Nos. 81-746 and 81-1172

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF AKRON,

Petitioner,

v.

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

Respondents.

AND

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

Cross-Petitioners

v.

CITY OF AKRON, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER CITY OF AKRON

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QUESTIONS PRESENTED

1. Whether the state's interest in maternal health and wellbeing is such that it may regulate abortion in a reasonable manner which is not unduly burdensome, even during the first trimester of pregnancy.

2. Whether a child under the age of fifteen years can be required to obtain the consent of one parent or her legal guardian or a court order authorizing the minor to consent to an abortion.

3. Whether the state can require the physician personally to inform the woman of facts relating to her pregnancy, the abortion procedure, fetal development, and agencies available to assist her.

4. Whether the state can require the physician personally to counsel the patient with respect to the risks and technique of the abortion prior to performing the abortion.

5. Whether the state can require a waiting period of twenty-four hours between the signing of an informed-consent form and the performance of an abortion.

6. Whether the term "humane" as it relates to the disposal of fetuses in Section 1870.16 is void for vagueness, and if so, whether the term is severable from the balance of the section in accordance with City Council's express intent that the provision be severable.

PARTIES

Petitioner, the City of Akron, was Defendant below along with John Ballard, Mayor; Dr. C. William Keck, Director of Public Health; and Peter Oldham, Prosecutor. Co-Defendants in the trial court were Dr. Francois Seguin and Mrs. Kathleen Black who were permitted to intervene "in their individual capacity as parents of unmarried daughters of child-bearing age" and who were permitted to appear as amici curiae on all issues in the case. The Respondents in this litigation are Akron Center for Reproductive Health, Inc.; Akron Women's Clinic, Inc.; Womencare, Inc.; and Dr. Bliss, a physician who had worked in one of the abortion clinics and who claimed to represent the rights of clinic patients who desired abortions.

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The opinion of the Court of Appeals for the Sixth Circuit, rendered on June 12, 1981, is reported as Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F. 2d 1198 (6th Cir. 1981), and is reprinted in the separate appendix to the petition in No. 81-746 as App. A (1a-36a). The opinion of the United States District Court for the Northern District of Ohio, Eastern Division, rendered on August 22, 1979, is reported as Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172 (N.D. Ohio 1979), and is reprinted as App. E (43a-106a).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on June 12, 1981. A petition for rehearing was filed with the Court of Appeals by the Petitioners, the Respondents, and the Defendant-Intervenors. The Court of Appeals denied all parties' petitions for rehearing. The Defendant-Intervenors' petition for rehearing was denied on July 22, 1981. This petition for certiorari was filed within ninety (90) days of that date on October 13, 1981. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS

The pertinent parts of the United States Constitution, Amendment XIV, Section 1; the Ohio Constitution, Art. XVIII, Section 3; and 3 Ohio Administrative Code, 3701-4705, are reprinted in the petition for certiorari (IX). The pertinent parts of Ohio Revised Code Chapter 2151 are reprinted in the separate appendix to the petition in No. 81-746 as App. I (130a-145a). The pertinent parts of the Ohio Rules of Juvenile Procedure are reprinted in the appendix as App. J (146a-150a). Akron Ordinance No. 160-1978 is reprinted in its entirety in the appendix as App. H (115a-129a).

STATEMENT OF THE CASE

A. Procedural Overview

Ordinance No. 160-1978 (App. 115a) was enacted by the Akron, Ohio, City Council on February 28, 1978, in order to regulate the provision of abortions within the City of Akron and thereby provide its citizens with a high standard of health care. The ordinance amended and supplemented Chapter 1870, entitled "Regulation of Abortions" of the Codified Ordinances of the City of Akron, and was to have become effective on May 1, 1978.

Respondents instituted an action challenging the facial validity of Ordinance No. 160-1978 on April 19, 1978. A preliminary injunction restraining enforcement of the ordinance was entered on April 27, 1978 by the United States District Court for the Northern District of Ohio, the Honorable Leroy J. Contie, Jr., presiding. A trial on the merits was held September 5-21, 1978. The final decision on the merits was rendered on August 22, 1979 (App. 43a), holding Sections 1870.05, 1870.06(B), 1870.09 and 1870.16 of the ordinance unconstitutional and permanently enjoining the enforcement of those provisions. (App. 106a). The District Court further held that the respondents lacked standing to challenge Sections 1870.02, 1870.03, 1870.04, 1870.11, 1870.12, 1870.13, 1870.14 and 1870.15 of Ordinance No.

160-1978. (App. 106a). The remaining sections of the ordinance were held to be constitutional. (App. 106a). Upon the filing of a motion to alter or amend the judgment pursuant to F.R. Civ. P. 59, the original Memorandum, Opinion and Order were modified by the Order of the District Court filed on October 4, 1979. (App. 107a).

Timely appeals were filed by all parties in the United States Court of Appeals for the Sixth Circuit. The Court of Appeals, on June 12, 1981, affirmed in part and reversed in part the judgment of the District Court. (App. 1a). Sections 1870.05(B), 1870.06(B), 1870.06(C), 1870.07 and 1870.16 were held unconstitutional by the majority of the Court (App. 1a). Judge Cornelia Kennedy filed a concurring and dissenting opinion on the merits (App. 25a). Motions for rehearing filed by the parties were denied on July 10 and 22, 1981. (App. 39a, 41a).

Petitioner, City of Akron, was granted certiorari on the following issues which have remained unresolved by this Court:

1. Whether the state's interest in maternal health and wellbeing is such that it may regulate abortion in a reasonable manner which is not unduly burdensome, even during the first trimester of pregnancy.

2. Whether a child under the age of fifteen years can be required to obtain the consent of one parent or her legal guardian or a court order authorizing the minor to consent to an abortion.

3. Whether the state can require the physician personally to inform the woman of facts relating to her pregnancy, the abortion procedure, fetal development, and agencies available to assist her.

4. Whether the state can require the physician personally to counsel the patient with respect to the risks and technique of the abortion prior to performing the abortion.

5. Whether the state can require a waiting period of twenty-four hours between the signing of an informed-consent form and the performance of an abortion.

6. Whether the term "humane" as it relates to the disposal of fetuses in Section 1870.16 is void for vagueness, and if so, whether the term is severable from the balance of the section in accordance with City Council's express intent that the provision be severable.

Respondents were also granted certiorari in Akron Center for Reproductive Health, Inc. v. City of Akron, Case No. 81-1172, on the following questions:

1. Whether the Sixth Circuit Court of Appeals correctly denied petitioners therein standing to challenge Section 1870.03 of the Akron Ordinance; and

2. Whether this Court should reconsider its holdings in Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179 (1973) that a state's interest in maternal health is "compelling" at the end of the first trimester of pregnancy.

B. Statement of the Facts

In order to promote the health and safety of

women seeking abortions, the City Council enacted Ordinance No. 160-1978 which sets forth a number of requirements relating to the performance of abortions. Section 1870.05(B)[1] is the first section here in controversy and provides that in order for a girl under the age of 15 years to obtain an abortion she must have the consent of one of her parents or her legal guardian, or, in the alternative, a court may provide consent where the parent or guardian is unavailable or refuses consent. State law provides the procedure to be followed in such a judicial proceeding.[2] The state law to be applied was unchallenged in these proceedings and consequently

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[1]Section 1870.05(B): "No physician shall perform or induce an abortion upon a minor pregnant woman under the age of fifteen (15) years without first having obtained the informed written consent of the minor pregnant woman in accordance with Section 1870.06 of this Chapter, and (1) First having obtained the informed written consent of one of her parents or her legal guardian in accordance with Section 1870.06 of this Chapter, or (2) The minor pregnant woman first having obtained an order from a court having jurisdiction over her that the abortion be performed or induced.

[2]Chapter 2151 of the Ohio Revised Code sets forth the applicable procedure to be followed in all cases where a minor is seeking or in need of judicial consent to a medical procedure. (App. 130a).

the District Court made no findings as to its operation and effect. Further, it is not to be assumed that the state court will not construe the ordinance in a manner consistent with the constitutional requirement of a determination of the minor's ability to make an informed consent. It is important to note that each of the experts who testified at trial conceded that it was most unlikely that a minor under the age of 15 could make an adequate decision on her own regarding pregnancy. (see e.g., Tr. X, 14).

The testimony at trial demonstrates that physicians have very little contact with pregnant minors who seek abortions at the respondent clinics. Ms. Francene Lucas, a counsellor at the Womancare Clinic, stated that in her understanding: "[i] t is not anybody's responsibility there at the clinic to judge the maturity of an under fifteen year old" (Tr. VII, 166), even though most of the patients visiting the clinic have visited it only on the day of the abortion (Tr. VII, 168), and even though maturity is conceded to be necessary for a truly informed consent. (Tr. II, 77, 83). Ms. Lucas felt that it was a "fair statement" to say that her role in counseling a minor was that of "information giving only." (Tr. VII, 174).

Both the District Court and the Court of

Appeals held Section 1870.05(B) unconstitutional. The Court of Appeals reasoned that Bellotti v. Baird, (Bellotti II), 443 U.S. 662 (1979), required invalidation of any statute which "provide(s) a possible third party veto" (App. 12a). The court, however, did not inquire into whether the judicial alternative was a sufficient alternative procedure whereby authorization for the abortion can be obtained under Bellotti (II). The District Court struck down Section 1870.05(B) even though the state juvenile court process as set forth in Chapter 2151 of the Ohio Revised Code was unchallenged in this case.

Section 1870.06(B)[3] provides that an attending physician must inform a woman prior to an abortion of several factors. This requirement is designed to

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[3]Section 1870.06(B): "In order to insure that the consent for an abortion is truly informed consent, an abortion shall be performed or induced upon a pregnant woman only after she, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05(B) of this Chapter, have been orally informed by her attending physician of the following facts, and have signed a consent form acknowledging that she, and the parent or legal guardian where applicable, have been informed as follows: (1) That according to the best judgment of her attending physician she is pregnant. (2) The number of weeks elapsed from the probable time of the conception of her unborn child, based upon the information provided by her as to the time of her last menstrual period or after a history and

protect the physician-patient relationship and ensure that a woman's consent is truly informed.

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[3](continued) physical examination and appropriate laboratory tests. (3) That the unborn child is a human life from the moment of conception and that there has been described in detail the anatomical and physiological characteristics of the particular unborn child at the gestational point of development at which time the abortion is to be performed, including, but not limited to, appearance, mobility, tactile sensitivity, including pain, perception or response, brain and heart function, the presence of internal organs and the presence of external members. (4) That her unborn child may be viable, and thus capable of surviving outside of her womb, if more than twenty-two (22) weeks have elapsed from the time of conception, and that her attending physician has a legal obligation to take all reasonable steps to preserve the life and health of her viable unborn child during the abortion. (5) That abortion is a major surgical procedure which can result in serious complications, including hemorrhage, perforated uterus, infection, menstrual disturbances, sterility and miscarriage and prematurity in subsequent pregnancies; and that abortion may leave essentially unaffected or may worsen any existing psychological problems she may have, and can result in severe emotional disturbances. (6) That numerous public and private agencies and services are available to provide her with birth control information, and that her physician will provide her with a list of such agencies and the services available if she so requests. (7) That numerous public and private agencies and services are available to assist her during pregnancy and after the birth of her child, if she chooses not to have the abortion, whether she wishes to keep her child or place him or her for adoption, and that her physician will provide her with a list of such agencies and the services available if she so requests.

Counseling at the respondent abortion clinics is typically not performed by the attending physician or any medically trained personnel. Respondent, Dr. Bliss, testified that on those occasions when he had performed an abortion in Akron, he spent only five to ten minutes with each patient immediately prior to performing her abortion. (Tr. I, 180). This practice was admitted by Dr. Bowen, of the Summit County Medical Society, not to be in accord with his own standards, (Tr. II, 61-63) and he further stated that he had never looked into the counseling and procedures at the abortion clinics before rendering an opinion on the need for this ordinance. (Tr. II, 43-57). The District Court found that:

> A patient's contact with the physician who is to perform the abortion procedure usually occurs when she is taken into the operating room. At that time, the physician reviews the patient's medical chart and asks the patient if she has any questions. The doctor then performs a pelvic examination. If the pelvic examination does not reveal any medical problems and, further, indicates that the pregnancy has not progressed beyond the first trimester, the abortion usually will then be performed. (App. 46a-47a).

The Court of Appeals held all subsections of Section 1870.06 unconstitutional, regardless of their content, on the ground that they impose "restrictions

or regulations governing the pregnant woman's attending physician with respect to the termination of her pregnancy, [Planned Parenthood of Central Missiouri v. Danforth], 428 U.S. at 80, notwithstanding any showing whatsoever that a true doctor patient relationship of the sort contemplated in Roe, supra, even exists between the clinics and their patients.

The District Court made no findings of fact regarding the subsections involved. It held Section 1870.06(B) to be unconstitutional based upon its ruling that the state cannot "specify what each patient must be told." (App. 96a). The District Court did, however, state that it had "no doubt that the state could constitutionally require that all abortion patients be counseled, either by their attending physicians or another individual having specified minimum qualifications (footnote omitted)." (App. 96a).

Section 1870.06(C)[4] requires that the attending

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[4]Section 1870.06(C): "At the same time the attending physician provides the information required by paragraph (B) of this Section, he shall, at least orally, inform the pregnant woman, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05(B) of this Chapter, of the particular risks associated with her own pregnancy and the abortion technique to be employed including providing her with at least a general description of the medical instructions to be followed subsequent to the abortion in order to insure her safe recovery, and shall in addition provide her with such other information which in his own medical judgment

physician provide certain information to the woman regarding the risks associated with her pregnancy and the abortion technique to be employed as well as a general description of the medical instructions to be followed subsequent to the abortion. In addition, any other information which in the physician's judgment is relevant to her decision to have an abortion or carry the pregnancy to term may be given. The testimony at trial by physicians working for local abortion clinics established
that the physicians themselves neither personally consult nor counsel patients prior to an abortion. (Tr. VII, 7). Rather, nonphysician counselors provide such services to a women prior to her abortion. Several physicians testified at trial that proper medical practice required that a physician counsel the woman. (Tr. II, 64; VIII, 31; X, 25-26). While the Court of Appeals struck down Section 1870.06 in its entirety as imposing "restrictions or regulations governing the pregnant woman's attending physician with respect to the termination of her pregnancy, [Planned Parenthood of Central Missouri v. Danforth], 428 U.S. at 80," the District Court held Section 1870.06(C) constitutional. The District Court stated:

> Subsection (C)'s requirement that this information be imparted by the attending physician rather than by a counselor, as is

[4](continued) is relevant to her decision as to whether to have an abortion or carry her pregnancy to term.

> presently done at the clinics operated by the corporate plaintiffs, however, makes effectuation of the abortion decision more expensive. That impact is not so great as to require a compelling state interest to support the requirement that the 'counseling' be done by the physician rather than by another individual. Akron's City Council could well have rationally concluded that because of the special relationship between a patient and her physician, such 'counseling' should be done by the physician. In so doing, it would further a valid state interest in the health of its female citizens.

Section 1870.07[5] of the Akron ordinance requires that there be a twenty-four hour delay between the time a women signs the consent form required by Section 1870.06 and the abortion procedure. This section is modified by Section 1870.12[6] which waives the twenty-

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[5]"1870.07 WAITING PERIOD

"No physician shall perform or induce an abortion upon a pregnant woman until twenty-four (24) hours have elapsed from the time the pregnant woman, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05(B) of this Chapter, have signed the consent form required by Section 1870.06 of this Chapter, and the physician so certifies in writing that such time has elapsed."

[6]"1870.12 EMERGENCY.

"The following provisions of this Chapter shall not apply where there is an emergency need for an abortion to be performed or induced such that continuation of the

four hour delay in the case of a medical emergency which poses an immediate threat and grave risk to the life or physical health of the pregnant woman.

There was substantial testimony at trial that a twenty-four hour waiting period between the signing of an informed consent and the abortion procedure would result in no disfavorable impact upon the woman. Respondents' medical expert, Dr. Crist, testified that the waiting period would not create a significant risk to the patient's physical health. (Tr. I, 82, 94 and 118). Respondents' witness, Dr. Bowen, who inspected the clinics as a member of the Summit County Medical Society and the Maternal Infant Health Committee, testified that it is preferable and better medical practice to separate counseling and the abortion procedure by twenty-four hours or more. (Tr. II, 65). Respondents' expert, Dr. Hoffman, testified that a twenty-four hour waiting period is desirable in most instances and that a twenty-four hour delay is not critical. (Tr. III, 147 and 168). Petitioners' experts, Dr. Sim and Dr. Schmidt, President of the

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[6](continued) pregnancy poses an immediate threat and grave risk to the life or physical health of the pregnant woman, and the attending physician so certifies in writing: (A) Section 1870.05. (B) Section 1870.06(B) with respect to the signature of one of the parents or the legal guardian of the pregnant woman where applicable. (C) Section 1870.07. (D) Section 1870.13. (E) Section 1870.14(B) with respect to aftercare of an abortion patient."

American College of Obstetrics and Gynecology, testified that the twenty-four hour waiting period is not significant in terms of risk and is desirable in terms of time to reflect. (Tr. VIII, 42; X, 12 and 26).

Based upon the testimony, the District Court found that this regulation did not unduly burden the woman's decision to have an abortion and that it furthered the important state interest of insuring "that a woman's abortion decision is made after careful consideration of all the facts applicable to her situation." (App. 99a).

The Court of Appeals reversed the District Court and held Section 1870.07 unconstitutional stating that "since Section 1870.07 causes a legally significant impact or consequence on the abortion decision, it cannot be applied to first-trimester abortions." (App. 17a).

Section 1870.16,[7] which requires that remains of the unborn child be disposed of in a humane and sanitary manner, was held unconstitutional by both courts below. This was based upon a finding by the District Court that the word "humane" was void for vagueness. (App. 103a).

SUMMARY OF ARGUMENT

Not all regulation of first-trimester abortions

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[7]"1870.16 DISPOSAL OF REMAINS

"Any physician who shall perform or induce an abortion upon a pregnant woman shall insure that the remains of the unborn child are disposed of in a humane and sanitary manner."

impermissibly interferes with a woman's protected decision to have an abortion. Nor must the questioned regulation always serve a compelling state interest in order to be constitutional. The initial question posed on review before this Court is whether the state's interest in maternal health and wellbeing is such that it may regulate abortion in a reasonable manner which is not unduly burdensome, even during the first trimester of pregnancy.

The Court of Appeals, in prohibiting all direct regulation of first trimester abortions, incorrectly interpreted the standard of review to be applied in reviewing the constitutionality of abortion regulations. In applying a two-tier analysis to the Akron abortion ordinance, the Court of Appeals effectively held all first trimester regulation to be impermissible.

Initially, the Appellate Court looked to "the nature of the particular regulatory provision," inquiring as to whether or not the regulation had a "'legally significant impact or consequence' on the right of a pregnant woman, in consultation with a physician, to choose to terminate her pregnancy." Accordingly, if there was no legally significant impact or consequence, no constitutional issue was raised. Where the regulation resulted in a legally significant impact or consquence, the Court further required that the "regulatory provision serve a legitimate and compelling state interest." But, only if a compelling state interest was found would it further inquire as to

whether the regulation imposed an "undue burden" on the abortion decision. (App. 9a).

Decisions of this Court, subsequent to Roe, supra, clearly show that states have the right to regulate abortions performed during the first three months of pregnancy so long as such regulation does not "unduly burden" a woman's constitutionally-protected right to have an abortion.

In looking to the constitutionality of requiring an unemancipated and immature child under the age of fifteen years to obtain the consent of one parent or her legal guardian or a court order authorizing the minor to consent to an abortion; it is important to note that the Akron ordinance provides an "alternative procedure" whereby authorization can be obtained in accordance with the constitutional requirements enunciated by this Court in Bellotti II, supra. Additionally, it is important to note that this section is directed toward minors "as to whom there are unquestionably greater risks of inability to give an informed consent." H. L. V. Matheson, 450 U.S. 398, (1981); Bellotti v. Baird, Bellotti I, 428 U.S. 132 (1976). This Court recently held in New York v. Ferber, _____ U.S. _____, _____ (1982); that "it is evident beyond the need for elaboration that a state's interest in 'safeguarding the physical and psychological wellbeing of a minor' is 'compelling'. Globe Newspapers v. Superior Court,_____ U.S. _____, _____ (1982)."

In reviewing the constitutionality of a state regulation which requires the physician personally to inform the woman of facts relating to her pregnancy, the abortion procedure, fetal development, and agencies available to assist her, the courts below should have looked to see whether the regulation unduly burdened the woman's right, in consultation with her physician, to decide to terminate her pregnancy. Roe, supra. The requirement is designed to protect the woman by insuring that her consent will be truly informed and that it is given only after she has consulted with her physician. Such a provision strikes a reasonable balance between the woman's protected right and the state's interest in maternal health without unduly burdening her right to decide to terminate her pregnancy.

After evaluating Section 1870.06(C) of the Akron ordinance, the District Court held that this section did not unduly burden a woman's right to seek an abortion. (App. 97a). The Court of Appeals reversed the District Court and held that this section had a legally significant impact on a first-trimester abortion decision and was therefore invalid. (App. 17a). In so holding, the Court of Appeals did not apply the proper standard of review. Section 1870.06(C) does not impermissibly interfere with the physician-patient relationship fundamental to the right to decide to have an abortion. Rather, it furthers a valid state interest in the health of its citizens and

assures that the woman's consent will be truly informed.

The imposition of a twenty-four hour waiting period between the time a woman signs the informed-consent form and the abortion procedure in Section 1870.07 was found by the District Court not to unduly burden the woman's decision to have an abortion. (App. 99a). Once again, the Court of Appeals reversed stating that "since Section 1870.07 causes a legally significant impact or consequence on the abortion decision, it cannot be applied to first-trimester abortions." (App. 17a). Thus, this section was invalidated only because it impacted on decisions to have an abortion during the first three months of pregnancy. The proper standard of review requires that in considering the regulation the focus be placed on the burden imposed on the woman's decision to have an abortion.

Section 1870.16 of the Akron ordinance is the last section herein under review and requires that the remains be disposed of in a "humane and sanitary manner." At issue in this section is whether the term "humane" as it relates to the disposal of fetuses is void for vagueness, and if so, whether the term is severable from the balance of the section in accordance with the express legislative intent that the provision be severable.

In determining the constitutionality of an abortion regulation, this Court has consistently required only that the regulation not be unduly burdensome. When viewed in

this light, the sections of the Akron ordinance under review are clearly constitutional as they do not unduly burden the woman's right to seek an abortion. The Court of Appeals' two-tier analysis conflicts with the standard of review thus far enunciated by this Court in that it prohibits all direct regulation of first-trimester abortions on the basis of there being no compelling interest per se during the first trimester. Such a standard is clearly in error. Therefore, the appropriate disposition of this case is to reverse the decision of the Court of Appeals as to Sections 1870.06(C) and 1870.07, and remand for an affirmance of the decision of the District Court as to those sections. As to Sections 1870.05(B), 1870.06(B), and 1870.16 the decision of the Court of Appeals should be reversed.

I. THE RULING BELOW CONFLICTS WITH THE DUE PROCESS STANDARD APPLIED BY THIS COURT IN DETERMINING THE CONSTITUTIONALITY OF ABORTION REGULATIONS.

A. The Appellate Court failed to determine whether the regulation was "unduly burdensome."

In dissenting from the majority's opinion, Judge Kennedy stated:

> . . . the Supreme Court has never suggested the analysis put forth by the majority. It has sometimes suggested that a compelling state interest is necessary to justify any state regulation

> of abortion during the first trimester, but that language has always been far broader than required by the facts before it. With the exception of the passage in Colautti [v. Franklin, 439 U.S. 379 (1979)], and a part of Planned Parenthood, all of the cases since Roe have suggested that the proper standard is simply whether a regulation that does not effectively prohibit abortions is "unduly burdensome" to the decision whether or not to abort. The Court's decisions are all consistent with that standard. (App. 32a).

Following this Court's decision in Roe, supra, in which it was stated that the "state's important and legitimate interest in the health of the mother" became compelling at the end of the first trimester of pregnancy, both State and District Courts have periodically held any regulation of first-trimester abortions to be impermissible.[8]

Subsequent to Roe, however, this Court has made clear that the states have the right to regulate abortions performed during the first three months of pregnancy so long as such regulation does not "unduly burden" a woman's constitutionally-protected right to have an abortion.

The regulation of a first-trimester abortion was

[8]As shown by the Court of Appeals' holding that "if a regulation resulted in a legally significant impact or consequence on a first-trimester abortion decision, it is invalid." (App. 9a).

first permitted in Danforth, supra, wherein this Court upheld a state statute requiring the informed written consent of a woman, in the first trimester of pregnancy, and requiring certain recordkeeping and reporting by those providing the abortion. In its discussion, this Court noted that:

> [T]he state may not restrict the decision of the patient and her physician regarding abortion during the first stage of pregnancy . . . [However] the imposition by §3(2) of such a requirement (prior written consent) for termination of pregnancy even during the first stage, in our view, is not in itself an unconstitutional requirement. (Emphasis added.) 428 U.S. at 66-7.

Thus not all regulation of first-trimester abortions impermissibly interferes with a woman's protected decision to have an abortion, and the questioned regulation need not always serve a compelling state interest in order to be constitutional. This is shown by this Court's statement in Danforth that the record-keeping requirement:

> . . . if not abused or overdone, can be useful to the state's interest in protecting the health of its female citizens, and may be a resource that is relevant to decisions involving medical experience and judgment. (Emphasis added.) 428 U.S. at 81.

It is apparent that a lesser standard of review was

utilized by this Court in evaluating the constitutionality of the regulation.

Interpreting the standard to be applied in determining whether or not a regulation was valid, this Court, in Bellott I, supra, 428 U.S., at 147, noted that in Danforth, it had been:

> . . . held that a requirement of written consent on the part of a pregnant adult is not unconstitutional unless it unduly burdens the right to seek an abortion." (Emphasis added).

The unduly burdensome standard of review enunciated by this Court in Danforth and Bellotti I was said, in Maher v. Roe, 432 U.S. 464, 473 (1977), to balance the woman's interest against the nature of the state's interference in exercising that right. In Maher, the Court noted that:

> Whalen [v. Roe, 429 U.S. 589 (1977)], makes clear, the right in Roe v. Wade can be understood only by considering both the woman's interest and the nature of the State's interference with it. 432 U.S. at 473.

As decided by the District Court:

> An absolute prohibition of first trimester abortions could only be justified by a compelling state interest. Likewise, regulations that afford the power to veto a woman's decision to terminate her pregnancy must be supported by a compelling state interest. See Danforth, 428 U.S. at 67-72. Regulations that interfere with a woman's privacy to a

> lesser degree, however, require a lesser showing by the state to withstand constitutional attack . . . (App. 88a-89a).

Accordingly, the Court must determine the degree that each section of Ordinance Number 160-1978 interferes with a woman's constitutional right, in consultation with her physician, to choose to terminate her pregnancy. That interference must then be weighed against any valid state interest furthered by such section.

B. The Court of Appeals erred in prohibiting all direct regulation of first-trimester abortions.

In applying a two-tier analysis to the Akron abortion ordinance, the Court of Appeals incorrectly interpreted prior decisions of this Court, especially in light of the recent decisions of Matheson, supra, and Thone v. Womens Services, P.C., _____ U.S. _____, 69 L. Ed. 2d 414 (1981), and in effect held all first-trimester regulation to be impermissible.

Initially, the Appellate Court looked to "the nature of the particular regulatory provision," inquiring as to whether or not the regulation had a "'legally significant impact or consequence' on the right of a pregnant woman, in consultation with a physician, to choose to terminate her pregnancy." Accordingly, if there was no legally significant impact or consequence, no constitutional issue was

raised. Where the regulation resulted in a legally significant impact or consequence, the Court further required that the "regulatory provision serve a legitimate and compelling state interest." But, only if a compelling state interest were found would it further inquire as to whether the regulation imposed an "undue burden" on the abortion decision. (App. 9a).

This "two-step analysis" required by the Court of Appeals also provided that first trimester regulations are per se invalid if they result in a legally significant impact or consequence, holding as a matter of law that the state has no compelling interest during the first trimester. (App. 9a). Such a standard of review goes far beyond the prior decisions of this Court allowing the direct regulation of first-trimester abortions. Connecticut v. Menillo, 423 U.S. 9 (1975); Danforth, supra; Matheson, supra; Thone, supra.

Recently, in Matheson, this Court upheld a requirement of prior parental notice where a minor seeks an abortion. The Court recognized that:

> As applied to immature and dependent minors, the statute plainly serves the important considerations of family integrity and protecting adolescents which we identified in Bellotti II . . . The Utah statute is reasonably calculated to protect minors in

> appellant's class by enhancing the potential for parental consultation concerning a decision that has potentially traumatic and permanent consequences. (Emphasis added). 450 U.S. at 411.

In so holding, this Court apparently did not apply a compelling state interest test. But even if such a test must be met, it is implied that the state has such an interest in this and all other first-trimester abortion regulations which have been held constitutional by this Court.

Of key importance is the fact that the regulation was one imposed on first-trimester abortion decisions and one which resulted in a legally significant impact, and, yet, the regulation was constitutionally permissible. Unquestionably, a statute requiring parental notification of a minor's decision to have an abortion results in a legally significant impact on the minor's constitutionally protected decision. The regulation, therefore, is not unconstitutional merely because it has a legally significant impact on the first-trimester abortion decision.

II. THE STATE HAS A LEGITIMATE INTEREST IN PROTECTING THE MINOR'S HEALTH BY REQUIRING PARENTAL OR JUDICIAL CONSENT TO AN IMMATURE,

UNEMANCIPATED MINOR'S ABORTION.

Section 1870.05(B) of the Akron ordinance is directed at minors unable to give an effective consent and in so regulating it does not provide anyone with an "absolute veto." Section 1870.05(B) provides that the consent of one parent or the legal guardian must be obtained prior to an abortion upon a pregnant minor under the age of fifteen years or, in the alternative, a court may provide consent where the parents or guardian are either unavailable or refuse consent. This section has been prematurely held unconstitutional as no mature minor under the age of fifteen is challenging the overbreadth of the regulation.

The Supreme Court first addressed the issue of requiring a parent's consent to a minor's abortion in Danforth, supra, 428 U.S., at 72-75, in which it was held that a blanket requirement that an unmarried girl obtain parental consent to an abortion was unconstitutional as it imposed an absolute veto power over a minor's decision to have an abortion.

This Court, when faced with a similar regulation requiring parental consent to a minor's abortion in Bellotti II, supra, stated that there must be an alternative procedure whereby authorization for the abortion can be obtained. This Court provided that:

> . . . if the state decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure[22] whereby authorization for the abortion can be obtained . . . n. 22 . . . we discuss the alternative procedure described in the text in terms of judicial proceedings. We do not suggest, however, that a state choosing to require parental consent could not delegate the alternative procedure to a juvenile court or an administrative agency or officer. Indeed, much can be said for employing procedures and a forum less formal than those associated with a court of general jurisdiction. 443 U.S. at 643.

The Akron ordinance provides such an "alternative procedure" whereby authorization for the abortion can be obtained in accordance with the constitutional requirements enunciated by this Court in Bellotti II. Section 1870.05 does not purport to determine either the nature of the judicial alternative or the procedure to be followed in such cases, as state law provides a mandatory procedure to be followed in juvenile proceedings under Chapter 2151 of the Ohio Revised Code and the Ohio Rules of Juvenile Procedure. (App. 130a). As such provisions were not constitutionally challenged "as applied" to judicial proceedings in which a minor seeks an abortion, and since the District Court made no finding as to their operation and effect, these

provisions cannot form the basis for holding that Section 1870.05(B) is unconstitutional.

The City of Akron is prohibited under the Ohio Constitution from legislating in areas in which the state has enacted general laws. Ohio Const. Art. XVIII, Section 3. Any attempt by the City to so legislate would be a nullity under Ohio law. Lies v. Cleveland Ry, Co., 101 Ohio St. 162, 128 N.E. 73 (1920). Akron v. Scalera, 135 Ohio State 65, 19 N.E. 2d 279 (1939). As the statutory provisions governing juvenile judicial proceedings were not constitutionally challenged in these proceedings, the Akron ordinances should properly be reviewed in light of a constitutional judicial alternative.

A. LACK OF STANDING

As Judge Kennedy noted in her dissenting opinion:

> Section 1870.05(B) is capable of a construction that would render it constitutional. This would be the case if, for example, the order from "a court having jurisdiction" was based, as it constitutionally must be, first on an inquiry into the minor's maturity. Thus, the section is not facially invalid. As the majority notes in reversing the District Court's holding that section 1870.05(A) is unconstitutional, no minor challenges the Akron ordinance. I would not find section 1870.05(B) unconstitutional until a mature minor challenges it and until it has been construed by a lower court.

Thus, it is not to be assumed that during the course of the juvenile proceedings the Court will not construe the ordinance in a manner consistent with the constitutional requirement of a determination of the minor's ability to make an informed consent. Indeed it is abundantly clear that there is no one better able to determine a minor's maturity and hence her ability to make a decision regarding abortion. Admittedly the abortion clinics are not making any such determination. (Tr. VII, 166, 174).

So construed, the regulation is constitutionally permissible. Unless and until the section is challenged by a minor who claims to be mature or emancipated, a holding that Section 1870.05(B) is unconstitutional would be improper and premature. In Bellotti I, supra, and in Matheson, supra, this Court refused to strike down legislation on its face without a state court's determination as to construction and application of the laws in question.

The constitutional challenge by the plaintiff in Matheson, based upon overbreadth, was denied as she lacked standing to advance the argument. This Court noted: "We need not reach that question since she did not allege or proffer any evidence that either she or any member of her class is mature or emancipated. 450 U.S. 405-406.

The overbreadth argument was not subject to

review under such circumstances as the statute was capable of a constitutional construction. This Court stated:

> In Bellotti I, supra, we unanimously declined to pass on constitutional challenges to an abortion regulation statute because the statute was 'susceptible of a construction by the state judiciary which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.' Id., at 147, quoting Harrison v. NAACP, 360 U.S. 167, 177 (1959). See Kleppe v. New Mexico, 426 U.S. 529, 546, 547 (1976); Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-347 (1936)(concurring opinion). We reaffirm that approach and find it controlling here insofar as appellant challenges a purported statutory exclusion of mature and emancipated minors. 450 U.S. at 407.

While the statute in Matheson dealt with parental notification rather than parental or judicial consent, the principles enunciated by this Court are equally applicable in the present case. [See also, New York v. Ferber, _____ U.S. _____, _____ (1982)].

B. Important State Interest in Protection of Minors

Recently, this Court vacated the decision of the Court of Appeals, in Thone, supra, wherein it had held a parental consultation requirement to be unconstitutional. In vacating the Court of Appeals'

decision in Thone, this Court remanded for reconsideration in light of the recent decision in Matheson, supra.

The Court in Matheson recognized that:

> As in Bellotti I, supra, 'we are concerned with a statute directed toward minors, as to whom there are unquestionably greater risks of inability to give an informed consent.' Id., at 147. 450 U.S. at 411.

The Utah statute requiring parental notification of a minor's decision to have an abortion was upheld. The opinion quoted at length from the dissenting opinion in Bellotti II, where four Justices joined in stating:

> (Plaintiffs) suggest . . . that the mere requirement of parental notice (unduly burdens the right to seek an abortion). As stated in Part II above, however, parental notice and consent are qualifications that typically may be imposed by the State on a minor's right to make important decisions. As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor. It may further determine, as a general proposition, that such consultation is particularly desirable with respect to the abortion decision—one that for some people raises profound moral and religious concerns.

* * *

'There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place. Id. at 640-641, quoting Danforth, supra, 428 U.S. at 91 (concurring opinion), (footnoes omitted). Accord, id. at 657 (dissenting opinion).'

While the initial decision in Danforth, provided that a state may not constitutionally legislate a blanket power of parents to veto their daughter's decision to have an abortion, that holding "does not suggest that every minor regardless of age or maturity, may give effective consent for termination of her pregnancy." 428 U.S., at 75, citing Bellotti I, supra.

Indeed this Court has recognized that the states have a compelling state interest in the wellbeing of a minor. Most recently in New York v. Ferber, _____ U.S. _____, _____ (1982), this court declared that "it is evident beyond the need for elaboration that a

state's interest in safeguarding the physical wellbeing of a minor is 'compelling.' Globe Newspapers v. Superior Court, _____ U.S. _____, _____ (1982)." This court went on to recognize that:

> Accordingly, we have questioned legislation aimed at protecting the physical and emotional wellbeing of youth even when the laws have operated in the sensitive area of constitutionally protected rights. Id. at _____.

Section 1870.05(B), on balance, does not unduly burden an immature, unemancipated minor's constitutionally protected right to seek an abortion, even if it must be exercised via an alternative procedure whereby authorization for the abortion can be obtained. Bellotti II, supra, 443 U.S., at 643. The parental or judicial consent requirement, however, would also meet the more stringent compelling state interest test should that be required, as states have a compelling state interest in safeguarding the physical wellbeing of minors.

III. THE STATE HAS A LEGITIMATE INTEREST IN INSURING INFORMED CONSENT.

Section 1870.06(B) provides that an attending physician must inform a woman prior to an abortion of several factors, including that she is pregnant, the number of weeks elapsed, information regarding fetal development, possible complications, that abortion is a major surgical procedure, and the availability of

agencies to assist her. This requirement is designed to protect the woman and ensure that her consent will be truly informed. Such a provision strikes a reasonable balance between the woman's right of privacy and the state's interest in maternal health and ensuring the informed consent of the patient. Maher, supra, 432 U.S., at 473.

Contrary to Respondents' allegations in the courts below, nothing in this section denies the physician flexibility, as Section 1870.06(C) expressly permits the physician to:

> . . . provide her with such other information which in his own medical judgment is relevant to her decision as to whether to have an abortion or carry her pregnancy to term.

The District Court made no findings of fact regarding the subsections involved. Its decision was simply based upon its ruling that the state cannot "specify what each patient must be told." By requiring the physician to provide the information, the City is protecting the woman's right to make the abortion decision in consultation with her physician.

Section 1870.06(B) was struck down in its entirety by the District Court notwithstanding that several subsections are clearly constitutional. Subsections (1), (2), (6), and (7) are doubtless rationally related to a woman's maternal health and

do not unduly burden her decision to have an abortion. Such subsections should have been severed from any subsections found to be unconstitutional.[9]

Subsections (1), (2), (6), and (7) provide respectively that prior to the giving of an informed consent, a woman is to be told by her attending physician (1) that she is pregnant, (2) the number of weeks that have elapsed from the probable time of conception, (3) that there are numerous public and private agencies available to her with birth control the state and tailor the comprehensive information and that, upon request, the physician will give her a list of such agencies and the services available, and (4) that there are numerous public and private agencies which are available to assist her during pregnancy and after the birth of her child if she choose not to have an abortion and that, upon request, the physician will provide her with a list. Not only are these requirements not unconstitutional, but they contain information necessary for a patient to make an informed decision.

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[9]"Should any provision of this Chapter be construed by any court of law to be invalid, illegal, unconstitutional, or otherwise unenforcible, such invalidity, illegality, unconstitutionality, or unenforceability shall not extend to any other provision or provisions of this Chapter (Section 1870.19).

While the Respondents contend that requiring such information to be given would impermissibly interfere with a woman's right to decide to terminate her pregnancy, it is important to note that the information contained in Subsection 1870.06(B)(1), (2), (6), and (7) is currently being provided to patients at the Respondent clinics. (Tr. III, 144-148).

Thus the only possible interference lies in the fact that the physician is required to provide such information rather than unlicensed counselors. Such an interference, if in fact it is one, does not unduly burden the woman's access to an abortion or her decision-making process. Rather, it insures the physician's consultation that has been recognized by this Court in Roe, supra, 410 U.S., at 153, 163-165.

An informational requirement, such as that contained in the Akron ordinance, was recently approved in a footnote by this Court in Matheson. The statute under review in that case provided that no abortion could be performed

> . . . unless a 'voluntary and written consent' is first obtained by the attending physician from the patient. In order for such a consent to be 'voluntary and informed' the patient must be advised at a minimum about available adoption services, about fetal development, and about foreseeable complications and risks of an abortion.' 450 U.S. at 400.

The Court summarily affirmed an informed consent provision in Franklin v. Fitzpatrick, 428 U.S. 901 (1976), which affirmed the three-judge District Court's decision in Planned Parenthood Association v. Fitzpatrick, 401 F. Supp. 554 (1975). The District Court, in upholding the provision, noted that:

> In that event, while telling a patient that the law requires such advice, the Act does not foreclose the physician from putting this statement in perspective for a given patient by reassurances, or by comparing the risks of other options. Proper counseling, it would appear, could incorporate the information demanded by advice to the individual case. 401 F. Supp. at 588.

The district court quite liberally applied the severability clause, Section 1870.19, to numerous sections, even severing words and phrases out of sentences, and yet refused to apply severability to Section 1870.06(B) which could have been severed quite easily in accordance with the intent of the framers of Chapter 1870. In failing to sever such subsections, the courts below ignored the clear legislative intent as expressed in Section 1870.19.

The test to determine severability as stated by the District Court in Wynn v. Scott, 449 F. Supp. 1302, (N.D. Ill. 1978), is: (1) are the sections so intertwined that structurally and logically a constitutional defect in one will taint the remainder;

(2) what is the will of the legislature; (3) is the statute a product of impermissible state purpose; that is, does every section, in fact, discourage and frustrate the abortion decision; and (4) is it possible to predict what the legislature would do if part of the act were held unconstitutional?

The subsections are not so intertwined that any defects in subsections 3, 4, and 5 taint the remainder. If severed, 1870.06(B) will be completely comprehensible and will clearly inform a physician of what must be told a woman prior to obtaining her informed consent. The informational requirement aids the patient in making a truly informed decision.

Even assuming a compelling state interest should be required to uphold the regulation, such an interest should be found in regulations protecting the physician-patient relationship that was the foundation of the decision in Roe.

IV. THE STATE HAS A LEGITIMATE INTEREST IN PROTECTING THE WOMAN'S HEALTH BY REQUIRING PHYSICIAN-PATIENT COUNSELING PRIOR TO THE ABORTION.

The decision rendered by this Court in Roe recognizes that the abortion decision is to be made in consultation with the woman's physician. 410 U.S., at 153, 163-165. Section 1870.06(C) seeks to protect the woman's right to make an informed decision in

consultation with her physician by requiring that the attending physician inform the pregnant woman:

> . . . of the particular risks associated with her own pregnancy and the abortion technique to be employed, including providing her with at least a general description of the medical instructions to be followed subsequent to the abortion in order to insure her safe recovery; and shall in addition provide her with such other information which in his own medical judgment is relevant to her decision as to whether to have an abortion or carry her pregnancy to term.

In reversing the District Court's finding that this section was constitutional, the Court of Appeals stated that "Section 1870.06(C) impinges on the medical judgment of the attending physician . . ." (App. 15a). No finding, however, was made that the section interfered with the woman's right to decide to have an abortion in consultation with her physician.

The core of the constitutional protection recognized in Roe, supra, is the woman's right to have an abortion in consultation with her physician. This constitutional protection does not guarantee "a physician freedom to practice medicine free of state regulation." (App. 84a). The privacy of Roe v. Wade, is not simply a right of personal privacy or a "right to your own body," but the privacy of the relationship between the woman and her physician,

just like the privacy of the marital relationship in Griswold v. Connecticut, 381 U.S. 479 (1965).

Section 1870.06(C) was enacted to ensure that the consultation protected in Roe v. Wade actually takes place. As stated previously, it is the current practice of Akron abortion clinics not to provide such consultation between physician and patient. (App. 87a). The necessity for consultation prior to the abortion, however, was undisputed.

Respondent's contention that Section 1870.06(C) is unconstitutional is not addressed to the content of the information required therein to be provided. Rather, the challenge is to the requirement that the information be provided by the physician. This section does not interfere with the woman's fundamental right to decide whether to terminate her pregnancy. Rather, it ensures the participation of the attending physician in a vital decision. The physician-patient relationship is an essental component of the woman's constitutional right to decide to have an abortion, as made clear by the decisions of this Court. Respondents seek to remove the attending physician from the picture; yet they seek to rely upon the privacy of the physician-patient relationship. However, absent physician involvement in the abortion decision, the rationale of Roe falls. This is reflected in the case of Menillo, supra,

wherein this Court upheld criminal sanctions imposed against violators of a state statute which prohibited anyone other than a physician from performing an abortion.

This Court therein stated:

> Even during the first trimester of pregnancy, therefore, prosecutions for abortions conducted by non-physicians infringe upon no realm of personal privacy secured by the Constitution against state interference.

The giving of the information contained in Section 1870.06(C) "enhances, rather than restricts, the woman's freedom of choice." (Dissenting opinion), (App. 35a). Such information does not confine the physician's discretion, but simply reitereates his common law and ethical duty. An abortion regulation interferes with the woman's right only if it imposed a "restriction on access to abortions that was not already there." Maher, supra, 432 U.S., at 474. This court has repeatedly recognized the importance of the physician-patient relationship to the abortion decision. Roe v. Wade, supra, 410 U.S., at 163, 164; Danforth, supra, 428 U.S., at 61; Bellotti II, supra, 443 U.S., at 641 n. 21, 643. In Colautti v. Franklin, 439 U.S. 379, 387 (1979), this court observed that:

> Roe stressed repeatedly the central role of the physician, both in consulting

> with the woman about whether or not to have an abortion, and in determining how any abortion was to be carried out.

As noted by Judge Kennedy in her dissenting opinion, "the Supreme Court apparently does not believe that the limited information required by .06(C) imposes an undue burden on the physicians." (App. 35a).

The argument that such a requirement intereferes with a physician's medical judgment was rejected in Planned Parenthood Assn. v. Fitzpatrick, 401 F. Supp. 554 (1975), aff'd. sub nom., 428 U.S. 901 (1976). Therein the court stated:

> To the extent the requisite information respecting the alternatives to abortion are inappropriate in any particular case, the physician is not prohibited from so indicating to the patient en passant. A doctor may conclude that, in his or her professional judgment, it is unlikely that a patient will experience detrimental physical and psychological effects which are not foreseeable. In that event, while telling a patient that the law requires such advice, the Act does not foreclose the physician from putting this statement in perspective for a given patient by reassuring, or by comparing the risks of other options. Proper counseling, it would appear, could incorporate the information demanded by the state and tailor the comprehensive advice to the individual case.

Section 1870.06(C) of the Akron ordinance does not impermissibly interfere with the physician-patient relationship fundamental to the right to decide to have an abortion. Rather, it furthers a valid state interest in the health of its female citizens and assures that the woman's consent will be truly informed. Furthermore, removal of the physician from the function of providing counseling, including information as to risks and aftercare, would certainly promote the important interest of the state in the woman's health to a "compelling" status, regardless of the stage of pregnancy.

In summarizing the situation, Judge Kennedy in her dissenting opinion, stated:

> The requirement that the information specified in .06(C) be given by a physician does no more than seek to ensure that there is in fact a true physician-patient relationship even for the woman who goes to an abortion clinic. The evidence presented at trial showed that the decision to terminate a pregnancy was made not by the woman in conjunction with her physician, but by the woman and lay employees of the abortion clinic, the income of which is dependent upon the woman's choosing to have an abortion. The testimony disclosed that the doctors at Akron Center's clinic did little, if any, counseling before seeing the patient in the procedure room. Akron's ordinance simply takes into account these realities of the 'physician-patient'

relationship at an abortion clinic.

V. THE STATE HAS A LEGITIMATE INTEREST IN PROTECTING THE WOMAN'S HEALTH BY REQUIRING A TWENTY-FOUR HOUR WAITING PERIOD.

By delaying the effectuation of the abortion decision, a reasonable balance is struck between the state's important interest of ensuring careful consideration of that decision by the woman and the woman's right to decide to have an abortion. The District Court, in accordance with the standard of review ennunciated by this Court, found that the regulation did not unduly burden the woman's constitutional rights. (App. 99a). In reaching this decision, the District Court held that Section 1870.07 furthered the important state interest of insuring "that a woman's abortion decision is made after careful consideration of all the facts applicable to her particular situation." (App. 99a).

In reversing the District Court, the Court of Appeals applied an overly stringent standard of review to the regulation, in conflict with the standard enunciated by this Court. Danforth, supra; Bellotti I, supra,; and Matheson, supra.

The Court of Appeals stated that "since Section 1870.07 causes a legally significant impact or consequence on the abortion decision, it cannot be

applied to first-trimester abortions." (App. 17a). The Court of Appeals, thus, invalidated this section only because it impacted on decisions to have an abortion during the first three months of pregnancy. The proper standard of review, as discussed earlier, requires that in considering the regulation the focus be placed on the burden imposed on the woman's decision to have an abortion. Danforth, supra; Bellotti I, and Matheson, supra.

A parental notification requirement was upheld by this Court in Matheson, even though it resulted in a legally significant impact on the minor's constitutionally protected decision to have an abortion during the first trimester of pregnancy. In so holding, this Court noted:

> That the requirement of notice to parents may inhibit some minors from seeking abortions is not a valid basis to void the statute as applied to appellant and the class properly before us. The Constitution does not compel a State to fine tune its statutes so as to encourage or facilitate abortions. To the contrary, state action 'encouraging childbirth except in the most urgent circumstances' is 'rationally related to the legitmate governmental objective of protecting potential life.' Harris v. McRae, supra, ____ U.S. at ____. Accord, Maher v. Roe, supra, 432 U.S. at 473-474. 450 U.S. at 413.

Clearly not all regulations applicable to first

trimester pregnancies are invalid because they have a legally significant impact.

Following the decision in Matheson, this Court vacated the judgment of the Eighth Circuit Court of Appeals in Thone, supra, wherein a forty-eight-hour waiting period had been held unconstitutional. In vacating the judgment, this Court remanded the case to the Court of Appeals for reconsideration in light of its decision in Matheson. It is apparent that a first-trimester regulation is not automatically invalid.

Respondent's medical expert, Dr. Crist, testified that the waiting period would not create a significant risk to the patient's physical health. (Tr. I, 82, 94, and 118). Additionally, Dr. Bowen, who was also called as a witness for the Respondents, testified that it is preferable and better medical practice to separate counseling and the procedure by twenty-four hours or more. (Tr. II, 65). Dr. Hoffman, another of Respondent's witnesses, testified that a twenty-four hour waiting period is desirable in most instances and that a twenty-four hour delay is not critical. (Tr. III, 147 and 168). Both Dr. Sim and Dr. Schmidt, President of the American College of Obstetrics and Gynocology, testified that the twenty-four hour waiting period (and even a seventy-two hour delay) is not significant in terms of risk and is desirable in

terms of time to reflect. (Tr. VIII, 42; X 12 and 26). The section is thus drawn so as not to impose an undue burden on the patient.

In Wolfe v. Schroering, 541 F. 2d 523 (6th Cir. 1976), the Sixth Circuit Court of Appeals upheld a twenty-four hour waiting period. The court stated:

> Nor do we view the Ky. Rev. Stat. 426.023 24-hour waiting period requirement between the woman's consent and the abortion as being unconstitutional. The district court invalidated the waiting period requirement because 'it attempts to regulate the abortion procedure during the first trimester, during which time the state has no compelling interest and thus can pass no regulation affecting this period.' Danforth, supra, _____ U.S. at _____, 96 S. Ct. at 2839-2840, 49 L. Ed. 2d at 803-804, rejected similar reasoning. Given the imprecision of the trimesters and 'viability,' a delay of 24 hours could not result in a transition from the first into second trimester, or from the second trimester into 'viability.' See Rodos v. Michaelson, 396 F. Supp 768, 771, 772 (D.R.I.), rev'd on other grounds, 527 F. 2d 582 (lst Cir. 1975). Nor do plaintiffs claim that the 24 hour waiting period significantly burdens the abortion process. Moreover, Section 436.023 contains an exemption for abortions where 'an emergency situation presents imminent peril substantially endangering the life of the woman.' 541 F. 2d at 526.

Clearly, Section 1870.07 is constitutional under

the Wolfe rationale. The testimony at trial showed not only that no significant danger is created by a twenty-four hour wait, but that the patient will actually benefit from such wait. The patient will have the time to mull over the information which she receives during counseling.

Further, the District Court, in upholding the waiting period recognized that the Respondents in this case claimed that the regulation "signficantly burdened the abortion process." (App. 98a).

The District Court, however, in accordance with the standard of review enunciated by the Court, found that the regulation did not unduly burden the woman's constitutional rights. This was so even though the Court believed the regulation would serve to make effectuation of the abortion decision more expansive. The Court held that the regulation served the important state interest of ensuring that a woman's abortion decision is made after careful consideration of all the facts applicable to her particular situation. Section 1870.07 does impose a restriction on a woman's access to an abortion and serves an important state interest in protecting the woman's informed decision.

VI. THE TERM "HUMANE" AS USED IN SECTION 1870.16 IS NOT UNCONSTITUTIONALLY VAGUE.

The courts below found Section 1870.16 to be unconstitutionally void for vagueness. This was due to the fact that the section which deals with the disposal of the remains required that it be done in a humane and sanitary manner. The District Court found that the word "humane" was void for vagueness. The overall intent of the section is, as was noted in Planned Parenthood Assn. v. Fitzpatrick, 401 F. Supp. 554, 573 (1975), aff'd Franklin v. Fitzpatrick, 428 U.S. 901 (1976), "to preclude the mindless dumping of aborted fetuses on garbage piles." In Fitzpatrick, the three-judge District Court upheld a regulation which provided that the Department of Health make regulations for the humane disposal of remains.

The language used in this section was largely taken from a state regulation which provides that "the fetus shall be disposed of in a humane manner." 3 Ohio Administrative Code 3701-47-05 1979. In light of the intent of Section 1870.16, it is clearly not void for vagueness.

Even if the term "humane" were found to be void for vagueness, the entire section should not have been struck down. By severing the term "humane" and allowing the balance to remain, the District Court would have insured two goals: (1) that potential criminal liability could not be founded on an

ordinance which local abortion clinics might have difficulty construing and (2) that the health and safety of the Akron community would be furthered by providing for the sanitary disposal of the fetus. It can hardly be doubted that the health of the community would be furthered by such a requirement and that such a regulation is reasonably within Akron's power. Fitzpatrick, supra.

In addition, by so severing the section the courts below would have been following the manifest intent of the City Council which had provided in Section 1870.19 that a finding of unconstitutionality of one provision was not to result in the striking of the entire ordinance. Champlin Refining Co. v. Corporation Commission, 286 U.S. 210 (1932).

CONCLUSION

Therefore, the appropriate disposition of this case is to reverse the decision of the Court of Appeals as to Sections 1870.06(C) and 1870.07, and remand for an affirmance of the decision of the District Court as to those sections. As to Sections 1870.05(B), 1870.06(B), and 1870.16 the decision of the Court of Appeals should be reversed.

Dated July _____, 1982

Respectfully submitted,

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