Nos. 81-746, 81-1172

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CITY OF AKRON,

Petitioner,

v.

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

Respondents.

and

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

Petitioners,

v.

CITY OF AKRON,

Respondent.

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

BRIEF FOR RESPONDENTS FRANCOIS SEGUIN, M.D. AND PATRICIA K. BLACK

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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 secion in accordance with City Council's express intent that the provision be severable.

PARTIES

The parties to this action are the Petitioner City of Akron and Respondents Francois Seguin, M.D. and Patricia K. Black, parents of minor daughters of child-

bearing age, who were intervening defendants in the trial court and appellants in the Court of Appeals for the Sixth Circuit, and who now support the position of Petitioner City of Akron. Opposing Respondents are abortion clinics Akron Center for Reproductive Health, Inc., *et al.*, and Dr. Robert Bliss, a Cincinnati physician.

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

BRIEF OF RESPONDENTS FRANCOIS SEGUIN, M.D. AND PATRICIA K. BLACK

OPINIONS BELOW

The opinions of the District Court and the Court of Appeals for the Sixth Circuit have been reported at 479 F. Supp. 1172 (N.D. Ohio 1979) and 651 F.2d 1198 (6th Cir. 1981), respectively.

JURISDICTION

Jurisdiction of this Court was invoked pursuant to 28 U.S.C. Sec. 1254(1). A petition for certiorari to the United States Court of Appeals for the Sixth Circuit was timely filed by each of the parties, and the petitions were granted in Nos. 81-746 and 81-1172 on May 24, 1982.

CONSTITUTIONAL AND STATUTORY PROVISIONS[1]

Ohio Revised Code—Sec. 2151.03

Ohio Revised Code—Sec. 2151.23

Ohio Revised Code—Sec. 2151.27

Ohio Revised Code—Sec. 2151.28

Ohio Revised Code—Sec. 2151.281

Ohio Revised Code—Sec. 2151.33

Ohio Revised Code—Sec. 2151.421

Codified Ordinances of the City of Akron—Sec. 2870.05

Codified Ordinances of the City of Akron—Sec. 1870.06

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[1] All relevant statutory provisions are quoted in full in the Supplemental Appendix to this brief and cited as (Supp. App. ___). Additional statutory provisions are found in the separately bound Appendix of the City of Akron.

STATEMENT OF THE CASE[2]

1. Proceedings Below

This litigation began as a challenge to the facial validity of Chapter 1870 of the Codified Ordinances of the City of Akron, Ohio (hereinafter "the City") pursuant to 42 U.S.C. Sec. 1983 and 28 U.S.C. Sec. 1331. Chapter 1870 was passed by the Akron City Council and was to have become effective on May 1, 1978, but a preliminary injunction restraining its enforcement 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. Final decision on the merits was rendered on August 22, 1979 (43a), and upon the filing of a motion to alter or amend the judgment pursuant to F. R. Civ. P. 59, the United States Court of Appeals for the Sixth Circuit original Memorandum Opinion and Order was modified by the order of the District Court filed on October 4, 1979 (107a). Timely appeals were filed by all parties in the trial court, and by opinion and order dated June 12, 1981 the Court of Appeals entered a split (2-1) decision affirming in part and reversing in part the opinion of the District Court (1a). Judge Cornelia Kennedy filed a concurring and dissenting opinion on the merits (25a). Motions filed by the parties for reconsideration were denied on July 10 and 22, 1981 (39a, 41a).

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[2] All references to the record are designated by a Roman numeral and number, referring to the Volume and Page of the transcript, *e.g.* (Tr. II, 23). All references, such as (43a), are references to the page in the separately-bound Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit filed by the Petitioner City of Akron. All references to the Joint Appendix in this case are cited as (J.A. ___).

Petitions for certiorari were timely filed by all parties (Nos. 81-746, 81-854, 81-1172), and the writs in Nos. 81-796 and 81-1172 were granted on May 24, 1982. The writ was denied in Nos. 81-854, but the issues presented in that case were substantially identical to those presented in Nos. 81-746.

The interests represented in the litigation are those of the abortion clinics (hereinafter "clinics"); a physician (hereinafter "Dr. Bliss") who purports to represent the rights of clinic patients, including "immature minors, who desire abortions"; the City of Akron (hereinafter "City") in its capacity as the governmental entity which passed the law; and these Petitioners (hereinafter "parents" or "Mrs. Black" or "Dr. Seguin") who were permitted by the District Court to intervene as parties "in their individual capacity as parents of unmarried daughters of childbearing age."

This case raises several issues which have not been resolved by this Honorable Court since *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973). Among these are:

1. The appropriate standard of review in an abortion-related case;
2. The nature of and parties to the judicial proceeding held to be permissible in *Bellotti v. Baird (I)*, 428 U.S. 132 (1976), and *Bellotti v. Baird (II)*, 443 U.S. 622 (1979), including the right of parents of immature minors; and
3. The permissible extent of regulations which seek to further a truly "informed" consent to abortion, especially where immature minors are involved.

As intervening parties defendant in the trial court, and as appellants in the Court of Appeals, these Respondents

still seek to have upheld by this Honorable Court those provisions of the Akron ordinance which apply to their interests as parents of unmarried daughters of childbearing age. They assert their individual parental rights in that regard as well as the right of the City of Akron to protect those rights.

2. Statement of Facts

The statement of facts contained in the Brief of the City of Akron is adopted by reference insofar as it discusses issues other than those directly related to the interests of these Responents. The facts summarized below are limited to those directly relevant to the decision of questions 1 and 2 of the "Questions Presented" herein.

Respondents Francois Seguin, M.D. and Patricia K. Black are parents of unemancipated, immature, minor daughters of childbearing age. As intervening parties defendant at trial they were most directly concerned with the provisions of Sections 1870.05 and 1870.06(B) of the Akron ordinance at issue in this case. Section 1870.06(B) provides a set of guidelines for informed consent and, in so doing, seeks to ensure that women, minors, and their parents will have all facts necessary to make a truly informed decision regarding abortion (120a and Supp. App. 9).

Section 1870.05 establishes two rules to govern the conduct of abortion clinics when dealing with unemancipated minors (119a-120a). In the case of unemancipated minors, ages 15-17, Section 1870.05(A) provides that a physician may not perform an abortion on such minors without utilizing one of two options: if the minor is not accompanied by her parent or legal guardian, (1) the clinic must either notify one of the parents or guardian

of the proposed abortion, or (2) possess a valid judicial consent to the abortion procedure. The Court of Appeals reversed the District Court's holding and upheld the facial validity of this requirement because the plaintiffs were clinics and a physician, rather than a minor, stating: "Until the requirements of Section 1870.05(A) are questioned by a minor who claims to be mature or emancipated or claims that notice would not be in her best interest, we cannot hold this section facially invalid" (13a). The clinics did not appeal this holding and it is therefore not before this Honorable Court.

Section 1870.05(B) provides that at least one parent must be notified and consent to the abortion, or that judicial approval of the abortion be obtained before it is performed when a minor is under the age of fifteen. The record supports the general contention that minors approach the abortion decision seeking adult guidance, approval and moral support (J.A. 129a-131a), and that this contention applies almost universally to minors under the age of fifteen. Each of the experts who testified stated that, because of her immaturity, it was most unlikely that a minor of these tender years could make an adequate decision on her own regarding pregnancy. (See, *e.g.*, J.A. 278a). On the record below, therefore, Section 1870.05(B) applies only to what have been called "immature" minors.

Although the principal plaintiffs in *Bellotti (II), supra,* 443 U.S. 622, 623 (1979), were "unmarried . . . minors who have adequate capacity to give a valid and informed consent," both the District Court and the Court of Appeals relied on that case to hold that the principal parties in this case, abortion clinics operated for profit, could not be forced to notify and obtain the consent of either a parent or a juvenile court prior to performing

an abortion on minors who are not capable of giving a valid and informed consent. The District Court reasoned that the provision of notice to the parents rendered the ordinance unconstitutional (93a) while the Court of Appeals held that *Bellotti (II), supra,* required invalidation of any statute which "provide(s) a possible third party veto" (12a). It did not discuss whether the provision for judicial override of the parental decision was significant or whether it considered a juvenile judge to have an impermissible "third party veto."

It is clear from the trial record that most of the "informed consent" information required to be given by Section 1870.06(B) to a minor and/or her parents is not given unless specifically requested by the patient. The clinics consider the information regarding risks, alternatives available, public services and fetal development to be either harassing, disturbing or irrelevant. Despite the severability clause, Section 1870.19 (129a), the Court of Appeals held that all subsections were unconstitutional, regardless of their content, on the grounds 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 Missouri v. Danforth*), 428 U.S. at 80'" (15a). Notably, however, the record clearly demonstrates total lack of the true physician-patient relationship envisioned in *Roe v. Wade, supra.* Rather, the abortion clinics in this litigation are commercial establishments which provide abortions "on demand."

a. Counselling and Physician Contact

The record demonstrates that physicians have very little contact with pregnant minors who seek abortions at the clinics. Dr. Bliss, the physician who claimed to

represent the rights of immature minors in the Akron area, lives and practices in Cincinnati, nearly 300 miles away. He only occasionally performed abortions in Akron and only at one of the clinics. In some cases, clinic patients receive tranquilizers before being examined for the first time by the doctor who is to perform the abortion. One of the physicians employed by the clinics has a heavy foreign accent which makes his speech difficult to understand (J.A. 147a). Dr. Bowen, who testified for the clinics regarding the position of the Summit County Medical Society, admitted on cross-examination that such practices were not in accord with his own standards (Tr. V, 61-63), and that he had never looked into the counselling and admitting procedures at the clinics before rendering an opinion on the need for this ordinance (Tr. V, 43-57). All the expert witnesses, even those called by the clinics, made it clear that adequate counselling is more than simply information giving, whether the patient is a minor or an adult, and that it will have and has a positive effect which can minimize most abortion problems (Tr. IV, 89-93; VIII, 20-45; X, 184-198).

Since the primary interest of the Respondent parents is the well-being of their daughters, it is particularly relevant to focus on the type of treatment afforded minors who seek abortions at the clinics in this case. The record makes it clear that the care provided by the clinics does not meet the standards for the treatment of minors described by any of the expert witnesses called at trial. There are therefore no safeguards whatsoever—save this ordinance—which would assure that immature minors receive adequate treatment and information prior to abortion. When coupled with the experts' opinion that few, if any, immature minors (*i.e.*, those under 15

years of age) have the ability to make a truly informed consent, the need for adult guidance by an informed individual concerned with the child's welfare is obvious.

Francene Lucas (whose testimony begins at Tr. VII, 146), a counsellor at Respondent WomenCare Clinic, was typical of the counsellors who appeared before the District Court. She does not have a bachelor's degree, although she did "attend college for approximately two years" (J.A. 251a). She received approximately eight hours of training for what she would be doing in a counselling capacity at the clinic. On various occasions during this eight-hour training period, she spent about an hour in consultation with a doctor (J.A. 252a). She was not required to do any reading of the literature other than that provided in the clinics themselves and was not tested on material she did read (Tr. VII, 165). The record discloses that Ms. Lucas' only previous experience in counselling was "as a respiratory therapist" (J.A. 247a). She spends approximately 15–25 hours per week, both in person and via "telephone counselling," advising women contemplating abortion (J.A. 247a). In the course of a normal business day she spends one to two hours answering the telephone or receiving people as they walk in the door (J.A. 247a–248a). She would conduct two, possibly three, counselling sessions, and 85% of the persons would participate in group counselling (J.A. 248a). Ms. Lucas' general procedure is to speak with each patient individually "for a few moments," and then "take her into the group counselling room" where she would "[give] information about the abortion procedure itself, [and] what [the patient could] expect to experience during and after the procedure." The patient is also told "how much time she will be spending in each area of the clinic, the laboratory, the procedure room,

the recovery room, [and] which personnel members she will have contact with" (J.A. 248a-249a). After this, the patient is given information as to what she may expect for two weeks following the abortion procedure. She also receives follow-up examination information, birth control information, and information about possible complications and hazards that may occur during and after the procedure. She is asked to read the consent form—a package that lists the risks and complications that may be involved—and asked to sign her name (J.A. 249a). Then the patient is put through the group counselling sessions. Only thereafter is the patient introduced to the nurse and doctor (J.A. 249a). Some patients, including minors, may also receive preoperative medication on standing physician orders (librium or valium) before they see the doctor (Tr. VII, 157; J.A. 256a).

Dr. Heald, an expert called by the clinics, testified that ability to consent and "the whole issue of teenage pregnancy is related to age" (J.A. 129a, 132a), but Ms. Lucas stated that, in her understanding, "[it] is not anybody's responsibility there at the clinic to judge the maturity of an under-fifteen-year-old" (J.A. 252a). Since the vast majority of the patients visiting the clinic have visited it only on the day of the abortion (J.A. 253a), and the physician spends only a few minutes with each patient, no one determines whether an immature minor really understands the information she has just received.

Although Ms. Lucas admitted that the fact of pregnancy is relevant to counselling, as is gestational age and birth control information, she did not routinely mention to a patient that there are numerous public and private agencies to assist her during her pregnancy. Information

on fetal development was not considered by any of the clinics to be relevant to the decision to have an abortion (Tr. VII, 169-171). Ms. Lucas felt that it was a "fair statement" to say that her role in counselling a minor was that of "information giving only" (J.A. 254a-255a). By contrast, Dr. Shelly, a psychiatrist with extensive experience, emphasized the need for a much more detailed and personalized approach to counselling (J.A. 282a-284a). All the experts emphasized that minors have special needs, but none of the clinics are staffed to provide for them.

At these clinics minors are forced to participate in group counselling with adults. They receive little personal attention (J.A. 254a-255a), even though the clinics' own expert, Dr. Heald, testified that teenagers tend to be intimidated easily if they are treated as adults. He explained that they are unsure of themselves and do not respond in the same manner as adults because they lack adult coping skills (J.A. 132a-133a). Notwithstanding these special needs, the clinics simply assume that minors, who are frightened and easily inteimidated, are to be treated no differently than adults (J.A. 255a, 155a, 132a-133a). In fact, one clinic even separates a minor from the parent who accompanies her to the clinic if the other group members object (Tr. III, 92; J.A. 155a).

b. Judicial Alternative

The District Court did not hear evidence respecting the nature of the judicial proceeding contemplated by Section 1870.05. Moreover, it did not consider that the contours of the hearing are governed by federal and state constitutional due process requirements. Such requirements specify that, except in emergencies, notice must be given to parents of any hearing which can affect their rights, and that expedited hearings are available

(Supp. App. 1-9). Since Ohio juvenile procedure was not challenged either on its face or "as applied" to abortions for immature minors, the court did not consider why the hearing provided by Ohio law for all medical cases where parental consent is unavailable would be inadequte "as applied" to abortion for an immature minor.

SUMMARY OF ARGUMENT

I. The record in this case demonstrates that only immature minors are affected by Section 1870.05(B) of the Akron ordinance, which requires parental consent or court approval for an abortion of an unmarried minor under 15 years of age. The procedures used in the Akron abortion clinics do not require parental involvement, nor do they ensure that an informed decision is made by the immature minor, but simply assume that she wants an abortion and that abortion is in her best interest. The ordinance provides for a judicial override of a parental veto, and the applicable state judicial procedure was not even challenged by the abortion clinics. Section 1870.05(B) does not unduly burden the abortion decision of an immature, unemancipated minor.

II. The standard of review in abortion-related cases should be clarified by this Court. The Court of Appeals for the Sixth Circuit applied an improper standard which automatically invalidates all substantive abortion regulation applicable to the first trimester of pregnancy. A state must show a compelling interest in support of an abortion regulation only when such regulation unduly burdens the right to seek an abortion, even during the first trimester. Under the facts of this case, the City of Akron nevertheless does have a compelling interest in requiring parental consent for the abortion of an unmarried, immature minor.

ARGUMENT

I.

THIS COURT SHOULD APPROVE THE PARENTAL CONSENT/JUDICIAL ALTERNATIVE PROVIDED BY SECTION 1870.05(B) OF THE AKRON ORDINANCE.

A. The Record Below Demonstrates That Only Immature Minors Are Affected By The Parental-Judicial Consent Provisions Invalidated By The Court Of Appeals And The District Court.

Section 1870.05(B) of the Akron ordinance applies only to minors under the age of fifteen. All experts who testified at trial regarding minors conceded that it was most unlikely that a child of fourteen or under could make an adequate decision on her own regarding her pregnancy (*e.g.*, J.A. 278a). The record amply supports the contention that all minors approach the abortion decision seeking guidance, approval and moral support from adults (J.A. 129a and 131a). The immaturity of the children protected by this ordinance and their reliance on adult opinion should be given great weight by this Honorable Court when it measures the state's interest in assuring that some adult having the child's interest in mind will make the ultimate determination of what is in her best interests. Nevertheless, both the District Court and Court of Appeals removed parental and judicial safeguards designed to assure that an informed adult having the child's best interest in mind will help her decide. Instead, the ultimate decision for these children was left to a financially-interested abortion clinic's staff (not even the physician), which has no experience or special training regarding the medical considerations or the counselling of immature minors, and which

admits to making absolutely no attempt to measure their emotional, moral, physical or psychological maturity.

Respondents Dr. Seguin and Mrs. Black testified that their daughters could be harmed by leaving them at the mercy of a clinic that will profit only if the choice is to abort. Mrs. Black, for example, stated that her desire to be notified prior to an abortion on her daughter was based on her knowledge that she "would lack maturity to make a decision on her own[,]" and "[s]he couldn't possibly . . . be capable of considering all of the side effects of the situation." Mrs. Black also testified that an abortion "would probably hinder her [daughter] physically, mentally, and spiritually, and that she couldn't possibly consider all the sides on her own" (J.A. 232a). Dr. Seguin, a board-certified pediatrician, who testified both as an expert in the care and treatment of minors and as the father of immature, unemancipated, minor daughters of child-bearing age, "felt it was of utmost importance that [h]e as a parent would be knowledgeable of it if one [of his daughters] were to become pregnant, so [that he could] properly [counsel her]" (J.A. 234a-235a). He felt his guidance and support as a parent was needed because he did "not think that at 14, 15 or 16 [his child could] make a mature judgment as to what ought to be done in such a situation" (J.A. 234a-235a). The testimony of the other experts supports him (*e.g.*, J.A. 110a-111a, clinics' expert).

The record also demonstrates that moral views differ over the acceptability of abortion as a "solution" to a problem pregnancy, and that some parents consider this to be a major factor in determining whether an abortion is in their daughter's "best interest." Both Dr. Seguin and Mrs. Black oppose abortion and would seek to reaffirm that moral view with their daughter as part of their

responsibility to instruct her in matters of moral choices should she be faced with the decision of delivery or abortion. By contrast, the clinics feel abortion is generally the answer for a pregnant minor and appear to consider any discussion of the moral perspective either irrelevant or "disturbing." (See, *e.g.*, J.A. 110a.) In their view a child is able to make a major life decision such as abortion if she is able "to state the benefits of not being pregnant in [her] life, and the disadvantages of continuing the pregnancy in [her] life, and in [her] circumstances" (J.A. 144a). Assuming, *arguendo*, that all parties can agree with the abstract proposition that any troubled, pregnant twelve-year-old with normal intelligence can recite some "benefits" of not being pregnant, it should be obvious that such an approach by the clinics begs both the maturity and "best interest" questions. This was not the test of maturity this Honorable Court had in mind when it decided *H. L. v. Matheson*, 450 U.S. 398 (1981), and it is certainly not consistent with the multifaceted inquiry suggested by the Court and the many experts who testified at trial as the key to determining what is "best for a given child.

> Yet an abortion may not be the best choice for a minor. The circumstances in which this issue (i.e. the "best interests") arises will vary widely. In a given case alternatives to abortion . . . may be feasible and relevant to the minor's best interests.

Bellotti v. Baird (II), *supra*, 443 U.S. at 642.

Nevertheless, such cursory "tests" to determine if the minor wants the abortion are standard operating procedure for these clinics. The "feasible and relevant" alternatives discussed by this Court are considered by the clinics to be irrelevant to the process.

Ironically, the decisions below make it impossible for either a concerned parent or a juvenile court judge to protect the pregnant child from such self-serving pressure tactics by the clinics. Rather, *Bellotti (II)* makes it clear that a case-by-case inquiry is crucial to a determination regarding a pregnant minor's ability to decide, *supra,* 443 U.S. at 643-644 & n.23, and the Akron ordinance seeks to require these clinics to make that inquiry. This Court should not permit *Roe v. Wade, supra,* to be used as an excuse for abortion clinics to provide substandard care for children.

B. The Record Below Indicates That The Counselling Provided Immature Minors Is Inconsistent With Community Medical Standards For The Treatment Of Immature Minors, And The Respondent Clinics Make No Attempt To Distinguish Between A "Mature" And An "Immature" Minor.

The record demonstrates, and all the parties agree, that the abortion decision is a difficult one. It requires time for thought and understanding of the facts. However reached, the decision can have a profound impact on a woman's physical and psychological health in her later life (Tr. X, testimony of Drs. Sim and Shelly). Because knowledge and understanding of possible complications, alternatives, and the biological facts of pregnancy and fetal development will go along toward assuring that the decision to abort is both firm and informed, the physician has a crucial role to play in assisting the patient in making the decision. This is especially true in the case of minors.

Because not every minor, regardless of age or maturity, may give effective consent for an abortion, *Danforth,*

supra, 428 U.S. at 75, it is imperative that some attempt be made to determine whether or not a given minor is capable of making a truly informed consent. To date, the Court's decisions have recognized this point, but have focused almost entirely upon protecting the choice options of those whose maturity makes it unnecessary for another to make the decision for them. *See, e.g., Bellotti (II), supra*; *Danforth, supra.*

In this case, however, the principal focus is upon minors who, because of their youth, are incapable of making the decision on their own (J.A. 278a). Once this inability to decide has been established, the question is no longer one which focuses on protecting the decision-making process, but rather upon who will be entrusted with the responsibility of making the decision in the first place. Once this is clearly understood, it becomes rather apparent that, if treated as an adult, the immature minor becomes merely a subject of treatment rather than an active participant in the process.

The unfortunate effects of treating immature minors as if they were adults is readily apparent in the assembly-line process utilized by the clinics in this case. The "counsellors" are unqualified to counsel immature minors and ignore the patently coercive effects of including children in group sessions with adults (J.A. 225a-226a; 130a (noting minors' susceptibility to pressure)). They have no special training which would assist them in determining the maturity level of a given minor (Tr. I, 226; II, 27-29; J.A. 118a) and make no real effort to do so in any event. Dr. B, a physician employed by one of the clinics, testified:

> Q: Do you make any attempt to judge the maturity of the patient?

A: What do you mean "maturity"? Can you explain it to me? I don't understand what do you mean by "maturity". Do you mean, the patient or the—

Q: I am speaking of the maturity of the patient, yes.

A: No.

(J.A. 245a-246a)

Ms. Goldberger, director of the Akron Women's Clinic, Inc., testified that her clinic wishes to maintain a pregnant woman's "feeling of well-being at the clinic and her feeling of well-being with the decision" (J.A. 143a). Even in the case of immature minors, the clinics simply assume that the decision to abort has been made prior to arrival at the clinic and seek to maintain that "decision" (whether or not it has really been made) by avoiding discussion of topics which are essential if the physician is to determine whether the decision is informed (Tr. VI, 121-122). For an immature minor incapable of making the decision on her own, the failure to discuss the "informed consent" factors identified by this Court in *H. L. v. Matheson, supra,* 450 U.S. at 400 n.1 (identifying available adoption services, fetal development and foreseeable complications and risks of abortion), reduces the decision-making process to nothing more than a determination that the girl desires an abortion (*cf. Matheson, supra,* 450 U.S. at 403-404 & n.8). Because the clinics admit that they lose their fee if the decision is not to abort, the decisions below allow adults whose financial interests are in conflict with the best interests of the child to make the choice for her.

C. A State-Imposed Requirement Of Parental Consent Coupled With A Provision For Judicial Override Does Not Violate The Rights Of An Immature, Dependent Minor And Is Consistent With Community Medical Standards For The Treatment Of Minors In The Absence Of Parental Consent.

1. *The Record In This Case Establishes The Respondent Clinics Simply Assume That A Minor Wants An Abortion If She Visits Their Facilities.*

The clinics made it clear at trial that they use counselling as a means to support the assumed decision of the prospective patient to abort. In the case of an immature minor, all the witnesses agreed that no knowledgeable decision can be made by the child alone. Nevertheless, these clinics object to parental or judicial involvement in the decision-making process because they feel that abortion is a perfectly "acceptable" moral alternative which is always in the "best interests" of an immature minor (J.A. 226a-227a, "Typically, we enter into a discussion . . . and this certainly includes what she feels is best in her conscience and life"; J.A. 118a, parents included only when they agree that abortion is best alternative; Tr. III, 121, witness felt "fairly pro-abortion for very young teenager"). By contrast, Dr. Seguin, a parent with minor daughters as well as a board-certified pediatrician and professor of clinical pediatrics at the Northern Ohio College of Medicine (Tr. III, 54), testified that it is wholly inappropriate to make any assumptions about either what is "best" for an individual minor patient or what she is capable of understanding without assistance from a parent or other adult (J.A. 235a-237a).

His view is in accord with that expressed by several members of this Court who have rejected the argument that "the opinion of a single physician as to the need or desirability of an abortion outweighs all state and parental interests." *Matheson, supra,* 450 U.S. at 419-420 (footnote omitted) (Powell and Stewart, J.J., concurring). Where, as here, the physician has little, if any, contact with or concern for the individual needs of abortion clinic patients, the casual approach to the treatment provided by the clinics is altogether apparent. Dr. C., a physician employed by one of the clinics, confirmed this view.

> A. Again, if she was already at the clinic, she's there for one purpose. She's already gone through all the steps to get to the clinic. She's already made her own decisions as to what to do with that pregnancy.
>
> Q. Are you saying, Doctor, then when an individual comes to the clinic she has made up her mind to have the abortion?
>
> A. Sure; when you go to a bar, you go there to drink.

(J.A. 231a-232a)

2. *Judicial Override/Consent For Necessary Medical Care Is Common Practice In Cases Where Parental Consent Is Withheld Or Otherwise Unavailable.*

The degree to which the clinics in this case have sought to insulate themselves from standards commonly applicable to others who treat minors without the benefit of parental consent or involvement is readily apparent from the record. Rather than to frankly admit, as did one of their witnesses, that they feel that abortion is generally

the treatment of choice for a pregnant minor (Tr. III, 121), the clinics claim to assert the right of the minor to decide, in consultation with her physician, to have an abortion. *See Danforth, supra,* 428 U.S. 52 (1976); and *Singleton v. Wulff,* 428 U.S. 106, 118 (1976). In the case where immature, pregnant minors are involved, however, such an approach falls far short of the minimum inquiry required for adequate consideration of the interests of the child, her parents, and the state. Where, as here, the clinic has no more than a bare financial interest in the performance of the abortion and there is no time for the child to form a physician-patient relationship with a clinic physician, it is highly questionable whether the clinic or clinic physician should be permitted to argue the child's rights.

Because "[t]here is no logical relationship between the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion," *Matheson, supra,* 450 U.S. at 408, it is fallacious to argue that an immature minor has the "right" to make a decision to abort "in consultation" with a clinic physician who sees her if she has any questions, and then performs the abortion (J.A. 228a). There is neither a consultative relationship with the physician, nor the capacity for mature judgment the decision demands (J.A. 278a). Since it goes without saying that someone other than the minor must then form a relationship with the physician in order to determine whether an abortion is the best form of treatment under the circumstances, this Honorable Court must determine who that third party is to be.

In virtually all other cases the responsibilty for the medical care of a child is borne by the parents. When they fail or refuse to carry out this duty, Ohio law

mandates state involvement. *See* Ohio Rev. Code Secs. 2151.03, 2151.23, 2151.28, 2151.281, 2151.33, and 2151.421 (Supp. App. 1-4; 140a). Because all parties to this proceeding claim to assert the "best interests" of the pregnant minor, it is necessary to examine the claims of each carefully. Only then can it be seen that the interests of the clinics are purely financial.

The interests of the state are threefold. First, the state has an interest "in fostering such consultation as will assist the minor in making her decision as wisely as possible." *Danforth, supra,* 428 U.S. at 99. Second, the state has an interest in preserving the integrity of a functioning family unit. *See Santosky v. Kramer,* ___ U.S. ___, 71 L. Ed. 2d 599 (1982); *Moore v. City of East Cleveland,* 431 U.S. 494 (1977). Finally, the state has an interest in protecting children from neglect and abuse by any person by providing for judicial and administrative remedies. *See* generally, Ohio Rev. Code Chap. 2151. Under Ohio law, no child is to be left without adequate medical treatment, and judicial remedies are available at the request of any person having knowledge of a child's need for medical care. Ohio Revised Code Sec. 2151.27 permits "[a]ny person" having knowledge of a child's medical need to "file a sworn complaint in the juvenile court" (Supp. App. 4). This section, taken together with the duty imposed upon all medical personnel, attorneys, teachers, social workers and other social service professionals to report all suspected cases of neglect or abuse to the appropriate authorities "forthwith" (Ohio Rev. Code Sec. 2151.421) makes it clear that the focus of Ohio law is on the best interests of the child (140a).

The interests of the parents and family of the immature minor are interests which are substantially identical

to those of the state, but with one important exception: the family is "the institution by which 'we inculcate and pass down many of our most cherished values, moral and cultural.'" *Bellotti (II), supra,* 443 U.S. at 634, quoting *Moore, supra,* 431 U.S. at 503-504 (plurality). As this Court noted in *Bellotti (II), supra,* the state is bound to defer to parental control over children unless there is compelling need for state intervention. 443 U.S. at 633-634, 638.

> [A]n additional and more important justification for state deference to parental control over children is that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Society of Sisters,* 268 U.S. 570, 535 (1925). "The duty to prepare the child for 'additional obligations' . . . must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Wisconsin v. Yoder,* 406 U.S. 205, 233 (1972). This affirmative process of teaching, guiding and inspiring by precept and example is essential to the growth of young people into mature, socially responsible citizens." *Bellotti (II), supra,* 443 U.S. at 637-638.

In this case, parental interests are represented by parents who believe that abortion would not be a proper choice for their immature minor daughters. When parents such as Dr. Seguin and Mrs. Black do not share the view of clinic experts who feel "fairly pro-abortion for young teenagers" (Tr. III, 121), clinics such as these at bar simply exclude them from the process (J.A. 118a). The *betes noires* allegedly warranting parental "bypass"—obstructionism, child-abuse, suicide, self-abortion and family strife—are relied upon by the clinics to exclude

any parental input whenever a parent may disagree with the choice of abortion. *See, e.g., Bellotti (II), supra,* 443 U.S. at 647; *Bellotti v. Baird,* 450 F. Supp. 997, 1000-1001 (D.C. Mass. 1978). Respondents submit, however, that such practices are precisely the reason why the state has enacted laws protective of children and made it so easy to invoke the protective power of the juvenile court or children's services agencies. *See* Ohio Rev. Code Secs. 2151.23, 2151.27, 2151.28, 2151.281, and 2151.421 (Supp. App. 1-4; 140a). As parents, their interests in the welfare of their children are, if anything, stronger than that of the state, and certainly stronger than any interest the clinics may have.

> *Lassiter* [*v. Dept. of Social Services,* 452 U.S. 18 (1981)] declared it "plain beyond the need for multiple citation" that a natural parent's "desire for and right to 'the companionship, care, custody, and management of his or her children'" is an interest more valuable than any property right.

Santosky, supra, ___ U.S. ___, 71 L. Ed. 2d at 610.

For this Honorable Court, or any other agency of the state, to assume—without the benefit of credible evidence—that parents will abuse their child if they learn that she has become pregnant flies in the face of this Court's statement that "there is no reason to believe the overall welfare of a minor can be equated with that of most parents." *Matheson, supra,* 450 U.S. at 419-420 n.8 (Powell and Stewart, J.J., concurring). *See also Santosky, supra*; *Parham v. J.R.,* 442 U.S. 584 (1979); *Quilloin v. Wolcott,* 434 U.S. 246 (1978); *Ginsberg v. New York,* 390 U.S. 629 (1968); *Wisconsin v. Yoder, supra*; *Pierce v. Society of Sisters, supra.*

Dr. Seguin testified that standard medical practice in Akron in cases where abuse is suspected is for the

physician to seek protection for the child through the juvenile court. Only then are the parents notified that treatment is being considered (J.A. 239a). Such practice recognizes the child's needs as well as the interests of the parents without sacrificing either.

By contrast, the clinics care little for the needs of the child. Children are routinely treated as if they were adults; no attempt is made to determine their level of maturity or understanding; and no attempt is made to protect a child from abusive parents once she leaves the clinic. Their concern is purely financial; for they do not even report suspected abuse cases to the authorities as required by law (J.A. 154a). *See* Ohio Rev. Code Sec. 2151.421 (140a). Clinic policy is not to be supportive of the child's best interests and welfare. Rather, it is to be supportive of a decision to have an abortion, the only one which will result in payment for the clinic. The effect of such procedure where an immature minor is involved is to permit unqualified clinic personnel having no experience in the treatment of minors and a financial stake in the choice of abortion to make the choice for her. What she really wants or needs is irrelevant; the clinic simply assumes that, once she consults them, she has made her decision.

In *Danforth, supra,* 428 U.S. 52 (1976), Mr. Justice Stewart observed in footnote 2 the clinic operation in *Bellotti (I), supra*:

> The counseling . . . occurs entirely on the day the abortion is to be performed. . . . It . . . takes place in groups that include both minors and adults who are strangers to one another. . . . The physician takes no part in this counseling process. . . . Counseling is typically limited to a description of abortion procedures, possible complications, and birth control techniques. . . .

> The abortion itself takes five to seven minutes.... The physician has no prior contact with the minor, abortions are being performed at the [clinic], the physician . . . may be performing abortions on many other adults and minors. . . . On busy days, patients are scheduled in separate groups, consisting usually of five patients. . . . After abortions, [the physician] spends a brief period with the minor and others in the group in the recovery room. . . .

428 U.S. at 91-92

He could have taken the facts directly from the record in this case. Unlike other medical practice, no fee is charged unless the patient decides to have an abortion, giving the clinic and physician a vested interest in the minor choosing abortion. If a minor decides not to undergo an abortion, the clinic loses income, and the physician, paid on a per-patient basis, loses his fee (J.A. 220a, 223a, 215a, 228a and 241a). With fewer questions asked and less information disseminated (J.A. 232a-233a), the decision to abort is a virtual certainty. An immature minor, with her "feelings of well-being" enhanced by a dose of valium or librium (Tr. VI, 26-27; J.A. 147a, 226a and 232a), will be docilely led in and out of an operating room by strangers. There she is supposed to establish, five minutes or so before her abortion, a "physician-patient" relationship with another stranger—this time a doctor—who may not even speak English well enough to make himself understood (J.A. 241a-245a). Should she develop complications after leaving the clinic, she must either find another doctor or tell her parents anyway. Dr. Bliss, who purports to represent her rights in this case, sees his patients in Cincinnati, nearly 300 miles away!

It is this physician-patient "relationship" on which the Court of Appeals relied to invalidate the alternative

parental/judicial consent provisions for immature minors provided by Section 1870.05(B). Because of its mechanistic concern for a possible "third-party veto," the Court of Appeals ignored both the fact that this ordinance protects young children, not adults, and that a judge's decision was not the type of impermissible "third-party veto" this Court held invalid in *Danforth, supra,* and *Bellotti (II), supra.*

D. The Clinics Did Not Challenge The Adequacy Of The Judicial Alternative To Parental Consent For Immature Minors Provided By Chapter 2151 Of The Ohio Revised Code.

The Court of Appeals invalidated Akron's parental/judicial consent option for immature minors because "'the unique nature and consequences of the abortion decision' . . . make it inappropriate, on the basis of deference to parental rights, to provide a possible third-party veto over the decision of the pregnant woman and her doctor to terminate her pregnancy" (12a, citing *Bellotti (II),* 443 U.S. at 643). The fallacy of this rationale is immediately apparent on examination. First, no minor, mature or immature, challenged this provision. As Judge Kennedy pointed out in her dissent:

> 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.

(33a)

Second, there is no doctor-patient relationship involved here. Judge Kennedy noted in dissent "that the doctors at Akron Center's clinic did little, if any, counselling before seeing the patient in the procedure room" (36a). Because of the immaturity of girls 14 years of age and under it is doubtful that they can even form the sort of relationship contemplated by this Court in *Roe v. Wade, supra.* Where the contact is as short as it is here, it is ludicrous to assert that a "relationship" exists.

Third, no "third-party veto" of a woman's "decision" is involved when, as here, the minor is inherently incapable of making the decision on her own. If a child lacks the ability to make a meaningful informed consent, the question for the court is: "Who shall decide, if not the child herself?" Based upon the record and judicial notice of the maturity of minors under 15, the appellate court should have found that such minors are immature as a matter of law.

The Court of Appeals did not identify the "third party" whose "veto" rendered Section 1870.05(B) unconstitutional. The parents have no veto, for a judicial override is available under the Ohio juvenile court law. Since "all members of [this] Court agreed that providing for decision-making authority in a judge was not the kind of veto power held invalid in *Danforth,*" *Bellotti (II), supra,* 443 U.S. at 650-651, the alleged defect in the ordinance has not been identified by the Court of Appeals.

In *Bellotti (II), supra,* this Court, in a divided opinion with no majority, indicated that it would be unconstitu-

tional for a state to require parental notice of a proposed abortion prior to a mature minor's attempt to invoke the power of a juvenile court to consent to an abortion because the parents might prevent the minor from going to court, 443 U.S. at 642-648, but in the *H. L. v. Matheson, supra,* a "pure" notice statute was approved. Unlike the state laws at issue in *Bellotti (II)* and *Matheson,* the Ohio law which would govern the judicial consent procedure has nothing to do with abortion. It was not challenged below, either on its face or "as applied" to abortions. Ohio Rev. Code Chapter 2151 governs the procedure of all juvenile proceedings in the State of Ohio, including cases of alleged medical need, and reflects a procedural due process requirement of notice prior to state action which can have an adverse impact upon important personal rights and interests. *See Goldberg v. Kelly,* 397 U.S. 254 (1970); *In re Gault,* 387 U.S. 1 (1967). The District Court, however, found Section 1870.05(B) unconstitutional without first determining whether the Ohio juvenile procedures comport with the standards of *Bellotti (II), supra.*

In *Danforth, supra,* this Court found a Missouri statute requiring parental consent prior to abortion unconstitutional because it left the parents with an "absolute veto" over a minor's decision to have an abortion. Section 1870.05(B) does not provide anyone with an "absolute" (*i.e.,* unreviewable and possibly arbitrary) veto. It applies only to minors whose ability to make such a decision is highly questionable and provides for judicial consent where the parents are either unavailable or refuse consent. *Bellotti (II), supra,* requires no more.

> We therefore conclude that if the State decides to require a pregnant minor to obtain one or both parents' consent it must provide an alternative pro-

cedure[23] whereby authorization for the abortion can be obtained. . . .

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[23] . . . we discussed 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. . . .

Bellotti (II), supra, 443 U.S. at text and n.23.

The gravamen of the clinics' problem with Section 1870.05(B), therefore, is not that it provides a "veto," but that it provides for a disinterested forum as contemplated by the express language of *Danforth* and *Bellotti (II).* The clinics' position is perfectly consistent with their practice: since they assume that an immature minor's best interests are always served by an abortion, there is no need to raise either of the questions thought to be relevant by this Court. Thus, any questioning of the clinics' motives or their assumptions regarding either maturity or "best interests", by parent, guardian or juvenile judge, is seen as an impermissible "third-party veto" of a "woman's" decision. Petitioners respectfully submit that this is not the sort of veto this Honorable Court had in mind.

II.

THE STANDARD OF REVIEW IN ABORTION-RELATED CASES SHOULD BE CLARIFIED BY THIS COURT.

A. The Standard Of Review In Abortion-Related Litigation Is Unclear And Leads To Conflicting And Illogical Results.

Since this Court's decision in *Roe v. Wade, supra,* there has been considerable confusion among courts and commentators concerning the appropriate standard of review to be applied in abortion-related cases. *Compare, e.g., Abortion Coalition of Michigan, Inc. v. Michigan Dept. of Public Health,* 426 F. Supp. 471 (E.D. Mich. 1977) (upholding sanitation regulations as applied to first-trimester abortion facilities), with, *e.g., Friendship Medical Center v. Chicago Bd. of Health,* 505 F.2d 1141 (7th Cir. 1974), *cert. den.,* 420 U.S. 997 (1975) (striking down sanitation regulations applied to first-trimester abortion facilities). The result has been a plethora of litigation with some of the more complex cases and issues reaching this Court more than once. *E.g., Bellotti (I)* and *(II), supra*; *Harris v. McRae,* 448 U.S. 297 (1980).

The reason for much of the confusion relates to the seemingly absolute nature of the language in *Roe v. Wade* implying that all first-trimester regulation, regardless of its asserted justification, is constitutionally impermissible. 410 U.S. at 163-164. As a result, maternal health-based regulations which by their nature cannot possibly infringe on the woman's right to decide to have an abortion (*e.g.*, the "free-standing surgical out-patient" regulations held valid in *Abortion Coalition of Michigan, supra,* but invalidated in *Friendship Medical Center, supra*) have been invalidated on the basis of this Court's essentially unlitigated factual conclusion that first-

trimester abortions are as safe as childbirth. *Roe, supra,* 410 U.S. at 164.

As a justification for a standard of review which focuses on the positive or negative effects on the decision to abort (*i.e.*, whether the regulation restricts or broadens safety and/or available choice-influencing factors or information), such a rationale arguably has merit. *Cf., Matheson, supra* (setting out choice-enhancing factors); *Danforth, supra* ("informed consent" upheld); *Bigelow v. Virginia,* 421 U.S. 809 (1975) (restriction of available information on abortion held invalid). As a justification for an unfocused, across-the-board rationale which would invalidate regulations intended to ensure maximum safety and range of choice, the safety-of-first-trimester abortions rationale of *Roe* makes no sense at all. The entire thrust of *Roe, supra,* and *Doe v. Bolton, supra,* was to ensure that, within limits, abortion was an available choice for women and treated like any other medical procedure. *See Doe, supra,* 410 U.S. 179 (1973); *Maher v. Roe,* 432 U.S. 464 (1977) (recognizing limits to this rationale because abortion is only medical procedure which involves taking of "potential" human life). It is the confusion over the appropriate standard of review to be applied in abortion cases which has resulted in the invalidation of provisions which do nothing more than treat abortion like any other medical procedure, and the result in this case should convince the Court that its assistance is needed to resolve the matter.

B. The Standard Of Review Applied By The Sixth Circuit Court Of Appeals For First-Trimester Abortion Regulation Was An Improper Standard Which Has Never Been Ennunciated By This Court.

In the case at bar, the 2-1 majority of the Sixth Circuit panel held that a two-step analysis is required to determine (1) whether the challenged regulation causes a "legally significant impact or consequence" on the right to terminate her pregnancy (*i.e.*, not *de minimus* or "slight") and, if so, (2) whether the regulation is supported by a "compelling state interest" (7a, 9a). The court stated that if the state has a compelling interest, then and only then should the trial court determine whether or not the regulation imposes an "undue burden" (9a). However, the court then asserted that, since "the state has no compelling interest in the first trimester of pregnancy," any regulation therein which results in a "legally significant impact or consequence" is impermissible (10a). Thus, this test is actually no test at all but simply a blanket invalidation of all first-trimester regulation.

Judge Cornelia Kennedy's well-reasoned dissent from the majority holding below disagreed:

> Because I am less certain than the majority that the Supreme Court's abortion decisions call for such a two-step analysis, I am not able to concur with the panel even though I do not completely agree with the District Court either. (25a)
>
> * * *
>
> Thus, 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 the language has always been far broader than required by the facts before it. With the exception of the passage in *Colautti, supra,* 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. (32a)

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[5] . . . The Seventh Circuit's concern that plaintiffs who must challenge abortion regulations on other than an across-the-board "compelling state interest" standard will be unable to anticipate the state's possible justifications for the regulations simply does not ring true in the abortion context. Nor do I share the Seventh Circuit's concern that the courts are incapable of determining when a burden on the abortion decision is "undue." (32A)

(Note 5, referring to *Charles v. Carey,* 627 F.2d 772, 777-778 (7th Cir. 1980))

When applying this test to Section 1870.05(B), the parental consent requirement, the Sixth Circuit necessarily had to find that provision unconstitutional, since it applies to the first trimester of pregnancy, without any consideration of its reasonableness or burden (11a, 12a). The Court totally disregarded the fact that *Bellotti (II), supra,* 443 U.S. at 640-641 (1979), approved such a parental consent requirement with a judicial override.

C. A State Must Show A Compelling Interest In Support Of A Duly Enacted Abortion Regulation Only When Such Regulation Has Been Shown To Be Unduly Burdensome On The Right To Seek An Abortion, Even During The First Trimester Of Pregnancy.

Although this Honorable Court had ostensibly prohibited all first-trimester abortion regulation in *Roe v. Wade, supra,* such was shown in subsequent decisions not to be the case so long as the regulation was not "unduly burdensome" on the abortion decision. *Cf., e.g., Connecticut v. Menillo, supra,* 423 U.S. 9 (1975) (licensed physician requirement); *Bellotti (I), supra* (parental consent); *Danforth, supra* (informed consent, record-keeping, reporting); *Harris v. McRae,* 448 U.S. 297 (1980) (abortion funding); *Maher v. Roe,* 432 U.S. 464 (1977) (Medicaid). In *Bellotti (II), supra,* 443 U.S. at 640, speaking for the plurality, Mr. Justice Powell stated: "The question before us—in light of what we have said in the prior cases—is whether [the regulation] does not unduly burden the right to seek an abortion." Likewise, in *Matheson, supra,* Mr. Justice Stevens noted: "The fact that a statute may have some impact upon a minor's exercise of her rights begins, rather than ends, the constitutional inquiry. Once the impact is identified, it must be evaluated in light of the state's interests underlying the statute." 450 U.S. at 421 (Stevens, J., concurring).

Review of the decisions of this Honorable Court demonstrates that even first-trimester regulation is permissible where either (1) there is no undue burden on the abortion decision, or (2) even if there is an undue burden, the state can demonstrate that such burden is justified by a compelling state interest. However, this

has never been clearly and comprehensively ennunciated in any of this Court's decisions in order to give the lower courts a "unified field theory" of abortion regulation to provide guidelines regardless of the nature, extent or trimester of regulation. The many issues presented and types of provisions contained in the Akron ordinance offer the Court such an opportunity. The facts of this case demonstrate that the parental consent and informed consent provisions of the Akron ordinance would not be unduly burdensome on the right of a pregnant, immature minor or woman to obtain an abortion.

D. The Facts Of This Case Compel The Conclusion That The City Has A Compelling Interest In Assuring An Informed Consent For All Women Seeking Abortions, And That This Interest Is Greatly Magnified In Cases Involving Unemancipated, Immature Minors.

In *Roe v. Wade, supra,* this Honorable Court recognized that the right to an abortion is not unqualified and must be considered against important state interests in regulation. 410 U.S. at 154. That right was abridged because this Court found no compelling state interest to justify absolutely prohibiting a woman and her physician from deciding that abortion is the best course of action for her. The Court emphasized in *Roe* that the abortion decision is to be made in consultation with the woman's responsible attending physician. 410 U.S. at 153, 163-165.

The majority of the Court below, over Judge Kennedy's dissent, has ruled as a matter of law that the state has no compelling interest during the first trimester and has effectively sanctioned the removal of the attending

physician from the process while claiming to rely on the privacy of the physician-patient relationship as its rationale. If the physician is only marginally (or not at all) involved in the decision-making process, as the facts of this case show, the entire physician-patient rationale of *Roe* fails, for there is no consultative physician-patient relationship to protect. The right of privacy in *Roe* lies not in the right of personal autonomy or self-determination, but in the privacy of the physician-patient relationship. In *Menillo, supra*, the Court upheld a requirement that an abortion be performed only by a licensed physician. The Court concluded that the insufficiency of the state's interest in maternal health in the first trimester was predicated upon the fact that the abortion would be performed by a physician under conditions ensuring maximum safety for the woman, stating:

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

423 U.S. at 11.

Throughout the course of its decisions since *Roe*, the Court has clearly envisioned a legitimate physician-patient relationship where women troubled by an unwanted pregnancy receive the advice, support and quality medical care they need to assure a reasoned and informed choice, not a production line where medical responsibilities are deferred to unqualified lay employees. Thus, requiring that the physician personally inform the pregnant woman of relevant medical facts, the risks associated with her pregnancy, the abortion technique to be employed, and other information which seeks to assure that

the choice is truly informed can hardly be considered "unduly burdensome." This is *a fortiori* true where the patient is 14 years of age and under. Common sense should dictate that such activity should be encouraged and, if necessary, required where it does not exist. "Strict scrutiny" simply serves no purpose unless it can be shown with some clarity that the challenged regulation is intended to restrict a woman's freedom of access to abortion. However, even if strict scrutiny were applied to the parental consent and informed consent requirements of the Akron ordinance, the facts of this case demonstrate that the state (City) has a compelling interest during the first trimester.

The basic consultative function of the physician is providing information as to physical and medical facts regarding pregnancy and abortion, risks, options and aftercare. In conjunction with good medical technique, that function promotes the important interest of the state in protecting the woman's health, regardless of the stage of pregnancy. It is, in fact, the very basis of the asserted "safety" rationale of *Roe*. In the case at bar, Dr. Myre Sim of the Royal Canadian Hospital in Ottawa, an expert in the psychiatric and physiological care of abortion and maternity patients for many years, testified that he did not think that anyone but the doctor himself should give the necessary information, and that such is the general medical practice (Tr. VIII, 15, 48). By contrast, the testimony of abortion clinic counsellors and physicians demonstrates complete abdication of this responsibility to the women in their care, a point not lost on Judge Kennedy. Her dissent aptly points out that "[t]he evidence presented at trial showed that the decision . . . 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. . . . Akron's ordinance simply takes into account these realities of the 'physician-patient' relationship at an abortion clinic" (36a).

In stating in *Roe* that the "compelling" point of the state's interest with respect to maternal health does not begin until the end of the first trimester, *see, e.g.*, 410 U.S. at 163, this Honorable Court has misplaced the focus as to the protection of the right of the woman's privacy. Certainly, the state's interest in the health of women is just as great during the first trimester as it is thereafter. That is what is tacitly recognized in *Menillo, supra.* The real issue is the extent to which the state may go to vindicate its interest as weighed against the woman's right of privacy. The premise that "until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth," *Roe, supra,* 410 U.S. at 163, assumes that the conditions under which the abortion is performed meet some kind of minimum medical standard. Even the licensed physician-abortionist may be performing abortions under conditions which would otherwise characterize him as a "backalley butcher." The degree of the state's interest should not be predicated solely on "present medical knowledge," *id.*, at 163, but the conditions under which abortions are actually being performed. This extends to the state's interest in assuring an informed consent as well. The constitutional right to an abortion is certainly no greater than the right not to have an abortion. What is protected by the Constitution is that choice. The state's interest extends to ensuring informed consent, *see Danforth, supra,* 428 U.S. at 67, and protecting parental rights, *see Bellotti (II), supra,* 443 U.S. at 637, as well, and is likewise no less compelling during the first trimester. Where the conditions under which abortions

are being performed do not in fact ensure informed consent, especially of an immature minor, or vindicate the "guiding roll of parents in the upbringing of their children," *see Bellotti (II), supra,* 443 U.S. at 637, the state has a compelling interest throughout the woman's (or girl's) pregnancy in the enactment of reasonable regulations to secure these countervailing rights. The evidence in this case clearly demonstrates that abortions are performed on immature minors without deference to the rights of the minors to make an informed choice or the rights of parents to have input in the abortion decision, all accomplished with a total absence of a physician-patient relationship.

CONCLUSION

For the foregoing reasons Respondents Francois Seguin, M.D. and Patricia K. Black respectfully move that this Honorable Court reverse the decisions of the Court of Appeals for the Sixth Circuit and the District Court for the Northern District of Ohio declaring Sections 1870.05(B) and 1870.06(B) and (C) of the Codified Ordinances of the City of Akron, Ohio to be unconstitutional.

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