Nos. 91-744 and 91-902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,

Petitioners,

v.

ROBERT P. CASEY, *et al.*,

Respondents.

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v.

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,

Respondents.

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

Brief Of *Amici Curiae* of the NAACP Legal Defense and Educational Fund, Inc., and Other Organizations,* in Support of Planned Parenthood of Southeastern Pennsylvania

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QUESTION PRESENTED

Whether provisions of the Pennsylvania Abortion Control Act that impose a 24-hour waiting period before the performance of an abortion (18 Pa. Cons. Stat. Ann. § 3205(a) (informed consent)), mandate parental consent (18 Pa. Cons. Stat. Ann. § 3206), and require spousal notification (18 Pa. Cons. Stat. Ann. § 3209) unduly burden women's right to privacy.

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INTEREST OF *AMICI CURIAE*

This brief is filed on behalf of twenty-four organizations that share a deep concern for the health and life chances of poor women, and particularly, for poor

women of color -- *i.e.*, African American, Latina, Asian American and Native American women. Our ranks include attorneys, medical professionals, community educators, and researchers, who fear the devastating effects of greater governmental interference in the reproductive choices of poor women and the provision of abortion services.

Poor women lack access to the quality health care services that more affluent Americans take for granted. Poor communities have few health care providers and poor women are already forced to wait long hours in overcrowded clinics and emergency rooms and to travel at great expense for needed services. As fifteen studies recently reviewed by the Institute of Medicine found, financial barriers, particularly inadequate insurance coverage and limited personal funds, are the most important obstacle to care-seeking among women receiving insufficient care. United States Dept. of Health and Human Services, *Health Status of Minorities and Low-Income Groups: Third Edition* 99 (1991). Indeed, simply paying for the abortion procedure itself

entails serious hardship for indigent women who, in order to exercise their right to abortion, must often let bills go unpaid or buy fewer necessities, such as food and clothing. Henshaw & Wallisch, *The Medicaid Cutoff and Abortion Services for the Poor*, 16 Fam. Plan. Persp. 170, 171 (1984). *Amici* are concerned about the adverse impact of statutory provisions that require women to delay treatment, to undertake multiple efforts to obtain care, and to overcome other psychological and procedural obstacles, such as those posed by the need to obtain spousal notification and parental consent.

In 1969, fully seventy-five percent of all the women who died of illegal abortions in the United States were women of color, and from 1972 to 1974, the rate of mortality from illegal abortions for women of color was twelve times greater than that of white women. Gold, *Abortion and Women's Health: A Turning Point for America?* The Alan Guttmacher Institute 5 (1990)(hereinafter cited as Gold); Dixon, Ross, Avery & Jenkins, *Reproductive Health of Black*

Women and Other Women of Color in FROM ABORTION TO REPRODUCTIVE FREEDOM: TRANSFORMING A MOVEMENT 157 (Fried ed. 1990). Even after legalization, high numbers of poor women of color were still precluded from obtaining safe and legal abortions. As a result, in 1975 women of color comprised eighty percent of the deaths associated with illegal abortions. Cates & Rochat, *Illegal Abortion in the United States: 1972-1974*, 8 Fam. Plan. Persp. 86, 87 (1986).

If the undue burden standard is to be adopted, it is crucial that the Court seriously consider the impact of statutory restrictions in the real world context in which poor women live. As Justice Marshall admonished nearly two decades ago, "It may be easy for some people to think that weekly savings of less than $2 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are." *U.S. v. Kras*, 409 U.S. 434, 460 (1973)(Marshall, J., dissenting). Restrictions on the provision of abortion services and the decision-making process do not fall with

equal measure upon rich and poor, and the burdens imposed on poor women should not be ignored.

A complete list of *amici* and their statements of interest are set forth in an Appendix to this brief.

SUMMARY OF ARGUMENT

Amici, supporting Planned Parenthood of Southeastern Pennsylvania, urge this Court to reaffirm *Roe v. Wade*, 410 U.S. 113 (1973). If, however, the Court adopts the undue burden test developed by Justice O'Connor, the Court would nevertheless be required to find the provisions of the Pennsylvania Abortion Control Act that define medical emergency, establish reporting requirements, and require informed consent, parental consent, and spousal notification unconstitutional.

The right to privacy is guaranteed to all women, regardless of income, race, or ethnicity. Accordingly, if the Court chooses to adopt the "undue burden" standard articulated by Justice O'Connor, the threshold examination of the statute's "burden" must include the practical impact of

the law on the ability of poor women to exercise the protected right. Laws that place obstacles in the path of poor women who have chosen to terminate pregnancy -- by imposing delays or procedural obstacles, economic barriers, or other impediments to access -- constitute a burden on the privacy rights of poor women.

The Pennsylvania provisions under review would impose enormous burdens on the abortion decisions of poor women. The 24-hour delay, parental consent, and spousal notification requirements, in particular, erect prohibitive barriers in the path of poor women who seek abortions, thereby threatening the health of, and life chances for, many women. These provisions, thus, constitute an undue burden on women's right to reproductive choice.

ARGUMENT

INTRODUCTION

The Court of Appeals erred in upholding the constitutionality of provisions of Pennsylvania's Abortion Control Act that force women to wait 24 hours between the

time that a woman's consent for abortion is obtained and the time that the abortion may be performed (18 Pa. Cons. Stat. Ann. § 3205(a) (informed consent)) and that mandate parental consent (18 Pa. Cons. Stat. Ann. § 3206). Through these provisions, as well as the Act's spousal notification requirement (18 Pa. Cons. Ann. § 3209), the state of Pennsylvania would actively restrict the provision of, and access to, abortion services.[1] The provisions unduly burden the right to privacy, particularly for poor women,[2] and are,

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[1]The issues presently before this Court pertain to five provisions of the Pennsylvania Abortion Control Act, *i.e.* (1) the definition of medical emergency; (2) informed consent; (3) parental consent; (4) reporting requirements; and (5) spousal notification. *Amici* assert that each of these provisions would have a severe and drastic impact upon the cost and timing of abortions, as well as the number of legal providers, and, consequently, would place an undue burden on a woman's abortion decision. The focus of this brief, however, is limited to the three provisions listed in the above text.

[2]Laws that restrict the provision of, and access to, abortion services for poor women will necessarily affect a high percentage of women of color. African American women, for example, are five times more likely to live in poverty and three times more likely to be unemployed than white women. United States Commission on Civil Rights, *The Economic Status of Black Women* 1 (1990). Indeed, the percentage of people of color living in poverty in the United States is dramatically high: 29% of Native Americans, United States Dept. of Health and Human Services, 1 *Report of the Secretary's Task Force on Black and Minority Health* 51 (1986), 31% of African Americans, and 26% of Latinos, as compared to 10% of whites. United States

therefore, unconstitutional.

In *Roe v. Wade*, 410 U.S. at 153, this Court recognized that the right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." This Court has repeatedly affirmed its recognition of "a freedom of personal choice in certain matters of marriage and family life ... [which] includes the freedom of a woman to decide whether to terminate a pregnancy." *See, e.g., Harris v. McRae*, 448 U.S. 297, 312 (1980); *Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 420, n. 1 (1983); *Hodgson v. Minnesota*, 497 U.S. __, 111 L.Ed.2d 344, 360 (1990). As Justice Stevens has reminded us, the Court's abortion cases implicate basic, fundamental values and address "the individual's right to make certain unusually important decisions that will affect [her] own, or [her] family's destiny." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 781, n. 11

Dept. of Commerce, Bureau of Census, *Statistical Abstract of the United States, 1991*, No. 748, 463 (1991)(1989 data).

(1986)(quoting *Fitzgerald v. Porter Memorial Hospital*, 523 F.2d 716, 719-20 (7th Cir. 1975), *cert. denied*, 425 U.S. 916 (1976)).

For poor women, and particularly for poor African American women, the right to privacy in matters of body and reproduction -- a right that was trammeled with state sanction during centuries of slavery -- is fundamental to notions of freedom and liberty. For years, governmental protection of the individual's person or her private decision-making was non-existent. The right to make and carry out reproductive decisions without governmental intrusion or government sanctioned interference was, and continues to be, a valued part of freedom. *See generally* Roberts, *The Future of Reproductive Choice for Poor Women and Women of Color*, 12 Women's Law Reporter 59 (1990)(analysis of the historical significance for poor African American women of reproductive choice and the "struggle against fearful and overwhelming odds... to maintain and protect that which woman holds dearer than life... to keep hallowed their own

persons...."); Bland, *Racial and Ethnic Influences: The Black Woman and Abortion*, in PSYCHIATRIC ASPECTS OF ABORTION 171 (Stotland ed. 1991); Genovese, *Roll, Jordan, Roll: The World The Slaves Made* 497-98 (1st Vintage Books Ed. 1972).[3]

Roe and its progeny established the limits of state authority to regulate the performance of abortions and announced the standards of review by which restrictions on

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[3]Even today poor women of color are often unable to share in the freedom of personal choice in matters of reproduction guaranteed by *Roe*. Poor women often lack the economic means to avail themselves of health services and are alienated by the inaccessibility of health care. The tragic effects of what is truly a health care crisis for poor women are well known and widely documented. *See, e.g.*, United States Dept. of Health and Human Services, *Health Status of Minorities and Low-Income Groups: Third Edition* 99 (1991); Bland, *Racial and Ethnic Influences: The Black Woman and Abortion*, PSYCHIATRIC ASPECTS OF ABORTION 171 (Stotland ed. 1991); Zambrana, *Research Issues Affecting Poor and Minority Women: A Model for Understanding Health Needs*, 14 Women and Health 137, 148-50 (1988); American Medical Association, Council on Ethical and Judicial Affairs, *Black-White Disparities in Health Care* 263 J.A.M.A. 2344 (May 2, 1990)("Underlying the racial disparities in the quality of health among Americans are differences in both need and access. Blacks are more likely to require health care but are less likely to receive health care services."); *see also Harris*, 448 U.S. at 339 (1977)(Marshall, J., dissenting); *Beal v. Doe*, 432 U.S. 438, 455, n. 1, 459 (1977)(Marshall, J., dissenting)(taking note of the paucity of abortion providers available to poor women and the lack of a "meaningful opportunity" to obtain an abortion).

this right are to be adjudged. "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' ... and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Roe*, 410 U.S. at 155, 164-66; *see Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 61 (1976).

Amici join Planned Parenthood of Southeastern Pennsylvania in urging this Court to reaffirm *Roe v. Wade*. If, however, the Court adopts the undue burden test developed by Justice O'Connor, the Court's prior decisions would also require reversal of the Third Circuit, which failed to analyze properly the burden imposed by the Pennsylvania statute.

In *Akron*, Justice O'Connor articulated the conceptual basis for the undue burden standard:

> This Court has acknowledged that 'the right in *Roe v. Wade* can be understood only by considering both the woman's interest and the nature of the State's interference with it. Roe did not declare an unqualified 'constitutional right to an abortion'.... Rather, the right

> protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy.'

Akron, 462 U.S. at 461 (O'Connor, J., dissenting)(quoting *Maher v. Roe*, 432 U.S. 464, 473-74 (1977)). If a statute "places no obstacles -- absolute or otherwise -- in the pregnant woman's path to an abortion" and imposes "no restriction," then, as this Court found in *Maher*, the "regulation does not impinge upon the fundamental right recognized in *Roe*," and the judicial inquiry has come to closure. *Maher*, 432 U.S. at 474. If, however, a regulation infringes, interferes, or coercively constrains the free exercise of the right, then the statutory *burden* is established and must be justified.[4] *See Akron*, 462 U.S. at 462, 464

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[4]The Court's application of a "burden" standard in cases involving First and Fourteenth Amendment protections of free speech and associational rights are instructive: the threshold issue is whether a law *burdens* the right, not whether there is an *undue* burden. In *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214, 222 (1989), the Court summarized the standard applied in those cases:

> To assess the constitutionality of a state election law, we first examine whether it burdens rights protected by the First and Fourteenth Amendments. If the challenged law burdens the rights of political parties and their members, it can survive constitutional

(O'Connor, dissenting). *Accord Maher*, 432 U.S. at 471 ("[T]he central question in this case is whether the regulation 'impinges upon a fundamental right explicitly or implicitly protected by the Constitution.'").

The application of the undue burden standard involves two steps. First, there is a threshold assessment of the burden imposed by a statute -- *i.e.*, an inquiry into whether the regulations restrict, or have a legally significant impact upon, the right to privacy. *See, e.g., Planned Parenthood Ass'n of Kansas City, Missouri v. Ashcroft*, 462 U.S. 476, 490 (1983)(Powell, J.)(regarding the cost of a requirement that pathology reports be conducted); *Akron*, 462 U.S. at 434 ("A primary burden created by the [hospitalization] requirement is additional cost to the woman."); *Danforth*, 428 U.S. at 79 (prohibition of abortion technique after the first twelve weeks of pregnancy would

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> scrutiny only if the State shows that it advances a compelling state interest and is narrowly tailored to serve that interest.

(citations omitted). *See also Tashjihan v. Republican Party*, 479 U.S. 208, 213-14 (1986).

have the effect of inhibiting abortions). To constitute a burden, then, regulations need not impose an absolute bar to obtaining an abortion or create an absolute deprivation. *See, e.g., Akron*, 462 U.S. at 435 (a second-trimester hospitalization requirement held unconstitutional upon finding that the requirement "may force women to travel to find available facilities, resulting in both financial expense and additional health risk").

Second, if a statute is found to be a burden, then courts must determine whether such burden is undue, or lacking in adequate justification.[5] *Hodgson*, 497 U.S. ___, 111 L.Ed.2d at 361 ("Because the Minnesota statute

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[5]The undue burden standard cannot logically be read to require plaintiffs to establish that the burden is *undue* as a threshold matter. *Cf. Akron*, 462 U.S. at 463 (O'Connor, J., dissenting)("The 'undue burden' required in the abortion cases represents the required threshold inquiry...."). To require such an expansive assessment as a threshold matter would necessarily encompass a review of the statute's justifications and means -- *i.e.*, precisely the same issues considered by the court after the threshold is overcome.

In this brief, *Amici* discuss only the proper analysis for determining whether a protected right is "burdened" by state law. *Amici* refer to the briefs submitted by other *amici* in support of Planned Parenthood of Southeastern Pennsylvania for fuller discussion of how to determine whether the burden is "undue."

unquestionably places obstacles in the pregnant minor's path to an abortion, the State has the burden of establishing its constitutionality. Under any analysis, the Minnesota statute cannot be sustained if the obstacles it imposes are not reasonably related to legitimate state interests.") *Compare Webster v. Reproductive Health Services*, 492 U.S. 490, 519 (1989)(viability testing requirement deemed justifiable even though it would raise the cost of abortions) *with Doe v. Bolton*, 410 U.S. 179, 198 (1973)("the interposition of the hospital abortion committee is unduly restrictive of the patient's rights and needs..."). As the Court stated in *Jacobson v. Massachusetts*, "[T]he rights of the individual in respect to his liberty may at times, under *the pressure of great dangers*, be subjected to restraint...." 197 U.S. 11, 29 (1905)(emphasis added).

In assessing whether a constitutionally protected right is burdened by state law, the Court must consider the practical impact of the law on the ability of the individual to exercise the protected right. In this case, the Pennsylvania

Abortion Control Act would so severely restrict the ability of poor women to obtain abortions that it would render illusory the right to make a private, procreative choice without state interference.

A. LAWS THAT OPERATE TO INTERFERE WITH OR IMPAIR ACCESS TO ABORTIONS BURDEN THE PRIVACY RIGHTS OF POOR WOMEN

Laws that burden women's access to abortion include those laws that deter women from obtaining abortions by interposing procedural obstacles, economic barriers, or other practical impediments to access. *See generally* Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 371, n. 431 (1992).[6] To assess whether, and the

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[6]The Third Circuit has acknowledged that abortion regulations infringe upon the abortion right in a number of ways, including,

> (1) causing a delay before the abortion is performed; (2) raising the monetary cost of an abortion; and (3) reducing the availability of an abortion by directly or indirectly causing a decrease in the number of legal abortion providers.

Planned Parenthood v. Casey, 947 F.2d 682, 698 (3d Cir. 1991).

degree to which, a regulation is burdensome, courts should not and, indeed, must not, ignore the way in which the regulation operates, including its impact on all women.

Any analysis of whether a law that regulates or restricts the provision of abortions burdens the right to privacy must include an examination of the law's burden on poor women for the simple reason that they, too, are guaranteed the constitutional right to privacy.[7] Moreover, poor women constitute a significant proportion of the women who utilize abortion services. For example, women with family incomes of under $11,000 are nearly four times more likely to have an abortion than women with family incomes of over $25,000.[8] The greater incidence of unintended pregnancies is a consequence of (i) the greater likelihood of experiencing contraceptive failure; and (2)

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[7]As the Third Circuit correctly concludes, it is unnecessary that the regulations impact upon the entire "universe of pregnant women" in order to constitute a burden. *Planned Parenthood v. Casey*, 947 F.2d at 691.

[8]Gold at 16.

preferences for having fewer children than nonpoor women.[9] At least one study indicates that for women below the poverty level, six out of ten births are unintended, *i.e.*, unwanted or mistimed, compared to three out of ten births to women above 200% of the poverty level.[10]

In particular, restrictions on the right to abortion fall most heavily on poor women because they are in a worse position to overcome barriers of cost,[11] availability, or delay imposed or generated by the regulation of abortion.

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[9]The Alan Guttmacher Institute, *Abortions and the Poor: Private Morality, Public Responsibility* at 20 (1979).

[10]Radecki, *A Racial and Ethnic Comparison of Family Formation and Contraceptive Practices Among Low-Income Women*, 106 Pub. Health Rep. 494, text at n. 32, 33 (Sept./Oct. 1991).

[11]*See* O'Hair, *A Brief History of Abortion in the United States*, 262 J.A.M.A. 1875 (1989). Significantly, only 13 states permit the use of state funds for medically necessary abortions. National Abortion Rights Action League Foundation, *Who Decides? A Reproductive Rights Manual* 10 (1990)(hereinafter cited as NARAL).

B. PENNSYLVANIA'S ABORTION CONTROL ACT WOULD IMPEDE THE DECISION-MAKING PROCESS AND THE EXERCISE OF THE RIGHT TO REPRODUCTIVE CHOICE FOR POOR WOMEN AND THUS CONSTITUTES A BURDEN ON THE RIGHT TO PRIVACY.

Through its regulations and restrictions, Pennsylvania's Abortion Control Act would actively interfere with the ability of poor women to obtain abortions. And for many poor women, the obstacles caused by the Act would not be merely burdensome, but insurmountable.

1. Section 3205(a) of the Act, which requires a 24-hour delay between the time that a woman's consent for an abortion is obtained and the actual time when the procedure is performed, burdens the right to abortion.

First, the 24-hour delay may significantly increase the costs of abortion for poor women because of the limited availability of abortion services. For poor women, it is already more difficult to find the necessary financial resources, medical information, child care and time away

from work.[12] The additional delay imposed by the 24-hour waiting period -- exacerbated by the likelihood of scheduling difficulties at overcrowded facilities at which poor women receive care,[13] as well as barriers of distance and mobility -- will actively interfere with the ability of poor women and women of color to obtain abortions.

The need to travel long distances already presents a substantial barrier to care for many women. For example, one of the plaintiff clinics in this case, the Women's Health

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[12]Lincoln, Doring-Bradley, Lindheim & Cotterill, *The Court, The Congress and the President: Turning Back the Clock on the Pregnant Poor*, 9 Fam. Plan. Persp. 207, 210 (Sept./Oct. 1977); Koonin, Kochanek, Smith & Ramick, *Abortion Surveillance, United States, 1988*, 40 Morbidity & Morality 17, 18 (July, 1991). Even the informal networks built by women to ensure pregnant women access to abortion are often inaccessible to women of color and the solutions offered unaffordable. Avery, *A Question of Survival/A Conspiracy of Silence: Abortion and Black Women's Health*, in FROM ABORTION TO REPRODUCTIVE FREEDOM: TRANSFORMING A MOVEMENT 75 (Fried ed. 1990).

[13]Overcrowded conditions at public facilities delay and frequently foreclose timely treatment. At Health and Hospitals medical clinics in New York City, for example, patients must wait six to twenty-two weeks to get a first clinic appointment; women must wait four to fifteen weeks for an appointment with a gynecologist. A recent Health and Hospitals Corp. report found that "one patient in eight tires of waiting in city emergency rooms and leaves without treatment." Scott, *HHC Finds Hospitals Hurt by Budget Cuts*, N.Y. Newsday, March 4, 1992, at 21.

Services (WHS) in Pittsburgh services an area of 34 counties within Pennsylvania, portions of Ohio, West Virginia, Maryland and New York. Against this backdrop, patients travel great distances and, according to the testimony of that agency's Executive Director, "it is not unusual for women to travel three, four hours to get to the clinic. Sometimes it's much longer because they have to take buses to get in." Trial Testimony of Roselle, Vol. II at 80.

In 1985, eighty-two percent of all counties in the United States -- in which one-third of all women of reproductive age lived -- had no abortion provider.[14] In rural areas the problem is especially acute. Nine out of ten non-metropolitan counties in the United States have no facility that perform abortions.[15] For example,

- Not a single physician in residence in the state of North Dakota performs abortions.[16]

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[14]Henshaw, Forrest & Van Vort, *Abortion Services in the United States, 1984 & 1985*, 19 Fam. Plan. Persp. 63, 65 (1987).

[15]*Id.*

[16]*See Leigh v. Olson*, 497 F.Supp. 1340, 1347 (D.N.D. 1980).

- In South Dakota there is only one doctor who will perform abortions. As a result, women must travel hundreds of miles to obtain an abortion.[17]

- In northern Minnesota, one clinic must provide all abortions for 24 counties.[18]

In particular, poor Native American women face some of the largest obstacles, since the Indian Health Services, which may be the only familiar provider of health care and the only health service available for hundreds of miles, is prohibited from performing abortions even if women can find the monetary resources to pay for the procedure themselves.[19]

The 24-hour delay may require duplicate journeys, overnight stays away from home, and two or more absences from work, often without pay, as well as added transportation expenses. For many poor women, the

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[17]*Foes Successfully Chip Away at Abortion Rights; Poor, Young Affected Most*, USA Today, June 3, 1991, at 6A.

[18]Belkin, *Women in Rural Areas Face Many Barriers to Abortion*, N.Y. Times, July 11, 1989, at A1, col. 3.

[19]Nsiah-Jefferson, *Reproductive Laws, Women of Color, and Low Income Women*, in REPRODUCTIVE LAWS FOR THE 1990'S: A BRIEFING HANDBOOK 21-22 (1988).

additional expense caused by the waiting period will be prohibitive.

Secondly, Section 3205(a) may often result in delays greater than the 24 hours required by statute. The Executive Director of WHS in Pittsburgh testified that her agency would not be able to guarantee that delays would be limited to 24 hours because physicians are not available every day of the week. Trial Testimony of Roselle, Vol. II at 82.

Significant delays in obtaining abortions increase dramatically the health risks associated with abortions. "*[A]ny* delay increases the risk of complications to a pregnant woman who wishes an abortion. Moreover, this risk appears to increase continuously and linearly as the length of gestation increases."[20] The total morbidity rate rises 20% when abortion is delayed from the eighth to the twelfth week, and the complication rate increases 91% for

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[20]Cates, Schulz, Grimes & Tyler, *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, 9 Fam. Plan. Persp. 266, 267 (Nov./Dec. 1977). *See also* Trial Testimony of Allen, Vol. I at 45.

that same delay.[21] Poor women of color in particular, who disproportionately suffer from illnesses exacerbated by pregnancy,[22] will be most affected by significant delays in obtaining abortion services.

In sum, the 24-hour waiting period places poor women at significant risk of harm and constitutes a burden.

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[21]*Id.*, at 267.

[22]Poor women of color suffer at high rates from a variety of serious health conditions that may be exacerbated by pregnancy. These include high blood pressure, hypertension, diabetes, sickle cell anemia, AIDS, and certain forms of cancer. *See* United States Dept. of Health and Human Services, *Health Status of Minorities and Low-Income Groups: Third Edition* 131-58 (1991); United States Dept. of Health and Human Services, I *Report of the Secretary's Task Force on Black and Minority Health* 74-75 (1985); United States Dept. of Health and Human Services, Office of Minority Health, *Diabetes and Minorities* in CLOSING THE GAP 2 (1988); Drury & Powell, *Prevalence of Known Diabetes Among Black Americans*, in ADVANCE DATA FROM VITAL AND HEALTH STATISTICS, Pub. No. (PHS) 87-1250; Association for Sickle Cell Education Research and Treatment Inc. *Sickle Cell Anemia: A Family Affair* (1988); Centers for Disease Control, *HIV/AIDS Surveillance: Year-End Edition* 15 (January 1992)(comparison of annual rate of reported AIDS cases for White females, 1.7 per 100,000, with rates for Black and Hispanic females, 24.6 and 12.6, respectively).

2. Section 3206 of the Act, which requires parental consent before an abortion can be obtained, burdens the rights of low-income young women, creating a virtual bar to abortion.

Although a parental consent requirement with a judicial bypass may be legal in some circumstances, *see Hodgson*, 497 U.S. at __, 111 L.Ed.2d at 375; *Bellotti v. Baird*, 443 U.S. 622, 633-39 (1979)(discussion of principles to be applied in parental consent cases), "the constitutional protection against unjustified state intrusion into the process of deciding whether or not to bear a child extends to pregnant minors as well as adult women." *Hodgson*, 497 U.S. at __, 111 L.Ed.2d at 360. The judicial inquiry begins with an examination of the burden imposed by the statute. *See, e.g., Hodgson*, 497 U.S. at __, 111 L.Ed.2d at 362-66.

As the Executive Director of WHS testified at trial, the combined effect of the 24-hour delay and parental consent provisions will be to create additional obstacles for teenagers who, in many instances, are already in difficult circumstances. "If you talk about a 24-hour period, we're

talking about delay and additional costs. If we're talking about parental consent, we're talking about additional delay. If we talk about a judicial bypass, it's still more delay, more expense, more trips to the clinic." Trial Testimony of Roselle, Vol. II at 81-82. In Massachusetts, for example, a parental consent law forced one-third of the state's minors to travel to a neighboring, less restrictive state to obtain an abortion.[23]

Anecdotal evidence points to the horrors of such restrictions: high school student Rebecca Bell died in 1988 of a massive infection after an illegal abortion that she obtained rather than telling her parents that she was pregnant.[24] Thirteen-year-old Spring Adams was shot to death by the father who had impregnated her when he learned that she was going to abort the pregnancy.[25]

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[23]O'Keefe & Jones, *Easing Restrictions on Minors' Abortion Rights*, Issues in Sci. & Tech. 74, 78 (Fall 1990).

[24]Sharpe, *17 Year Old Died of Fear and Abortion*, Cincinnati Enquirer, Nov. 26, 1989, *cited in* NARAL at 6.

[25]NARAL at 6.

Moreover, judicial bypass provisions frequently leave young women and the freedom to exercise their fundamental right to the discretion of hostile judges.[26] One judge, who openly demonstrated the impermissible grounds on which he would base a decision, stated that he did not like the law and that he would only allow a minor to have an abortion without parental consent in cases of incest or the rape of a White girl by a Black man.[27] In some Minnesota counties, judges refuse to hear petitions for judicial bypass, forcing minors to travel 250 miles to receive a hearing. Half of the minors who were able to utilize the bypass procedure of that state's notification law were not residents of the city in which the hearing was held.[28]

Parental consent provisions exacerbate delay and

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[26]*See, e.g.*, Bonavoglia, *Kathy's Day in Court* in FROM ABORTION TO REPRODUCTIVE FREEDOM: TRANSFORMING A MOVEMENT 161 (Fried ed. 1990).

[27]Wilkerson, *Michigan Judges' Views of Abortion Are Berated*, N.Y. Times, May 3, 1991.

[28]*Hodgson*, 497 U.S. at __, 111 L.Ed.2d at 387 (Marshall J., dissenting in part).

increase both the cost and the risk to teens: in Minnesota, the parental *notification* requirement -- a far less onerous law than Section 3206 of the Pennsylvania Abortion Control Act -- increased the number of minors who obtained second trimester abortions by 26.5%.[29] This change ran counter to the national trend toward earlier term abortions.[30]

The difficulties of obtaining an abortion and the additional obstacles created by statute fall heaviest on young low-income women of color. The proportion of women of color under 15 years of age who have abortions is high -- nearly double that for their white counterparts.[31] For these young women, the vast majority of whom had unintended

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[29]NARAL at 6; *Hodgson v. Minnesota*, 648 F. Supp. 756 (D. Minn. 1986), *aff'd and rev'd in part*, 853 F.2d 1452 (8th Cir. 1988), *aff'd*, 497 U.S. __, 111 L.Ed.2d 344 (1990).

[30]American Civil Liberties Union Reproductive Freedom Project, *Parental Notification Laws: Their Catastrophic Impact on Teenagers' Right to Abortion* 15 (1986).

[31]Koonin, Kochanek, Smith & Ramick, *Abortion Surveillance, United States, 1988*, 40 Morbidity & Mortality 17 (July 1991).

pregnancies,[32] abortion is a necessary health service. Laws that place these services further from reach have a severe, detrimental impact.

The medical dangers of abortion are already particularly acute for adolescents, in part because they often postpone pregnancy confirmation and abortion. *See* Trial Testimony of Allen, Vol. I at 62-63. As a consequence of the parental consent provision, compounded by the 24-hour delay provision, teenagers will not be able to obtain abortion services until even later, more dangerous stages of pregnancy. The mortality rate for abortion increases fifty percent *each week* after the eighth week of pregnancy, and the risk of major complications in the procedure increases by approximately thirty percent per week.[33]

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[32]Among teenagers, 84% of all pregnancies and 92% of pre-marital pregnancies, are unintended. NARAL at 7.

[33]Grimes, *Second-Trimester Abortions in the United States*, 16 Fam. Plan. Persp. 260-65 (Nov./Dec. 1984). *See also* Cates & Grimes, *Morbidity and Morality of Abortion in the United States*, in ABORTION AND STERILIZATION: MEDICAL AND SOCIAL ASPECTS 155 (Hodson ed. 1981).

3. Section 3209 of the Act, which requires spousal notification before an abortion can be obtained, burdens the right to abortion.

After conducting the requisite legal and factual analyses, the district court concluded that the spousal notification requirement "is constitutionally defective because it impermissibly invades a woman's fundamental right to privacy in the abortion decision." *Planned Parenthood v. Casey*, 744 F.Supp. 1323, 1384 (E.D.Pa. 1990). On appeal, the Third Circuit affirmed, holding that the provision imposes an undue burden on a woman's abortion decision and does not serve a compelling state interest. 947 F.2d 682 (3d Cir. 1991). In reaching this conclusion, the Third Circuit looked to this Court's opinion in *Hodgson*, 497 U.S. at __, 111 L.Ed.2d at 371, & n. 36, and observed,

> The Supreme Court has thus been attuned to the *real-world consequences* of forced notification in the context of minor child/parent relationships.... In this case, we conclude that the real-world consequences of forced notification in the context of wife/husband relationships impose similar

> kinds of undue burdens on a woman's right to an abortion.

947 F.2d at 711 (emphasis added). *Amici* fully agree. And just as the courts should be attuned to the real-world consequences of forced notification in the context of familial relationships, so too should they heed the real-world burdens caused by other statutory requirements that would unduly burden a woman's abortion decision.

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Roe v. Wade and *Doe v. Bolton* did not countenance a test of constitutionality that would prohibit only absolute deprivations. *Roe*, 410 U.S. at 164-66 (1973)(specified standards of review); *Doe v. Bolton*, 410 U.S. 179 (1973)(procedural requirements held unduly restrictive). Correspondingly, under the undue burden standard, barriers to abortion that are constructed by government and that would impinge upon the ability of poor women to exercise their fundamental right must be recognized as burdensome.

Unlike the line of cases beginning with *Maher v. Roe*, 432 U.S. 464 (1977), and evidenced, most recently, in

Webster, 492 U.S. 490 (1989), and *Rust v. Sullivan*, 500 U.S. __, 114 L.Ed.2d 233 (1991), this case does not involve the question whether a state may choose not to grant benefits that would further the provision of abortion services. *See also Harris v. McRae*, 448 U.S. 297 (1980); *Poelker v. Doe* 432 U.S. 519 (1977); *Beal v. Doe*, 432 U.S. 438 (1977). To the contrary, the Pennsylvania laws at issue place discrete and burdensome obstacles in the pregnant woman's path to an abortion. Pennsylvania is not merely encouraging an alternative option, but, instead, actively delaying and otherwise burdening the exercise of a protected activity. *Compare Thornburgh*, 476 U.S. 747 (1986); *Akron*, 462 U.S. 416 (1983); *Danforth*, 428 U.S. 52 (1976); *Doe v. Bolton*, 410 U.S. 179 (1973).

"Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision... whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result... would protect inadequately

a central part of the sphere of liberty that our law guarantees equally to all...." *Thornburgh*, 476 U.S. at 772. *Amici* believe that the sphere of liberty guaranteed to all should contain protection for the right of poor women to make reproductive choices free from intrusion by burdensome government restrictions. We thus ask that the Court consider the burdens of governmental restrictions on the availability of abortions for poor women.

The provisions of the Pennsylvania Abortion Control Act requiring a 24-hour waiting period, parental consent and spousal notification actively interfere with women's decision-making and the provision of abortion services, and will limit the ability of poor women to obtain needed services. The provisions unduly burden the right to privacy and are unconstitutional.

CONCLUSION

For the foregoing reasons, the judgment of the Third Circuit regarding Sections 3205(a) and 3206 should be reversed, and the judgment regarding Section 3209 affirmed.

Respectfully submitted,

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