QUESTION: No, they'd only -- you've already taken the exceptions into account in narrowing the group very -- to, you know, 1 percent, or whatever it is.

MR. PREATE: Justice --

QUESTION: You aren't suggesting there's no one whose decision will be affected by the statute.

MR. PREATE: Well, that's the point. On this record, which is what we have to go on, there is nothing established by the petitioners as to how many there are in that category.

QUESTION: Well, if there's no one affected by the statute, what is the State interest in upholding the statute?

MR. PREATE: The State interest in upholding the statute is the protection of the life of the unborn and the protection of the marital integrity, and to ensuring of communication, the possibility -- we not asking --

QUESTION: But not if the statute has no effect. As a general matter, when we're dealing with rational basis review, we ask whom does the law affect, and so it seems to me that you have to justify the law based on the effect of this 1 percent who would not otherwise -- and you may have an argument.

MR. PREATE: And -- and --

QUESTION: It's a very strange argument to say that the law doesn't affect 90 percent of the people so we're not concerned with the law. I've never heard that argument.

MR. PREATE: We're not in any way advocating that, because we think that the law is rational. If you look at the State interests that are trying to be pursued here -- protecting the life of the unborn, protecting the marriage, ensuring the possibility of communication -- this statute rationally advances it.

It may not advance it in every single instance, but that is not the test. The test is, does it generally rationally advance the interest that the State is trying to protect? In this instance, it does. But by the sheer numbers that we have demonstrated --

QUESTION: General Preate, I thought we were talking, not rational basis but undue burden. Are they the same thing?

MR. PREATE: No, they are not, Justice Scalia.

QUESTION: How do I go about determining whether it's an undue burden or not? What law books do I look to?

MR. PREATE: This is a quantitative analysis, Justice Scalia. You begin by ascertaining under undue burden the -- whether it is a significant increase in cost such that it broaden the impacts, prohibits women from

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having abortion or whether it bans abortion.

QUESTION: I suppose it depends on how important I would think it is, that a husband of a wife know before a fetus that he co-generated be destroyed. Would that be part of it?

MR. PREATE: That would be part of the analysis that is done on the weighing side, after you establish whether or not there is in fact -- in the first instance, the threshold question is what is the broad practical impact? If there is no broad practical impact, it's minimal, as is in Pennsylvania statute, then you reach the question of the weighing that's involved.

QUESTION: Well, it depends. I mean, if the impact is only minimal, but also the interest involved is only minimal, then I suppose it is an undue burden, and I guess that again leads you to how much weight you place on that kind of an interest.

MR. PREATE: As I understand it, Justice Scalia, what you are talking about is if there is no undue burden, that is, there is no broad practical impact in the initial analysis, then you determine whether or not the statute rationally furthers the State's interest. It's a rational basis test in the second phase of it.

And under the rational basis test, which would be the same rational basis test that some members of this

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Court have applied in Webster, you come to the conclusion that Pennsylvania's spousal notice section does pass undue burden analysis, and it does pass rational basis analysis.

QUESTION: May I ask you a question about your understanding of the undue burden test. Do you think it refers to the number of persons burdened by the law on the one hand or the severity of the burden on a particular individual affected by the law on the other hand? Which is the right analysis?

MR. PREATE: I think Justice Stevens, in the initial application, it's a quantitative analysis, whether there is a broad practical impact here. The fact that it might --

QUESTION: In other words, it is the number of persons affected is your answer --

MR. PREATE: The number of persons affected --

QUESTION: Regardless of how severe the burden on a particular individual?

MR. PREATE: As the test has been posited, the question of whether or not --

QUESTION: I am just asking you to explain to me what your conception of the test that you are asking us to adopt is.

MR. PREATE: It may be that some women would be deterred to some degree, but that is not sufficient to

create an undue burden.

QUESTION: It is the number of women affected?

MR. PREATE: Initially, it is the number of women affected, the broad practical impact of it --

QUESTION: How about as applied to a specific woman?

MR. PREATE: As applied to a specific woman? Let's say there is such a woman who has been battered, psychologically battered, and so the exception doesn't work in her instance.

QUESTION: Right, let's suppose that.

MR. PREATE: Let's posit that. In that instance, of course, that is a worst case scenario, that is not the way you test facial challenges, in that instance, the law would work. You would test this statute as applied in the lower courts, and that woman would then be --

QUESTION: And you would apply an undue burden test there on the as-applied challenge, do you suppose?

MR. PREATE: No, I would think that --

QUESTION: No?

MR. PREATE: No. I would think that you would be asking the court to give full reign to the interests that you have. The woman would have, under rational basis analysis test, a liberty interest protected by the

Fourteenth Amendment, or under the undue burden standard, would have a limited right --

QUESTION: I would have thought you would look at the burden of the law as applied to the woman.

MR. PREATE: And I think that you would look to that, but you are asking the court, in an as-applied mechanism to give full effect to your right, the statute given. It is a given that it burdens you. So you can't just look at the burden in the as-applied context, but you must look at it in that context, giving full reign to your right, and that is what the woman would be seeking from the district court or for a court of common pleas, in asking the court, in applying this spousal notice section to her particular instance because she didn't have one of the exceptions to check off because she is psychologically or economically pressured.

QUESTION: But in the facial context, I don't understand what you -- so there are two undue burden tests. There is one at the facial level in which we consider the statute engross and decide whether, all things considered in the generality of applications, the burden is undue.

And then we have a second wave of application of the undue burden test case-by-case, so that even though the law facially may be okay, it may be invalid in its

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particular application because of -- is that what you are saying?

MR. PREATE: In the second instance, as applied it --

QUESTION: I am worried about the first one, not the second one. I thought the --

MR. PREATE: In a facial challenge, Justice Scalia, you are looking at not the worst scenario hypothesis, but whether this act could be applied constitutionally to anyone, and that is --

QUESTION: Any single case, not engross, to any single case. Isn't that the normal situation? To challenge a statute facially you have to show that it can never be constitutionally applied, isn't that right?

MR. PREATE: That's correct.

QUESTION: That is not looking at it engross. That is asking whether there is any single case where a woman would not be unduly burden.

MR. PREATE: In this particular instance, we find that there is no undue burden in our statute, anywhere in our statute, and if the undue burden test is, as applied or understood by this Court causes our statute to fall, then we ask this Court to adopt rational basis as the appropriate analysis.

QUESTION: Do you think that compelling speech

requires any kind of First Amendment analysis?

MR. PREATE: Compelling --

QUESTION: Speech. The State is compelling a woman to say something to her husband.

MR. PREATE: We are asking that she --

QUESTION: Does that invoke any First Amendment concerns?

MR. PREATE: Not in our view, this statute --

QUESTION: I would have thought perhaps compelling speech would get us right into a First Amendment area.

MR. PREATE: In this particular instance, this statute, we feel causes notification, but there is a legitimate State interest involved in furthering that interest.

QUESTION: In other words, the doctor is to say certain things to the patient, do you think that is really commercial speech there?

MR. PREATE: Yes, I do, Justice O'Connor --

QUESTION: Why is that? When the doctor is giving professional advice to the patient, you think that is commercial?

MR. PREATE: That is commercial. The petitioners already do that right now. They already tell their patients, the physicians and the counselors that

there are medical risks associated with this procedure.

QUESTION: I wouldn't have thought that was commercial speech. What do you rely on?

MR. PREATE: In Zauderer.

QUESTION: But that is advertising, that is different.

MR. PREATE: In Pennsylvania's general informed consent law, applying to every single contact between the doctor and a patient, there is the same information that must be presented and that is, the doctor must tell the patient about the medical risks of the procedure and the alternatives to it.

QUESTION: Well, it might meet a First Amendment test, but I am wondering how you get to commercial speech on that kind of advice?

MR. PREATE: We think that with the -- with the interests involved, the statute furthers those interests and that it can legitimately require the husband to be notified because of the interests involved.

I see that my time is running short, and I wanted to make sure the Solicitor General has some time to respond.

We think that Pennsylvania has developed an intelligent statute that fully comports with the due process clause of the Fourteenth Amendment.

It is a statute that is carefully drafted and it has been amended to reflect the teachings of this Court's jurisprudence since Roe. We ask this Court to overturn Akron and Thornburgh's strict scrutiny approach as being unwarranted extensions of Roe.

On the facial challenge, whereby the petitioners must show that there are no set of circumstances under which these provisions can be valid, the petitioners have utterly failed to do so, done in by no small measure by, as the record demonstrates and as indicated in the Third Circuit Court of Appeals' opinion, but their own rational practices which this statute mirrors.

QUESTION: Mr. Preate, because you have a little time left, there is one point on which I guess I never fully followed your argument, and I wonder if you would go back to it.

You got to the point, you were arguing about the number of instances, the percentage of instances in which the spousal notification would in fact make a difference in the behavior of the parties involved. And as I recall, you got it down to about 5 percent to begin with who would not otherwise, 5 percent of the women who would not otherwise give notice to their spouses.

Then from that 5 percent you subtracted some number for those, I guess subject to medical emergencies,

those subject to the certification that they would be physically abused, and I think by that process of elimination you got it down to about 1 percent who would actually be affected by the stricture of the statute, is that right?

MR. PREATE: That is not correct, Justice -- you start with the 1 percent because 95 percent of 20 percent is 1 percent. You are talking about 500 women that --

QUESTION: You are talking about all women, but the spousal notification applies only to married women.

MR. PREATE: That is correct.

QUESTION: What is the percentage of married women? Well, your time is up.

MR. PREATE: Sorry. Thank you.

QUESTION: Thank you, Mr. Preate.

ORAL ARGUMENT OF KENNETH W. STARR

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

GENERAL STARR: Thank you Mr. Chief Justice, and may it please the Court. In view of what has been discussed, let me address very briefly three points.

The first is the standard of review which has been the subject of considerable discussion. In a number of its cases over the last 20 years in the abortion area, the Court has articulated the governing standard of review

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in different ways. And as a result, there is confusion in the law as to how legislatures, if they choose, can legislate, and how judges are to judge in this extraordinarily sensitive and divisive area.

In our view, the correct articulation of that standard is to be found in the Webster plurality opinion. That standard has deep roots. It finds its roots in a long line of due process cases that do not involve liberty interests which, by virtue of the nation's history and its legal traditions, rise to the level of fundamental rights to a free people. This is the process of analysis that is quite familiar to the Court, very lengthily laid out by Justice Harlan in his dissent in Poe versus Ullman, and then adumbrated in his concurring opinion in Griswold against Connecticut.

Second, and relatedly, with all respect, we do not believe that stare decisis considerations weigh against the Court providing that needed clarification as to the standard. This not an issue -

QUESTION: May I ask you one rather basic question?

GENERAL STARR: Certainly.

QUESTION: It effects the standard of review and everything else. What is the position of the Department of Justice on the question whether a fetus is a person

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within the meaning of the Fourteenth Amendment?

GENERAL STARR: We do not have a position on that question and this Court has not addressed, or at least there is no Justice at this Court --

QUESTION: It's addressed in Roe.

GENERAL STARR: That, that, that is correct. And it does seem to me that ultimately that is an extraordinarily difficult question which this Court need not address, and it need not address it in this case.

QUESTION: What is that we need not address it. I'm just interested to know --

GENERAL STARR: We do not have a position.

QUESTION: Does the United States have a position on that question?

GENERAL STARR: We do not, because we think it would be an extraordinarily difficult and sensitive issue by virtue of a number of questions that would flow from that, including equal protections and so forth.

QUESTION: Well, the Court decided that in Roe, did it not?

GENERAL STARR: The Court did, in fact, decide that there is a very keen interest on the part of the State in what the Roe Court called potential life, and that's my --

QUESTION: Yes, but said the fetus is not a

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person under the Fourteenth Amendment.

GENERAL STARR: Well I think that that is the necessary consequence of Roe v. Wade. But I think that the key point is that a number of the Justices of this Court have said that regardless of that legal question, that constitutional question, that the State does have a compelling interest in the potential life, in fetal life, and that that interest runs throughout pregnancy.

QUESTION: We did not say in Roe that a State could not have a position on whether a fetus is a person, did we?

GENERAL STARR: Certainly the Court --

QUESTION: We said that the Constitution takes no position on whether a fetus is a person, and/or that it does take a position that a fetus is not protected by the Constitution.

GENERAL STARR: The Court seemed to admit of the possibility of State regulation to protect the unborn at all stages.

QUESTION: Including State regulation on the basis of the people's determination within that State that a fetus is a person. There's nothing in Roe that says a State may not make that judgment, if it wishes.

GENERAL STARR: That it says, that the State may, if it sees fit, that the State does have -- I think

Roe goes this far. Roe says that there is a legitimate interest of the State in the potential life in utero throughout pregnancy, and then the nature of that interest changes and becomes stronger over time. But it did, in fact, say that there is a legitimate interest.

And there has been an expression by a number of the Justices of this Court to suggest that that interest is, indeed, a compelling interest on the part of the State.

QUESTION: Is that also not the position of the Government of the United States, that it is a compelling interest throughout pregnancy?

GENERAL STARR: That is our position, that there is a compelling interest.

QUESTION: And what is context. What is the textual basis for that position in the Constitution? Is there any?

GENERAL STARR: Well I think that, if I may, Justice Stevens, it seems to me that it goes to the recognition that we all do, that there is in fact an organism. As, Justice --.

QUESTION: I'm asking what is the textual basis in the Constitution? You argue very vigorously there's no textual basis supporting your opponents position. What is the textual basis for your position that there's a

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compelling interest in something that is not a person within the meaning of the Fourteenth Amendment?

GENERAL STARR: The State has --

QUESTION: What is the textual basis for it?

GENERAL STARR: The State has an interest in its potential citizen, it does not have to be granted, have the basis in the Constitution. Justice Stevens, it is my view that the State can look out and say we, as we have historically, regulate and legislate in the interest of those who will come into being, who will be born. It is an interest that every member of this Court has said in potential life.

QUESTION: That's not responsive to my question. My question is what is the textual basis in the Constitution. If you're going to say there is none, fine, that's perfectly all right.

GENERAL STARR: I think it's in the nature of our system. And if nothing else, the Tenth Amendment, Justice Stevens, suggests that the State can order its relationships in ways that reflect the morality of the people, within limits.

QUESTION: General Starr.

GENERAL STARR: There's a determination to -- I'm sorry.

QUESTION: Why does there have to be something

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in the Constitution? There's nothing in the Constitution that requires the State to protect the environment, is there?

GENERAL STARR: Of course not.

QUESTION: And yet that can be a compelling State interest, may it not?

GENERAL STARR: Yes. As I have said, the Constitution does not seek to order and to ordain. These are interests in which the State can have, and our nature of government --

QUESTION: All that Roe says is that the Constitution does not protect the fetus under the Fourteenth Amendment. It does not say that a State may not choose to do so.

GENERAL STARR: It doesn't even go so far, it seems to me.

QUESTION: Or that if a State chooses to do so, it is not a compelling State interest. There's nothing in Roe that contradicts that.

GENERAL STARR: I think it calibrates it. I think, Justice Stevens, it is, in fact, the nature of our governmental structure. I know no -- I do know of prohibitions that the Constitution sets forth. I do not know of particular provisions, other than, indeed, perhaps the Tenth sheds light on this.

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That this is a matter that ultimately is, and I think this is quite important in terms of analyzing what Pennsylvania has done here. What Pennsylvania has said, in effect, is that we will not prohibit abortion, save for gender selection abortions. Our colleagues on the other side believe that Roe v. Wade forbids that, that it protects that decision. It does not prohibit; it has seen fit to regulate. That is very much in the tradition of the Western democracies.

QUESTION: What is the standard?

QUESTION: And you started out to tell us what the standard was?

GENERAL STARR: We believe it was articulated, Justice White, by the Webster plurality.

QUESTION: Well what is it?

GENERAL STARR: It is the rational basis standard. And that is the standard that has been articulated by this Court in a variety of decisions and by a variety of Justices of this Court, in its abortion jurisprudence.

QUESTION: And under that standard, you would think all of the provisions that are at issue here should be sustained.

GENERAL STARR: Exactly.

QUESTION: And so would complete prohibition,

wouldn't it?

GENERAL STARR: Complete prohibition that had no exception for the life of mother, I think could raise very serious questions under --

QUESTION: But subject, subject to that --

GENERAL STARR: The protection of life.

QUESTION: Subject to that exception, it would cover complete pro -- it would justify complete prohibition.

GENERAL STARR: I think it best not to answer these in the abstract. We look to the specific interests of the State as it has articulated those interests. For example --

QUESTION: Well I'll grant you that, but you're asking the Court to adopt a standard and I think we ought to know where the standard would take us.

GENERAL STARR: I think the rational basis standard would, in fact, allow considerable leeway to the States, if it saw fit.

QUESTION: Well, General Starr --

GENERAL STARR: Through the democratic --

QUESTION: That's not really a fair answer. Rational basis under your analysis: there's an interest in preserving fetal life at all times during pregnancy. It's rational, under your view. Ergo it follows that a total

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prohibition, protected by criminal penalties, would be rational, it would meet your standard.

GENERAL STARR: I don't think so. The common law, the common --

QUESTION: Well why not? In what proviso -- what is your rational basis standard if not the traditional one?

GENERAL STARR: Ours is the traditional one. But under that traditional analysis there must, in fact, be a rational connection with a legitimate State interest, and the State cannot proceed in an arbitrary and capricious fashion, in my view. If I may complete this, I think this is an important part of the answer.

It would be arbitrary and capricious. It would, moreover, deprive an individual of her right to life if there were not an emergency exception. And even in Roe v. Wade, the Texas statute at issue there provided for that exception. It would be quite at war with our traditions, as embodied in the common law, not to provide, at a minimum, for that kind of exception.

QUESTION: No, but what you're saying is the rational basis standard, which normally just requires a reason that is legitimate to support it, can be overcome in some cases by countervailing interest, which is not the normal rational basis standard.

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GENERAL STARR: Well, may I respond.

QUESTION: Yes, you may.

GENERAL STARR: I think that the traditional rational basis test does, in fact, analyze the ends. It looks at the ends and the means. And it requires, in fact, that the State not conduct itself in an arbitrary and capricious fashion. That is the ultimate insight of the rational basis test.

I thank the Court.

QUESTION: Thank you, General Starr. Ms. Kolbert, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF KATHRYN KOLBERT

ON BEHALF OF THE PETITIONERS

MS. KOLBERT: Mr. Chief Justice, I'd like to address two points very quickly. The first is in response to this last dialogue with General Starr.

Recognition of a State's interest in fetal life as compelling throughout pregnancy would denigrate and restrict the ability of women at all stages of pregnancy to have an abortion. And certainly in the only exception that the Mr. Starr and the Solicitor General has laid out for this Court, is in the very rare instance where only the life of the woman would be excluded from a ban.

Bans of second trimester abortions, bans of certain classes of women having abortions, bans that would

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prevent women who have serious and long lasting health needs to have abortions, would be significantly approved by this Court if the rational basis standard were adopted, precisely because of a formulation that the State's interest is compelling throughout pregnancy and sufficient to override any liberty interests, any interests of the woman to choose or not choose a pregnancy.

And, in fact, that is why this Court must go back to the hallmark of Roe. That is again reaffirm that the right to choose abortion is fundamental. And only when the Government can show a compelling purpose -- as recognized in Roe that is, a compelling purpose after the point of viability -- should it be able to sustain a statute.

The second point I wanted to raise goes to the question of the rights by numbers approach articulated by the Commonwealth. It is our view that the husband notification statute applies to every single married woman in Pennsylvania. That the rights of autonomy, the rights of communication within the family, are infringed because those communications are subject to criminal prosecution, and subject to independent district attorneys subpoenaing women and probing the communications between husband and wife.

QUESTION: Are there First Amendment values at

stake there, do you think?

MS. KOLBERT: Your Honor, I do believe there are, not only in this section, but in the bias counseling provisions as well. Clearly, we've set forth in our brief why we believe this is not commercial speech. But in both instances, the Court is forcing the physician to be the proponent of its ideology, and also to communicate information about the abortion decision.

QUESTION: Thank you, Ms. Kolbert.

MS. KOLBERT: Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

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

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