Nos. 81-185, 81-746 and 81-1172, 81-1255 and 81-1623

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CHRIS SIMOPOULOS, M.D., FACOG,
Defendant-Appellant,
—v.—
COMMONWEALTH OF VIRGINIA,
State-Appellee.

CITY OF AKRON, et al.,
Defendants-Petitioners,
—v.—
AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., et al.,
Plaintiffs-Respondents.

(Caption continued on inside front cover)

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA AND ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND ANNEXED BRIEF OF THE COMMITTEE FOR ABORTION RIGHTS AND AGAINST STERILIZATION ABUSE, THE NATIONAL BAR ASSOCIATION (WOMEN LAWYERS DIVISION), THE NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE, THE NATIONAL LAWYERS GUILD, THE NATIONAL WOMEN'S HEALTH NETWORK, AND THE REPRODUCTIVE RIGHTS NATIONAL NETWORK

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AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., et al.,
Plaintiffs-Petitioners,

—v.—

CITY OF AKRON, et al.,
Defendants-Respondents.

PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., et al.,
Plaintiffs-Petitioners,

—v.—

JOHN L. ASHCROFT, ATTORNEY GENERAL OF THE STATE OF MISSOURI, et al.,
Defendants-Respondents.

JOHN L. ASHCROFT, ATTORNEY GENERAL OF THE STATE OF MISSOURI, et al.,
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—v.—

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Commonwealth of Virginia,
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John L. Ashcroft, Attorney General
of the State of Missouri, et al.,
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On Appeal from the Supreme Court of Virginia
and on Certiorari to the United States Court
of Appeals for the Sixth Circuit and the
United States Court of Appeals for the
Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF THE COMMITTEE FOR ABORTION RIGHTS AND AGAINST STERILIZATION ABUSE, THE NATIONAL BAR ASSOCIATION (WOMEN LAWYERS DIVISION), THE NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE, THE NATIONAL LAWYERS GUILD, THE NATIONAL WOMEN'S HEALTH NETWORK, AND THE REPRODUCTIVE RIGHTS NATIONAL NETWORK

The undersigned, as counsel for the Committee for Abortion Rights and Against Sterilization Abuse (CARASA), The National Bar Association (Women Lawyers Division), The National Emergency Civil Liberties Committee (ECLC), The National Lawyers Guild, The National Women's Health Network, and The Reproductive Rights National Network, respectfully move this Court for leave to file the accompanying brief amici curiae.

Amici organizations have all been actively involved in representing the interests of women adversely affected by legal restrictions on access to safe abortion services. Amici organizations support rights of reproductive freedom, including the rights to choose parenthood, to obtain abortions

and to be free from involuntary and coerced sterilization. Amici are particularly concerned that state action making abortion services expensive and inaccessible have a disporportionately harsh burden on poor, working and minority women.

THE COMMITTEE FOR ABORTION RIGHTS AND AGAINST STERILIZATION ABUSE (CARASA) was formed in 1977 in response to the reaction against gains that women achieved in relation to sex based equality and reproductive freedom. It was founded by concerned women, who feared that poor women's limited access to abortion and the easy availability of sterilization would increase the incidence of sterilization abuse.

CARASA has several hundred active members working in the community to educate and organize people, and in the legislature to assure access to abortion, freedom from involuntary sterilization and a decent quality of life in which people can raise their children.

THE NATIONAL BAR ASSOCIATION, WOMEN LAWYERS DIVISION, founded in 1925, is a professional membership organization which represents more than 13,000 Black attorneys, judges and law students. Its purposes include achieving equal opportunities for minorities in the legal profession and protecting the civil and political rights of all citizens. To effectuate its goal of racial and sexual equality,

the National Bar Association, through its Women's Division, has been actively involved in issues concerning child abuse and reproductive freedom.

THE NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE ("ECLC") is a not-for-profit organization dedicated to the defense of the Bill of Rights and its extension to all our people -- particularly the poor and the powerless. Founded in 1951, the organization has worked to achieve these goals through litigation and public education. Among the cases it has sponsored in this Court are Kent v. Dulles, 357 U.S. 116, Kleindienst v. Mandel, 408 U.S. 753, and Law Students Civil Rights Research Council, Inc. v. Wadmond,

401 U.S. 154. Through similar means, it has sought to protect the right of reproductive freedom and the right to equal protection of the law at issue in this case.

THE NATIONAL LAWYERS GUILD ("NLG") is an organization of 7,000 lawyers, law students and legal workers dedicated to the goal of full equality for all people. Since its inception in 1937, the NLG has worked consistently for the advancement of the rights of poor and working people, racial minorities and women.

In the past decade, its work to support the women's movement has become an organizational priority. The National Lawyers Guild, a founding member of the Reproductive Rights

National Network, is actively involved in protection of reproductive rights for poor, minority and working women. Individual NLG members, in cases brought throughout the nation, represent litigants seeking to prevent cutbacks in abortion funding or attempting to end sterilization abuse.

THE NATIONAL WOMEN'S HEALTH NETWORK is a national consumer organization which focuses on women's health. It has 10,000 individual members and, in addition, 300 organizational members including health centers, consumer groups and women's health organizations. It is the only national consumer organization focusing on a broad range of women's health issues.

THE REPRODUCTIVE RIGHTS NATIONAL NETWORK is a national organization working to defend abortion rights, end sterilization abuse, reduce infant mortality, assure adequate childcare services, and promote lesbian rights. More than 80 organizations participate in the NETWORK, doing activist work on reproductive health issues from a feminist prospective.

The annexed brief argues that Commonwealth of Virginia, the City of Akron, and the State of Missouri violate the constitutional rights of women by placing onerous and wholly unjustified restrictions on access to abortion. Because these restrictive laws are premised upon and perpetuate inaccurate stereotypes about the

incompetence of women, the constitutional guarantee of sex based equality, as well as the constitutional right to privacy recognized in Roe v. Wade, compell invalidation of the challenged provisions.

We have sought the consent of the parties to file this brief amici curiae. Counsel for all parties in all three cases have consented, with the exception of counsel for the Commonwealth of Virginia in Simopoulos v. Virginia (No. 81-185).

Respectfully submitted,

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This brief is submitted by the undersigned amici curiae conditionally upon the granting of the motion for leave to file to which it is attached.

INTEREST OF AMICI

The interest of the amici is set forth in the attached motion for leave to file.

SUMMARY OF ARGUMENT

Until quite recently, the law sharply restricted the opportunities of women in wage work and public life. A central justification for such laws was to protect and maintain women in their biologically ordained role as mothers. Since 1971 this Court has repeatedly affirmed that gender based laws "must carry the burden of showing an 'exceedingly persuasive justifica-

tion'. . ." Miss. Univ. for Women v. Hogan, 50 U.S.L.W. 5068, 5070 (1982).

State action restricting access to abortion imposes onerous costs upon women. In the guise of protecting women, such laws compel an enormous sacrifice of women's physical integrity and personal autonomy.

The laws challenged in these cases require that physicians abandon standard medical practice and considered professional judgment; criminal penalties enforce compliance. In the many areas where hospitals are inaccessible to physicians providing abortions, the effect of the "protective" hospitalization requirement is to force the woman to endure an unwanted pregnancy. Similarly, the mandatory "informed"

consent and waiting period requirements exact high costs from women and physicians, solely to perpetuate the inaccurate stereotype of the woman as incapable of moral and practical decisionmaking, and to force her to accept her maternal destiny.

ARGUMENT

I. Historically Differences in Reproductive Capacity of Men and Women Have Provided A Primary Justification for Laws Creating a Separate, Inferior Status for Women.

Since 1971 this Court has repeatedly recognized that "legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the 'proper place' of women and their need

for special protection." Orr v. Orr, 440 U.S. 268, 283 (1979). Laws premised on stereotypes about men and women are destructive, and constitutionally infirm, not only because they hurt individual men and women who do not fit the stereotype, but also because they are self-fullfilling. As the Court stated, in striking down the Utah law requiring that parents support their male children until age 21 and their female children only until age 18:

> No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. . .If the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing

> society has long imposed. Stanton v. Stanton, 421 U.S. 7, 14-15 (1975).

Only last term, this Court eloquently reaffirmed that "the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification." Miss. Univ. for Women v. Hogan, 50 U.S.L.W. 5068, 5070 (1982).

The Court and the country have not always been sensitive to the oppression of sex based discrimination. "There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination." Frontiero v. Richardson, 411 U.S. 677, 684 (1973). There is also no doubt

that this unfortunate history of sex discrimination was primarily justified by the differences in reproductive capacity of men and women. The biological fact that women are capable of bearing children has been used to legitimate legislation creating a separate system of rights and responsibilities for women, and judicial approval of laws to "protect" and maintain women in their biologically ordained role as mothers.

This Court's approval of separate spheres for men and women based on women's reproductive capacity was first set forth in Bradwell v. Illinois, 83 U.S. (16 Wall) 130 (1873). Myra Bradwell had met all the qualifications to become a member of

the Illinois bar except for one - she was not a male. The Court faced the question whether a state could deny her the occupation of her choice solely because she was female and answered that it could. Justice Bradley's concurrance is the classic statement of the 19th century view of women's place in this society:

> ...the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood ...

> The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the creator. And the rules of civil society must be adopted to the general constitution of things ... Bradwell v. Illinois 83 U.S. (16 Wall) at 141.

This "noble and benign" mission of motherhood denied Myra Bradwell the right to practice law; Justice Bradley perceived it was "the law of the creator," not the state, which constructed this dual system of rights.

Bradwell was only the beginning of this Court's endorsement of discrimination against working women in the guise of protection. In Muller v. Oregon, 208 U.S. 412 (1908), this Court again viewed women's anatomy as destiny.

> That women's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effect upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of women becomes an object of public interest and care in order to preserve the strength and vigor of the race. Muller, 208 U.S. at 421.

The need for a woman to "proper[ly] discharge her maternal function" justified the maximum hours law in Muller, 208 U.S. at 422, and other laws "protecting" women by limiting

their employment opportunities.[1/] These laws helped create the sex segregated job market, with the more lucrative positions reserved for men.[2/] By defining a job as requir-

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1/ See Women's Bureau, U.S. Dep't. of Labor, Summary of State Labor Laws for Women (1969), reprinted in Hearings on S.J. Res. 61 Before the Subcomm. on Const. Amendments of the Senate Comm. on the Judiciary, 91st Cong., 2nd Sess. 729 (1970); Oldham, "Sex Discrimination and State Labor Laws," 44 Den. L.J. 344 (1967).

2/ See generally Blumrosen, "Wage Discrimination, Job Segregation and Women Workers," 6 Women's Rts. L. Rep. 19 (1979-80); Ross, Sex Segregation and "Protective" Labor Legislation, reprinted in Hearings on S.J. Res. 61 Before the Subcomm. on Const. Amendments of the Senate Comm. on the Judiciary, 91st Cong., 2nd Sess. 392 (1970). Furthermore, sex segregation in employment has not decreased and some indicators show it is actually increasing. See U.S. Comm'n on Civil Rights, Social Indicators of Equality for Minorities and Women (1978); U.S. Dept. of Labor, 1975 Handbook on Women Workers (1975).

ing overtime, night work, or heavy lifting, employers could completely disqualify women. Maximum hour laws denied women higher paid overtime work. Finally forced maternity leaves denied women work and seniority.[3/] These "protective" laws gave women the option of staying at home or taking employment in lower paid, less desirable jobs.

Employment was only one of the areas in which courts used biological differences to sanction laws denying women the rights and responsibilities

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[3/] See e.g. the policies struck down in Nashville Gas Co. Tenn. v. Satty, 434 U.S. 136 (1977); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974).

of male citizens. Women and the blind were given special "protection" by a Georgia statute requiring payment of a poll tax.[4/] "In view of the burdens necessarily borne by them for the preservation of the race, the State reasonably may exempt them [women] from poll taxes." Breedlove v. Suttles, 302 U.S. 277, 282 (1937). Unlike the blind, however, women were only exempt if they did not register to vote. The statute alleviated the tax burden by discouraging women from participating in the political process.

[4/] The poll tax is now illegal by judicial decision, Harper v. Virginia State Brd. of Elections, 383 U.S. 663 (1976) and constitutional amendment, U.S. Const. amend XXIV.

Biology justified the exemption of women from jury duty. Finding that "woman is still regarded as the center of home and family life", this Court upheld a Florida statute automatically excluding women from serving on juries unless they registered with the court clerk. Hoyt v. Florida, 368 U.S. 57, 62 (1961). As recently as 1970 lower Federal courts upheld such exemptions. Following Hoyt, a Federal district court explained: "Granted that some women pursue business careers, the great majority constitute the heart of the home, where they are busily engaged in the 24 hour day task of producing and rearing children, providing a home for the entire family, and performing the

daily household work ..." Leighton v. Goodman, 311 F. Supp 1181, 1183 (S.D.N.Y. 1970).

Woman's role as a potential childbearer and childrearer justified a separate set of rights and responsibilities. Women were seen primarily responsible in the private sphere of home and family, while men's responsibilities were in the public sphere. Biological differences have been used to perpetuate an invidious system of discrimination against women. Under the banner of "protection" the law has justified a dual system of rights which prevented women from equal access to and participation in the public sphere in the glorification of motherhood.

Today, however, this Court rejects laws that create separate spheres for men and women by firmly and repeatedly affirming the Constitutional right to sex based equality under the law. See, most recently, Mississippi University for Women v. Hogan, supra. Since 1973 this Court has also affirmed that the Constitutional right to privacy prevents the state from denying women, and their physicians, access to the safe and legal abortion services that are essential to women's capacity to live as free, equal and autonomous citizens. See e.g., Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976).

II. Laws Restricting Access to Reproductive Health Services Impose Enormous and Disproportionate Burdens on Women.

Only women bear the physical burdens of pregnancy. These burdens range from minor discomfort to permanent damage to health to loss of life.[5/] When the state acts to restrict access to reproductive health services pregnant women are compelled to endure this physical invasion and the physical, psychological, and socio-economic consequences of it.

The value which the common law and constitution attach to the indivi-

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5/ G. Bourne and D. Danforth, Pregnancy (rev. ed. 1975). For an excellent summary see Regan, "Rewriting Roe v. Wade," 77 Mich L. Rev. 1569, 1579-83 (1979).

dual's right to control his or her own body is so high that people are not generally required to reach out to aid another, even when it is possible to save another person from grave injury.6/

6/ W. Prosser, The Law of Torts §56 (4th ed. 1971) 340-341.

> Consider a simple burning building, with a child trapped inside. Would a court impose criminal liability on anyone, even the child's parent, who did not attempt to save the child at the risk of second-degree burns over one or two percent of his or her body? . . . (A)n innocent life can be saved by a physical invasion comparable to or less than pregnancy and delivery. . . (E)ven if the potential rescuer is specified to be the child's parent, liability is unlikely. In all other cases, the suggested imposition is unthinkable in the context of our legal system.

Regan, "Rewriting Roe v. Wade," supra n.5 at 1558.

Laws restricting access to abortion impose upon one class of people, women, uniquely onerous obligations to endure physical intrusion to aid another.[7/] By restricting abortion and forcing

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7/ It is not possible to say that a pregnant women voluntarily assumes a duty to aid the fetus. No method of contraception is entirely effective. The one year failure rates for various methods of contraception range from 2% for pills to 10% for diaphrams and condoms to 40% for douche. R. Hatcher, et. al. Contraceptive Technology, 1982-1983 (11th Rev. Ed. 1982).

An assertion that women, by engaging in sex, voluntarily assume a duty to aid the fetus depends on the archaic, reprehensible, and constitutionally indefensible notion that women, but not men, may be punished for their sexual activity, and punished by being forced to bear a child. Eisenstadt v. Baird, 405 U.S. 438 (1972); Carey v. Population Services Intl., 431 U.S. 678 (1977).

a woman to carry a fetus to term, the state demands that women tolerate the most intrusive form of physical invasion of their bodies. The right to freedom from this type of physical intrusion has long been a part of our legal heritage:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control, of his own person ... Union Pacific Railway Co. 141 U.S. 250, 251 (1891).

Individual interests in freedom from state mandated intrusions on physical integrity are explicitly protected by the 13th Amendment's prohibition against involuntary servitude, the 8th Amendment's ban on cruel and unusual punishment, as well as the constitu-

tionally protected right to privacy.[8/]

The sexually differential impact of reproductive capacity is not limited to pregnancy itself. When reproductive health services are restricted, all heterosexually active women know that their life may be interrupted at any time by the short and long range risks

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8/ The constitutional right to privacy affirmed in Roe v. Wade has deep and strong historic roots. 410 U.S 113, 152 (1973). It prohibits laws restricting access to abortion, unless they are narrowly designed to serve compelling state purposes. This constitutional requirement is appropriately more rigorous than the heightened scrutiny demanded of ordinary sex based classifications; the enormity of the burdens that unwanted pregnancy imposes upon women and the centrality of control of reproductive capacity to women's equality as citizens, workers and human beings require no less.

and burdens of pregnancy.[9/] This in turn profoundly affects the ability of

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9/ In Michael M. v. Sonoma County, 450 U.S. 464, 471 (1981) this Court recognized that pregnant women and girls confront:

> problems more numerous and more severe than any faced by her male partner. She alone endures the medical risks of pregnancy or abortion. She suffers disproportionately the social, educational, and emotional consequences of pregnancy.

In that case the Court found that the sexually disproportionate burdens which unwanted pregnancy imposes on women are so severe that the rigorous equal protection standard had been met, even though the fit between the sex based classification defining the crime of statutory rape and the objective of avoiding unwanted pregnancy was extremely tenuous. Here by contrast there is a direct, demonstrable relationship between state created barriers to abortion and severe, predictable injury to women.

women to plan their lives. By exacerbating this uncertainty, restrictions on reproductive health services pervasively undermine the ability of women to achieve and contribute in wage work and public life.

Technology sometimes allows human beings to transcend the limits of biology. We fly. We visit anartica and space. Advances in human understanding, science and medicine allow people greater control of reproductive capacity. When the state denies women access to reproductive health services, it is not nature, but the state, that prevents them from approaching the capacity for personal autonomy that

has traditionally been the perogative of men.10/

10/ Kenneth Karst, "Forward: Equal Citizenship Under the Fourteenth Amendment," 91 Harv. L. Rev. 1, 57, n.320 (1978) notes, "Only a lawyer (a male lawyer) could regard . . . laws (regulating pregnancy, abortion and contraception) as sex neutral."

Laurence Tribe, American Constitutional Law, (1978) p. 924, observes:

> If a man is the involuntary source of a child-if he is forbidden, for example, to practice contraception-the violation of his personality is profound; the decision that one wants to engage in sexual intercourse but does not want to parent another human being may reflect the deepest of personal convictions. But if a woman is forced to bear a child-not simply to provide an ovum but to carry the child to term-the invasion is incalculably greater. Quite apart from the physical experience of pregnancy itself, an experience which of course has no analogue for the male, there is the

(Footnote continues on following page)

III. The Restrictive Abortion Regulations Challenged Here, Single Out Abortion From All Other Medical Services, Impose Requirements That Perpetuate Destructive, Inaccurate Stereotypes of Women, And Coerce Women to Accept Their Maternal Destiny.

The constitutionally protected right to privacy prevents the state from restricting access to abortion, prior to viability, unless the state demonstrates that restrictions are narrowly designed to serve compelling interests in the promotion of maternal health. Roe v. Wade, 410 U.S. at 162-63. The restrictive regulations challenged here are not justi-

(Footnote continued from preceding page)

> attachment the experience creates, partly physiological and partly psychological, between mother and child. Thus it is difficult to imagine a clearer case of bodily intrusion, even if the original conception was in some sense voluntary.

fiable in relation to maternal health. Their purpose and effect is to demand the sacrifice of the health and well being of the woman.

All of the laws challenged in these three cases impose requirements for abortion that are very different from the legal restraint normally applicable to other medical procedures. For example the Akron and Missouri laws require that prescribed information be conveyed, that the women wait, 24 hours in Akron and 48 hours in Missouri, after receiving the required information, and that the information be communicated by the physician. These requirements, like all the restrictions challenged in these cases, are enforced by imposing

criminal sanctions against the physician. These special requirements for abortion are all premised upon and perpetuate an inaccurate stereotype of women as incompetent, dependent upon male authority and incapable of moral decision making.

We support general requirements that written consent be obtained prior to any medical procedure, including abortion. Planned Parenthood v. Danforth, 428 U.S. 52, 65-67 (1976). Tort law requires consent prior to medical treatment, and, in most jurisdictions demands that the physician provide that information which a reasonably prudent person would want in deciding whether to undergo the proposed treatment. See e.g. Canterbury

v. Spence, 464 F.2d 772 (D.C. Cir.), cert denied, 409 U.S. 1064 (1972). At the heart of the informed consent requirement is the recognition, eloquently expressed by Benjamin Cardozo in 1914, that "every human being of adult years and sound mind has a right to determine what shall be done with his own body." Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 129, 105 N.E.2d 92, 93 (1914). In 1976 Ohio codified the common law informed consent requirement, providing immunity from civil liability to doctors who use a consent form setting:

> forth in general terms the nature and purpose of the procedure, together with known risks, if any, of death, brain damage, quadriplegia, paraplegia, the loss of function of any organ or limb, or disfiguring scars

> associated with such procedures, with the probability of each such risk if reasonably determinable.

The general Ohio consent law also requires acknowledgment "that all questions asked about the procedure have been answered in a satisfactory manner." Ohio Rev. Code Ann. §2317.54 (1976). Consent to treatment is presumed to be legally valid if it meets these general requirements.[11/]

11/ Missouri common law requires that ". . . the patient is entitled to such information as he needs to make an intelligent decision and to give an informed intelligent consent." Roberson v. Menorah Medical Center, 588 S.W.2d 134, 137 (Mo. Sup. Ct. 1979). Doctors must provide such information as other physicians convey in comparable situations. Aiken v. Cleary, 396 S.W.2d 668, 674 (Mo. Sup. Ct. 1965).

The special abortion consent laws are constitutionally objectionable in that the explicit information required to be conveyed assume and perpetuate an inaccurate stereotype of women as incapable of moral decision-making. The Akron ordinance demands that she be told "that the unborn child is a human life from the moment of conception," and Missouri requires that she be informed of the "anatomical and physiological characteristics of the unborn child." A woman who experiences an unwanted pregnancy must make a decision. A woman who believes she is pregnant does not seek abortion services from a clinic or private physician, until and unless she makes a moral and personal choice to

terminate the pregnancy. The decision normally proceeds action to effectuate it.12/

12/ The trial court in Missouri found as a matter of fact on the basis of expert testimony "that, as a general proposition, women seeking abortions have completely thought out the abortion decision prior to approaching a clinic or personal doctor." Planned Parenthood Ass'n of Kansas City v. Ashrcoft, 483 F. Supp. 679, 696 (W.D. Mo. 1980)

Most abortions are provided in a relatively small number of large facilities. In 1980, 76% of abortions were performed in clinics serving 1000 or more abortion patient during the year. S. Henshaw, et. al., "Abortion Services in the United States, 1979 and 1980," 14 Family Planning Perspectives 5, 10 (1982). The most common reason women offer for the decision to have an abortion is that they "would not be able to give a child a fair chance at this time." This was cited by over 80% of women seeking abortions. L. Shusterman, "Predicting the Psychological Consequences of Abortion," 13A Soc. Sci. & Med. 683, 686 (1979).

This Court recognized in Roe v. Wade that "those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus," as to when human life begins, and that there is a "wide divergence of thinking on this most sensitive and difficult question." 410 U.S. 160-61. These laws reflect a false and demeaning presumption that the state and the physician are more competent to make this moral decision than is the woman.

The laws also reflect an inaccurate stereotype of women as incompetent to make practical choices. Akron commands the physician to inform the woman that "numerous public and private agencies and services are available to assist

her during the pregnancy and after the birth of her child," and Missouri law requires that she be given a list of such services. The physician and the state are not in a better position than the woman to evaluate the "public and private agencies and services" available to help her if she should bear a child.[13/] As Justice Stevens

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13/ The reality is that for many women the birth of a child condemns them to continued, desperate poverty. The American Promise: Equal Justice and Economic Opportunity, the Final Report of the National Advisory Council on Economic Opportunity (1981) documents that during the 1970's "more of the poor were women, and more women, especially those heading families with minor children, became poor." Inadequate public and private support services impose an "unusual amount of stress" on poor women that "exacts a toll on their physical and emotional health." Id. at p. 7.

observed, in discussing parental involvement in a minor's decision making, "the most significant consequences of the decision are not medical in character. . ." Bellotti v. Baird, 428 U.S. 132, 103 (1976). The abortion decision is profoundly moral and personal, as well as medical. The special consent laws for abortion both reflect the stereotype of woman as incapable of making significant life choices and attempt to force her to fulfill the "noble and benign" mission of motherhood.

The informed consent provisions do not treat the woman as a human being with a "right to determine what shall be done with her own body," but rather as confused and disoriented.

The ordinance requires that the doctor inform her that abortion "may leave unaffected" any psychological problems she may have. A law requiring the communication of information as self-evident and frivolous as this does not treat the woman as a competent person.

The requirements that the women wait, 24 hours in Akron and 48 hours in Missouri, after receiving the prescribed information ratify archaic stereotypes about the changability and indecisiveness of women. The trial courts below found that the waiting period "requires the patient to make two trips to the clinic instead of one," with attendant increases in travel, child care, and work loss

expenses.[14/] As the Circuit Court recognized in the Akron case, the "unstated" purpose of the mandatory waiting period is "to require a 'cooling off period' during which second thoughts might come into play." 651 F.2d at 1208.

14/ Akron Ctr. for Reproductive Health v. City of Akron, 479 F. Supp. 1172, 1204-05; the waiting period "has, in fact, a detrimental effect on the health interests of women seeking abortions and . . . is unduly burdensome. . . " Planned Parenthood Ass'n of Kansas City v. Ashcroft, 483 F. Supp 679, 696. All the Circuit Courts that have considered fixed mandatory waiting periods after counseling and before abortion have found no medical justification for the inflexible waiting requirement. See Akron Center, 651 F.2d at 1208; Ashcroft, 655 F.2d 848, 866; Charles v. Carey, 627 F.2d 722, 785-86 (7th Cir. 1980); Planned Parenthood League of Mass. v. Bellotti, 641 F.2d 1006, 1014-16 (1st Cir. 1981).

As we have noted, the abortion decision normally proceeds action seeking an abortion. What then is the purpose of singling out this service, and demanding that women "think twice "? The waiting period embodies and perpetuates the classic stereotype of the changeable woman.[15/] The waiting period exacts substantial costs in terms of time, convenience, travel, and money; it inevitably in-

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15/ Virgil tells us "A woman is always a fickle, unstable thing." Francis I of France explains, "Woman often changes; foolish the man who trusts her." The poet, Aaron Hill says, "First, then, a woman will or won't, depend on it." Alexander Pope opinioned, "Women's at best a contradiction still." J. Bartlett, Familiar Quotations, pp. 118, 400, 407 (14th ed. 1968.)

creases medical risk. A law causing concrete harm to women and supported by nothing but sex based stereotypes cannot stand. Stanton v. Stanton, supra; Orr v. Orr, supra; Mississippi University for Women v. Hogan, supra.

The requirement of the Akron and Missouri laws that the physician personally communicate this prescribed information is also demeaning to the woman. As we have seen, some of the information required is trivial or untrue; much of it does not relate to medicine or physical or emotional health, but rather to misplaced moral and social concerns. A law denying the physician's normal authority to delegate educational and communication tasks to others increases the

cost of the abortion. It has no effect other than to restrict access to abortion and to deny the decision making competence of the woman patient.

Finally, the restrictive laws challenged in these three cases impose criminal penalties upon physicians who fail to comply with their mandate. Ordinary tort principles of informed consent treat the doctor/patient relationship as a private one; the doctor's superior knowledge, authority and skill give rise to the duty to provide information, but the law leaves enforcement of this duty to private agreement and civil action. Criminal sanctions provide special "protection" for women seeking abortions. As has so often been true of laws providing "special

protection" for women, these policies reflect "an attitude of 'romantic paternalism' which, in practical effect, put women not on a pedestal but in cage." Frontiero v. Richardson, 411 U.S. 677, 684 (1973). Doctors who do not wish to confront the Hobson's choice of either personally communicating information they believe to be false or risking punishment as criminals can simply abstain from performing abortions. The shortage, in many areas total unavailability, of physicians willing and able to perform

abortions is exacerbated.[16/] In the name of providing women "special protection" from uninformed decision-making, these laws create often insurmountable obstacles to effectuation of the women's choice. Laws mandating criminal punishment for doctors who fail to communicate information that many might reasonably believe to be false impermissibly "confine the attending physician in an undesired and uncom-

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16/ In 1980, 78% of all U.S. counties had no identified provider of abortion services. S. Henshaw, "Abortion Services in the United States, 1979 and 1980," 14 Family Planning Perspectives 5, 5 (1982). Only about 10% of obstertrician-gynecologists in private practice perform abortions in their offices. Id. at 12. Only 17% of public hospitals and 34% of private, general non-Catholic hospitals reported any abortions performed in 1980. Id. at 11.

fortable straightjacket in the practice of his profession." Planned Parenthood v. Danforth, 428 U.S. 52, 67, n. 8 (1976).

Each of these three cases also challenges the requirement that abortions performed after the 12th week of pregnancy be done in the hospital. In every other medical situation, competent adults, in consultation with their physicians are free from state constraint in choosing whether medical treatment requires hospitalization.[17/] The physician and patient choice whether or not to use hospital facilities is influenced by medical

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17/ See generally Curran and Shapiro, Law, Medicine and Forensic Science, Ch. 5 and 6 (1982).

factors, personal convenience, the availability of hospital facilities, and cost. In no other situation does the state demand that medical treatment be restricted to the hospital. Forcing women seeking abortions to use hospital facilities again reflects and reinforces the stereotype of women as incompetent, and in need of uniquely special state "protection."

The second trimester hospitalization requirement plainly has the practical effect of putting women, "not on a pedestal, but in a cage." Frontiero v. Richardson, 411 U.S. 677, 684 (1973). The evidence presented in each of these cases, confirms general data, showing that in most areas of the country there are no

hospitals in which second trimester abortions may be performed.[18/] So, in the name of "protecting" women from the dangers of out-patient abortions in the second trimester, these laws force women to travel to areas where hospitals are available or where doctors are legally free to exercise their own medical judgment that hospitalization is unnecessary. The "protection" of women imposes upon them enormous financial and emotional

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18/ Supra n. 16. Among the seriously limited number of hospitals providing any abortion services, 30% allow abortions only to women at 10 or fewer weeks gestation. Only 21% of hospitals allowing abortions will do so after 14 weeks gestation. S. Henshaw, et. al. "Abortion Services in the United States, 1979 and 1980," 14 Family Planning Perspectives 5, 14-15 (1982).

costs, and increases risks to life and health as a result of the inevitable delay. Many women are unable to pay the price that the state exacts for their "protection," and will hence be forced to continue their pregnancy.

Because of our pervasive history of harming women through laws designed to provide them special protection, the Court has often held, and recently eloquently reaffirmed that if the objective of a law is to "'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate." Mississippi University for Women v. Hogan, 50 U.S.L.W. 5068, 5070 (1982). In a world in which no state "protects"

its citizens from unwisely choosing outpatient medical services, the special "protection", which the second trimester requirements provide exclusively for women seeking abortions, reflect and reinforce the assumption that women are "innately inferior" in their capacity to make appropriate medical decisions, in consultation with their physician. The lack of medical justification for the flat requirement that second trimester abortions be performed in the hospital[19/] simply confirms that the

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19 Planned Parenthood, et. al. v. Ashcroft, 664 F.2d 687 (8th Cir. 1981) reviews the data and concludes that the hospitalization requirement for second trimester abortions under-

(Footnote continues on following page)

purposes of these policies are to reinforce the stereotype of women as people who suffer from an "inherent handicap," and to force them to fulfill their "paramount destiny" as mothers.

(Footnote continued from preceding page)

mines women's health interest. The Sixth Circuit in Akron Center, etc. v. City of Akron, 651 F.2d 1198, found that evidence established the safety of outpatient procedures in the second trimester, and that the hospitalization requirement placed a significant burden on access to abortion, but nonetheless believed that this Court's summary affirmance of Gary-Northwest Indiana Women's Services v. Bowen, 451 U.S. 934 (1981) precluded a finding that the burdensome requirement was unconstitutional. See also Margaret S. v. Edwards, 488 F.Supp. 181, 193 (E. D.La. 1980), striking a hospitalization requirement as detrimental to women's health.

CONCLUSION

For the reasons stated above, amici respectfully submit that the judgment of the Eighth Circuit Court of Appeals should be affirmed, the judgment of the Sixth Circuit Court of Appeals should be affirmed in all respects except its holding that the constitutionality of the hospitalization requirement was forclosed by this court, and the judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted,

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