Nos. 81-746 and 81-1172

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CITY OF AKRON, ET AL.,

Petitioners,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL.,

Respondents.

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL.,

Petitioners,

v.

CITY OF AKRON, ET AL.,

Respondents.

On A Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ABORTION FEDERATION

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INTEREST OF AMICUS

This brief is filed in support of the Akron Center For Reproductive Health, Inc., et al. by the National Abortion Federation (hereinafter NAF), a not-for-profit professional organization dedicated to preserving the right of all women to choose a safe legal abortion.[1/] NAF has more than 230 abortion clinic members in 41 states, the District of Columbia and Puerto Rico, including the Akron Center for Reproductive Health, the lead plaintiff in this case. NAF members also include physicians who provide abortion services in their offices

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1/ Counsel for the parties to this appeal have given their consent to the filing of this brief. Their letters of consent are filed with this Court.

as well as other organizations and individuals committed to the preservation and provision of safe legal abortions.

Founded in 1977 to fill the need for a national professional forum for abortion service providers, NAF provides a panoply of programs and services designed to guarantee high quality patient care and ensure access to safe and inexpensive abortion services.

NAF has promulgated exhaustive standards, formulated by special committees of practitioners and experts, on the medical, nursing, counseling, administrative and ethical aspects of abortion services. NAF standards are designed and implemented to promote the health, safety and psychological well-being of patients. They

are reviewed regularly and updated to reflect the most advanced knowledge in the field. NAF's current standards are set forth in full as an appendix hereto. Whenever possible, NAF works closely with health departments and legislative bodies in order to promote awareness of and conformity with these standards for quality care.

NAF periodically assesses the need and trends in the profession and provides several forums for the presentation of new information based on technological advancement, research and experience. NAF offers post-graduate medical seminars, accredited by the American Medical Association for continuing education credits, which concern the prevention and management

of complications of abortion. NAF also sponsors regional workshops in the areas of nursing, counseling, public affairs, and management.

NAF is a clearing-house of information to abortion service professionals and the general public on all aspects of abortion services. NAF distributes information on both the availability and cost of a variety of reproductive health services in addition to abortion, including fertility counseling, pre-natal care, home birthing, contraception and male and female sterilization. NAF also collects and disseminates information about violence against abortion providers and women seeking abortion in an effort to assist them in preventing violent attacks and managing them when they do

occur.

NAF undertakes specific research and publishes reports as part of its public education program. A special NAF task force recently published a report entitled Minors and Abortions, a copy of which has been lodged with the court. NAF also offers an information brochure, in English and Spanish, about abortion as well as printed guidelines on how to choose an abortion facility.

NAF has established the only national toll-free Hotline offering the general public and women seeking abortion information on a wide variety of subjects relating to abortion and reproductive health. NAF encourages feedback from Hotline consumers, and promptly investigates complaints about abortion providers.

More than 10,000 women and men -- teenagers, parents, husbands, social workers, teachers, ministers and even judges -- have used the Hotline service.

NAF does not promote the choice of abortion; rather it seeks to ensure that the means of effectuating that choice are both safe and accessible. NAF's Public Policy Action Program is designed to ensure continued access to safe legal abortion by educating the professional community and the thousands of men and women who daily visit NAF clinics across the country to meet the increasing threats to legal abortion.

NAF members provide approximately half of all the abortions in the United States. NAF constantly strives to assure that its members and the entire medical community have the tools and information

to provide the highest quality care to abortion patients. Thus, NAF opposes governmental attempts to interfere with and hamper the provision of quality medical and psychological care to abortion patients.

SUMMARY OF ARGUMENT

The Constitution guarantees that the fundamental right of privacy which includes the right to choose abortion cannot be eviscerated by anti-abortion factions in local legislatures. No law which directly interferes with a woman's access to abortion can withstand rigorous Constitutional scrutiny unless it is narrowly tailored to meet a compelling state interest.

Akron has enacted an explicitly anti-abortion and thoroughly unconstitutional

Ordinance, broadly drawn for the purpose of discouraging abortion and inhibiting access to abortion services.

The requirement that physicians personally counsel abortion patients prevents women from obtaining the benefit of medical judgment that trained counselors are best qualified to obtain truly informed consent and ensure that a woman's choice to terminate a pregnancy is uncoerced.

The parental consent requirement fails utterly to permit mature minors to make the abortion choice for themselves or to allow immature minors to avoid parental involvement when it is not in their best interests.

The restriction of second trimester abortions to hospitals fails to serve a

compelling state interest in women's health. Outpatient abortions even during the second trimester are now as safe as childbirth and in-hospital abortions. By restricting second-trimester abortions to hospitals when Akron hospitals fall woefully short of meeting the need for the service, Akron not only fails to promote women's health, it actually harms the health and well-being of women.

ARGUMENT

POINT I

LEGISLATION THAT INTERFERES WITH THE EFFECTUATION OF THE FUNDAMENTAL RIGHT TO CHOOSE ABORTION IS UNCONSTITUTIONAL UNLESS NARROWLY TAILORED TO MEET A COMPELLING STATE INTEREST

This Court has long recognized that the Constitution guarantees a fundamental right of privacy in matters of reproductive choice. Griswold v. Connecticut, 381 U.S. 479 (1965); Cf. Skinner v. Oklahoma, 316 U.S. 535 (1942)(the right to procreate is a fundamental constitutional right). In Roe v. Wade, this Court established that the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. 113,

153 (1973). Because the right of privacy guarantees independence in making certain fundamental decisions about whether or not to bear a child, state regulations interfering with the effectuation of these decisions "may be justified only by a 'compelling state interest' . . . and . . . must be narrowly drawn to express only" that interest. Id. at 155. Laws that limit access "to the means of effectuating" decisions in matters of childbearing receive the same rigorous scrutiny as laws that prohibit choice altogether, since "access is essential to exercise of the constitutionally protected right." Carey v. Population Services International, 431 U.S. 678, 688 (1977).

The Constitution ensures that women's right to effectuate the abortion decision may not be eroded by state interference with the provision of abortion services. This Court has the power and the duty to invalidate state and federal statutes in conflict with the Constitution. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304 (1806), Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

When political turmoil threatens the enjoyment of fundamental constitutional rights, this Court must be especially vigilant to protect

> individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.

West Virginia Board of Education v.

Barnette, 319 U.S. 624, 637 (1943); see also, Cooper v. Aaron, 358 U.S. 7, 18-19 (1958); Brown v. Board of Education, 349 U.S. 294, 299-301 (1955).

Mr. Justice Jackson, writing for the Court in Barnette, illuminates the vital necessity of protecting fundamental rights from erosion or extinction through the political process:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. ...[F]undamental rights may not be submitted to vote; they depend on the outcome of no elections.
>
> Nor does our duty to apply the Bill of Rights to assertions of official authority

depend upon our possession of marked competence in the field where the invasion of rights occurs. True, the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence.

* * *

But we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence . . . withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

319 U.S. at 638-40.

A. Regulations That Inhibit Access to Abortion Services Must be Subjected to Rigorous Judicial Scrutiny

This Court has consistently applied the strict test enunciated in Roe v. Wade to state regulations that directly interfere with the right to choose abortion. Statutory provisions that create obstacles for a woman seeking abortion services burden her right to have an abortion. Unless such legislation is narrowly drawn to serve a compelling state interest, it is unduly burdensome and unconstitutional. Doe v. Bolton, 410 U.S. 179 (1973); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976). Colautti v. Franklin, 439 U.S. 379 (1979). See also Bigelow v. Virginia, 421 U.S. 809 (1975).

Only those regulations imposing no "legally significant" obstacle to the effectuation of the abortion decision need not be subject to rigorous review. For example, Danforth upheld a requirement for written informed consent and certain reporting requirements because this Court found that neither provision presented any obstacle to a woman's ability to effectuate her decision to have an abortion. 428 U.S. at 66-68, 80-81. However, this Court explicitly cautioned states against informed consent and reporting provisions that burden the abortion decision and its effectuation. Id.

This Court has also upheld restrictions on government funding of abortions on the ground that refusal to subsidize abortions simply is not a state created obstacle to the effectuation of the

fundamental right to choose abortion. Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977). Finding that there was no fundamental right to Medicaid payments for abortions, this Court subjected the restrictions only to minimal review. Id. Neither Maher nor McRae affects the rigorous review required here. In both cases, this Court specifically distinguished funding restrictions from "direct state interference with a protected activity," and reiterated that rigorous review is appropriate where, as here, "the State attempts to impose its view by force of law...." Maher, 432 U.S. at 475-76; McRae, 448 U.S. at ____, 101 S.Ct. 2671, 2686-88.

This Court's decisions concerning minors' rights to abortion similarly do not dilute the heightened standard of

review applicable to direct state interference with all women's access to abortion. The cases holding that a minor's access to abortion is not coextensive with an adult's are grounded on special considerations applicable only to minors because of their youth. H.L. v. Matheson, 450 U.S. 398 (1981); Bellotti v. Baird (II) 443 U.S. 622 (1979); Bellotti v. Baird (I) 428 U.S. 132 (1976).

B. Regulations That Hamper The Exercise of Medical Judgment Burden a Woman's Right to Choose Abortion

Laws that encumber the physician's exercise of medical judgment in providing abortion services are as unconstitutional as statutes which directly obstruct a woman's access to those services. Doe v. Bolton, 410 U.S. 179 (1973). Although

recognizing the "presence of rascals in the medical profession as in all others", this Court has held impermissible legislation that cramps medical judgment because such legislation inevitably impinges on a woman's right to receive abortion services "in accordance with her licensed physician's best judgment." Id. at 197. See also, Whalen v. Roe, 429 U.S. 589, 604 n. 33 (1977).

This Court has consistently "underscored the importance of affording the physician adequate discretion in the exercise of ... medical judgment." Colautti v. Franklin, 439 U.S. 379, 387 (1979), citing Doe v. Bolton. See also, United States v. Vuitch, 402 U.S. 62 (1971).

Licensed physicians throughout the country have, over the last decade,

relied increasingly on freestanding abortion clinics to provide abortion services. The vast majority of abortions in this country are performed in freestanding clinics. Henshaw, et al., "Abortion Services in the United States, 1979 and 1980," 14 Family Planning Perspectives No. 1, p. 5 (1982). Clinics not only provide high quality comprehensive medical care to abortion patients but assure the greatest access to abortion services at the lowest possible cost. Id. at 11. The health care team in abortion clinics, led by the physician, includes nurses, nurse practitioners and counselors or health advocates.

Abortion clinics not only best serve the needs of abortion patients but have provided a model for the delivery of outpatient surgical care in general. Only

recently have other surgical services become available on an outpatient basis. See, for example, Foster, "Ambulatory Gynecologic Surgery," "Ambulatory Care In Obstetrics and Gynecology, Ryan, G. Ed. (1980).

The physicians responsible for providing abortions have chosen to provide the services in freestanding clinics. States may not burden access to abortion services simply because clinics do not provide services in the traditional doctor-patient mode. Legislation that has the purpose and effect of discouraging the abortion choice and, if the choice is nonetheless made, of making abortion services more expensive and less accessible, directly interferes with access to abortion and inevitably has an adverse impact

on women's health and well-being. Such legislation impermissibly "limits" the right of women seeking abortion "to receive medical care in accordance with her licensed physician's best judgment." Doe v. Bolton, 410 U.S. at 197.

POINT II

SPECIFIC PROVISIONS OF THE AKRON ORDINANCE CANNOT WITHSTAND RIGOROUS JUDICIAL SCRUTINY

The provisions of the Akron Ordinance presented for review here deliberately interfere with women's ability to effectuate their right to choose abortion. The law is not narrowly tailored to meet any compelling state interest. To the contrary, it is broadly drawn to discourage abortion and inhibit access to abortion.

A. The Counseling Requirement Forces Patients To Receive Incorrect and Alarming Information Only From Physicians

Section 1870.06 of the Akron Ordinance forces physicians to recite to women seeking an abortion an anti-abortion litany of largely irrelevent and inaccurate "information." Requiring attending physicians to personally counsel their abortion patients impermissibly interferes with the exercise of their medical judgment, and their patients right to medical care in accordance with that judgment.[2/]

2/ Amicus does not address in detail the patently unconstitutional substantive information requirements amply briefed by plaintiffs and other amici. Indeed, the City of Akron virtually concedes the unconstitutionality of these requirements, arguing instead that they should be severable.

Physicians have recognized that the traditional doctor-patient dialogue is not the only or even the best way to ensure that a patient gives informed consent to surgery. Many doctors have rejected the traditional model in favor of comprehensive counseling services provided by trained counselors. Abortion counseling is designed not only to provide patients with information concerning the abortion procedure but also to ensure that their choice to have an abortion has been freely made without coercion. See NAF Counseling Standards at A-8 through A-13.

Counseling by specially trained counselors is a particularly innovative practice in the delivery of abortion services. There is no other medical setting that offers such an opportunity

for educational and emotional guidance from specially trained non-physician staff. Because they are not physicians, counselors are less intimidating to patients who are more willing to talk openly to counselors. Counselors are less inclined than doctors to use abstruse and technical language so patients understand counselors more easily.

This Court has warned that states may not use informed consent requirements to "confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession." Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 67 n. 8 (1976). By forcing physicians to personally counsel their abortion patients, Akron impermissibly restrains physicians and denies their abortion patients the right

to counseling services in accordance with their doctors' best medical judgment.[3/]

B. The Parental Consent Requirement Unconstitutionally Fails To Permit Mature Minors To Consent To Abortion Or Allow Immature Minors Whose Best Interests Are Not Served by Parental Involvement To Obtain Abortions Without Their Parents' Knowledge

This Court has repeatedly recognized how devastating unwanted pregnancy can be for teenagers. Michael M. v. Sonoma County, 450 U.S. 464 (1981), Bellotti v. Baird, 443 U.S. 622 (1979).

Accordingly, although recognizing an important state interest in encouraging

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3/ Akron's efforts to restrict medical judgment as to appropriate counseling services would likely have the no doubt intended side effects of reducing the availability and driving up the cost of abortion services. Physicians forced to spend time in extensive counseling sessions will be able to perform abortions for fewer patients. These patients able to receive services will inevitably have to bear an increased cost.

pregnant minors to consult their parents, this Court struck down a statutory scheme which even provided a judicial alternative to parental consent because the law failed to provide a complete by-pass to parental involvement in the abortion decisions of mature minors and those immature minors whose best interests would not be served by parental involvement. Bellotti v. Baird, 443 U.S. 622 (1979). See also H. L. v. Matheson, 450 U.S. 398 (1981), (Powell, J., concurring).

Like the Massachusetts Law held unconstitutional in Bellotti (II), the Akron Ordinance fails to account for the right of mature minors to make the abortion decision for themselves or to protect even the immature minor for whom parental involvement would be harmful.

The law also fails to provide a quick and confidential procedure to secure judicial authorization for an abortion.

NAF endorses encouraging young pregnant women to involve their parents in their decision whenever possible and recognizes that "[i]n most cases, parents are supportive of their daughters in time of crisis and decision." NAF, Minors and Abortion at 24. However, in those cases where parental involvement would be harmful, it is crucial that the young pregnant woman be permitted to obtain an abortion without her parents' knowledge and be able to secure that permission without delay.

Minors are, for a variety of reasons, more likely to delay seeking the abortion than older women. Minors

and Abortion at 13. Minors, because of their youth, are less likely to recognize signs of pregnancy, less sophisticated about access to health care, less likely to have ready financial resources, and more frightened of revealing their plight. Id. If their own delay is exacerbated by state created delays in securing judicial authorization, the risk to their health is staggering. Id.

The Akron Ordinance fails utterly to account for mature minors or to protect the immature whose best interests would not be served by parental involvement. The law does not, as the Constitution requires, meet the needs of young women coping with unwanted pregnancy.

C. Restricting Second Trimester Abortions Unconstitutionally Restricts Access To Abortion and Fails To Protect Women's Health

Akron's restriction of second trimester abortion procedures to hospitals not only directly interferes with effectuation of the abortion decision, it precludes the second trimester abortions for many women because Akron hospitals do not begin to meet the need for the service. See Akron Center For Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198, 1209 (6th Cir. 1981). Moreover, it substantially increases the cost of the service to those few women who will be able to obtain second trimester abortions in Akron. Id.[4/]

4/ The Sixth Circuit held that although the second trimester restriction unduly burdened access to abortion, it was bound by Gary-Northwest Indiana Women's Service, Inc. v. Orr, 451 U.S. 934 (1981), aff'g

(Fn. continued next page)

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496 F. Supp. 894 (N.D. Ind. 1980) to uphold the provision. 651 F.2d at 1210. In Gary-Northwest, this Court summarily affirmed the refusal of a three-judge court to vacate its earlier judgment and enjoin an Indiana statute restricting second trimester abortions to hospitals.

Summary affirmances reject only the specific challenges presented in the jurisdictional statement. Mandel v. Bradley, 432 U.S. 173, 176 (1977), Fusari v. Steinberg, 419 U.S. 379, 391-393 (1975). (Burger, C.J. concurring). The questions presented in Gary-Northwest went to procedural issues not relevant here. The only arguably substantive issue presented in Gary-Northwest was "whether the lower court had abused its discretion in failing to issue a preliminary injunction." No. 80-1275, Jr. St. at i (emphasis added). "In reviewing...interlocutory relief, this Court ...intimate(s) no view as to the ultimate merits..." Brown v. Chote, 411 U.S. 452, 457 (1973).

Unlike the Indiana statute at issue in Gary-Northwest, Akron's second trimester restriction was fully litigated at a trial on the merits. Moreover, the Indiana statute, in sharp contrast to this one, defined hospitals to include ambulatory outpatient surgical centers.

Thus, the summary affirmance in Gary-Northwest is not precedent here.

In Roe v. Wade this Court, on the basis of evidence of the relative safety of abortion and childbirth then available, held that, because second trimester abortions were then less safe than childbirth,

> ...the state's important and legitimate interest in the health of the mother [becomes] "compelling..., in light of present medical knowledge,..." at approximately the end of the first trimester.

410 U.S. at 163 (emphasis added). Roe accordingly held that states could regulate abortions in the second trimester, but only to further "the preservation and protection of maternal health." Id.

In Danforth, this Court, utilizing the strict scrutiny applicable to all laws impinging on fundamental rights, struck down a Missouri statute banning saline infusion procedures in the second trimester because

it had the effect of virtually eliminating access to second trimester abortions and was not narrowly tailored to preserve women's health. 428 U.S. at 79.

Application of the rigorous scrutiny mandated by Danforth to the hospital restriction here requires its invalidation notwithstanding the suggestion in Roe v. Wade that restricting second trimester abortions to hospitals or specially licensed clinics might be constitutional. 410 U.S. at 163. There, this Court relied heavily on the policy of the American Public Health Association ("APHA") recommending a hospital setting for second trimester abortions which was based on the risks associated with the technology available at that time. Id. at 144-146, 163.

Since Roe v. Wade was decided, technological advances in the provision of second trimester abortions, pioneered by NAF members, have resulted in the availability of safe second trimester abortions on an outpatient basis. For example, Dilation and Evacuation (D&E) abortions, which were virtually unknown in 1973, are available on an outpatient basis during the second trimester and safer than childbirth. The APHA has accordingly changed its policy to recommend outpatient second trimester services, and, like NAF, is urging this Court to strike down Akron's second trimester hospital restriction. See, brief Amicus Curiae of APHA. The briefs of the American College of Obstetrics and Gynecology and the American Medial Association and of the Planned Parenthood Federation of America, among others, also docu-

ment the safety of outpatient second trimester abortions and support the position urged here.[5/]

Like the saline ban in Danforth, Akron's hospital restriction cannot withstand rigorous scrutiny and

> ...fails as a reasonable regulation for the protection of maternal health. It comes into focus, instead, as an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after he first 12 weeks.

428 U.S. at 79.

5/ The technological strides made since Roe suggest that the state's interest in maternal health may not become compelling and justify any regulatory obstacle until the end of the second trimester of pregnancy. See Margaret S. v. Edwards, 488 F. Supp. 181, 194-196 (E.D. La. 1980).

CONCLUSION

For the reasons stated above this Court should hold unconstitutional all of the Akron ordinance provisions restricting access to abortion services.

Respectfuly submitted,

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August 27, 1982