appointments, [37] arrange for payment, and physically present themselves at the abortion sites--all without letting their husbands find out. Neither the District Court nor the witness --who had no actual experience with spousal notification provisions, J.A. 239-240 (testimony of Lenore Walker)-- said how many of these women would find themselves "psychologically incapable" of checking off a line on a form, which is all that Section 3209 requires. See J.A. 504-505 (spousal notice form).

The petitioners thus did not show that Section 3209 would have anything close to the "broad practical effect" of severely limiting access to abortions.

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[37]Typically, the woman must have a pregnancy test before her abortion will even be scheduled, and the abortion itself is typicaly schedule within two weeks thereafter. Supra at 17.

Their challenge is more accurately characterized as an attempt to rely on a "worst-case analysis" which may never happen, and which is simply inadequate to support their facial challenge to the statute. Ohio, 110 S.Ct. at 2981.

In the absence of any undue burden, the only remaining question is whether Section 3209 is reasonably related to any legitimate state interest. Despite what the petitioners say, Pet. Br. at 43-44, there is no real question that a husband has a "deep and proper concern" in his wife's pregnancy and in the fetus she carries, Danforth, 428 U.S. at 69; that the abortion decision may profoundly affect the marriage, in which he also has an interest, id. at 70; and that the State legitimately may act to enable him to

protect those interests.[38]

Nor can there be any real question that the law is reasonably designed to further those ends. The petitioners argue that wives either tell their husbands about their abortion decisions already, or have good reasons for not telling them. In the first case, they say, the law is unnecessary, in the second case it is harmful, and in either case it is an irrational means of furthering whatever legitimate interests the state may have. Pet. Br. at 43-44. This argument was well answered in Justice Stevens' concurring

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[38]The petitioners say that Section 3209, like the law in Danforth, gives a husband the power to "compel[] his wife to bear children for him." Pet. Br. at 44. They ignore the distinction, which the Court has always recognized, between laws requiring consent and laws requiring mere notice. See, e.g., Matheson, 450 U.S. at 411 n. 17; Hodgson, 110 S.Ct. at 2969. (Kennedy, J., concurring in judgment in part and dissenting in part).

opinion in Matheson. Speaking in the admittably different context of parental notice, and harking back to his earlier concurrence in Danforth, Justice Stevens rejected similar arguments against Utah's statute:

> It is unrealistic, in my judgment, to assume that every parent-child relationship is either (a) so perfect that communication and accord will take place routinely or (b) so imperfect that the absence of communication reflects the child's correct prediction that the parent will ... [act] arbitrarily to further a selfish interest rather than the child's interest. A state legislature may conclude that most parents will be primarily interested in the welfare of their children....
>
> Utah's interest in its parental-notice statute is not diminished by the fact that there can be no guarantee that meaningful parent-child consultation will actually occur.... The possibility that some parents will not react with compassion and understanding... does not undercut the legitimacy of the State's attempt to

> establish a procedure that will enhance the probability that a pregnant young woman exercise as wisely as possible her right to make the abortion decision.

Matheson, 450 U.S. at 423-424 (Stevens,J., concurring in judgment)(footnote and citation omitted, bracketed matter in original), quoting Danforth, 428 U.S. at 103-104 (Stevens, J., concurring in part and dissenting in part).

The same is true here.[39] It may well

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[39]We do not suggest that the relationship between spouses equates with the parent-child relationship. Clearly, the interest served by parental notice--making available to the child the advice and support of her parents--is different from the interest served by spousal notice--preserving the possibility for a husband to participate in a decision that profoundly affects his own interest. This, however, does not undercut Justice Stevens' points that notice statutes are a rational way to pursue these interests, and that the possibility that such statutes might not always work out as intended does not destroy their legitimacy.

be true that a state cannot simply decree inter-familial communication that conforms to some idealized model of its own. But Section 3209 does nothing of the sort; rather, it seeks only to preserve the husband's interest in the possibility of such communication by making sure that the husband knows of his wife's intentions.

2. Other Issues.

The petitioners' remaining arguments require little discussion.[40] First, they claim that Section 3209 interferes with marital privacy. It is not entirely clear, however, what they mean by this, nor is it clear how a right to marital privacy--that is, the right to protect "the sanctity of their [marital] communications," Hodgson, 110 S.Ct. at

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[40]The Court of Appeals found it unnecessary to reach these arguments, 103a, n. 8, as did the District Court.

2944, n. 33 (opinion of Stevens, J.)(emphasis added)--can create a privacy interest in one spouse's unilateral decision to conceal important matters from the other. If the woman's own privacy interest is, as argued above, insufficient to justify this concealment, it is hard to see what is added by the invocation of the marital interest.

Lastly, the petitioners claim that Section 3209 violates the Equal Protection Clause. Pet. Br. at 47-48. Noting that Pennsylvania's law does not require that a husband notify his wife before undergoing a medical procedure that would affect his fertility, they claim that Section 3209 "embodies precisely the prohibited stereotype that wives should bear children." Id. at 48. The short answer to this is that the Court has repeatedly recognized the unique nature of the

abortion procedure and has repeatedly held that States are justified, because of its unique nature, in treating it differently from other medical procedures. Matheson, 450 U.S. at 412; Bellotti I, 428 U.S. at 148-149; Danforth, 428 U.S. at 67. Such state laws are based not upon a value judgment that all women should bear children, but upon the biological fact that only women bear children. Petitioners' reliance on the fact that spousal notice is not required in procedures that produce male sterility is thus misplaced. Pet. Br. at 46-47. The true analog to such procedures is not abortion, but female sterilization procedures. Pennsylvania requires neither wives nor husbands to notify their spouses of such procedures, and petitioners' equal protection claim is without merit.

E. CONFIDENTIAL REPORTS.

Section 3214 requires abortion facilities to file with the Department of Health an individual report for each abortion performed. These reports are kept confidential, as the law requires, and there is no evidence that any information from these reports identifying either a patient or a physician has ever been disclosed; in fact, neither this nor any other report even contains patients' names. Supra at 23; 205a-208a. The reports are used to gather a wide variety of information on maternal health, which is then released only in the form of statistical compilations. See, e.g., 149a-152a.

Among the information Section 3214 requires is the name of the referring physician, if any, § 3214(a)(1); and the bases for the following medical judgments:

that a third-trimester abortion was necessary to protect the life and health of the mother, § 3214(a)(8);[41] that a medical emergency existed, § 3214(a)(10); and the determination of gestational age, § 3214(a)(11). The petitioners claim that if these matters must be reported, physicians will be reluctant to refer or perform abortions, and that this in turn will reduce the availability of abortions. Pet Br. at 59. As the Court of Appeals said, however, these fears are at best unfounded, 79a-80a; and, we add, they are at worst self-fulfilling and self-serving. "Laws are not declared unconstitutional because of some general reluctance to follow a statutory scheme the legislature finds necessary to accomplish a legitimate

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[41]Second and third trimester abortions <u>together</u> accounted for only 6% of Pennsylvania abortions in 1988. 150a.

state objective." Hodgson, 110 S.Ct. at 2968 (Kennedy, J., concurring in judgment in part and dissenting in part).

These reporting requirements obviously further the Commonwealth's interest in collecting accurate information on maternal health, especially in the area of medically necessary abortions, and in ensuring compliance with the requirements of the Act.[42] 78-79a, 80a. They do not impose an undue burden on the abortion decision, and are

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[42]Under the Act, a referring physician may make the required determination of gestational age, § 3210(a), and may obtain the patient's informed consent, § 3205(a). In reviewing the reporting forms, the Department of Health sometimes finds it necessary to contact the reporting physician directly. 220a. While it may be true that the Department could rely on abortion clinics to obtain whatever information is needed from the referring physician, 272a-273a, it is not irrational for the legislature to prefer the Department to collect its data from the primary, and therefore most reliable, source.

therefore constitutional.

F. PUBLICLY AVAILABLE REPORTS.

Section 3209 requires each abortion facility to file a report with the Department of Health disclosing its name and address, and the names and addresses of any parent, subsidiary or affiliate organizations. Section 3214(f) requires each facility to file with the Department quarterly reports specifying the total number of abortions performed, broken down by trimester. Both of these reports are available for public inspection and copying only in the case of any facility which has received any state-appropriated money within the preceding 12 months. The petitioners claim that the public availability of these reports exposes them and their patients to abuse and harrassment from persons and groups who

are opposed to abortion.[43] Pet. Br. at 58. This claim, and the District Court's acceptance of it, 267a-268a, simply ignores two facts.

The first is that the identity and location of abortion providers is, and in the nature of things must be, easily accessible to the public. The petitioners could not function otherwise, and in fact all of them advertise in telephone directories, print or broadcast media. Supra at 26. The second fact, which follows unfortunately but naturally from the first, is that the petitioners are already the targets of substantial public protest, ibid., even though the public

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[43]They claim also that the public availability of these reports is an unconstitutional condition on their receipt of public funds, Pet. Br. at 58-59, n. 91. But as the Court of Appeals explained, 83a-85a, this adds nothing to the petitioners' case.

disclosure provisions of Sections 3209 and 3214 have never gone into effect. However disruptive and even illegal some of these protests may be, they are obviously not caused by these provisions of the Act. The petitioners, relying solely on their own self-serving speculations, claim that the public disclosure provision will result in an increase in such protests, 211a-213a, but the Court of Appeals correctly rejected their conclusory statements as insufficient to establish that these provisions will unduly burden the right to an abortion. 82a-83a.

On the other hand, the public disclosure provisions do further a legitimate state interest: that the public should know how its money is being spent. Such information is generally available to the public under Pennsylvania law, Pa. Stat. Ann., tit. 65, §§ 66.1 and 66.2

(Purdon 1959 & 1991 Supp.), and it hardly seems necessary to belabor either the legitimacy of the state's interest or the rationality of the means chosen to further it.

III. IN THE ALTERNATIVE, THE COURT SHOULD RE-EXAMINE AND OVERRULE ROE V. WADE, RETURNING THE REGULATION OF ABORTION TO THE STATES' DEMOCRATIC PROCESS.

In the preceding sections, we have argued at length that Roe v. Wade, properly understood and applied, does not forbid the abortion regulations contained in Pennsylvania's statute, and that this case therefore does not confront the Court with the necessity of reconsidering Roe. Nevertheless, it remains true that Roe is a deeply flawed decision, and it may be that the time has come to reconsider it.

The reasons for and against taking this step are familiar to the Court and need only be summarized here. On the one

hand, the Court is generally reluctant to formulate a rule of law broader than is necessary to decide the case that is actually before the Court. Webster, 492 U.S. at 525-526 (O'Connor, J., concurring in part and concurring in the judgment). On the other hand, the Court does overlook this rule fairly frequently, and it would be ironic if Roe, which itself decided a question so much more broadly than was necessary, should now be insulated from review by this rule. In addition, the no-broader-than-is-necessary rule, rigidly applied, would mean that many constitutional decisions could never be reconsidered until someone squarely defies them, a process that is unlikely to enhance either the development of the law or respect for the Court's decisions. Webster, 492 U.S. at 532-537 (Scalia, J., concurring in part and concurring in the

judgment).

If the Court does decide to reach the question of Roe's continuing validity--or, alternatively, if the Court must reach it because the Court holds that Pennsylvania's statute cannot be squared with Roe--the respondents have no doubt of the correct outcome. Justice White's formulation of the abortion right, in our view, is the correct one: "a woman's ability to choose an abortion is a species of 'liberty' that is subject to the general protections of the Due Process Clause. I cannot agree, however, that this liberty is so 'fundamental' that restrictions upon it call into play anything more than the most minimal judicial scrutiny." Thornburgh, 476 U.S. at 790 (White, J., dissenting); accord, Roe, 410 U.S. at 172-173 (Rehnquist, J., dissenting). The Court should overrule

anything in Roe to the contrary.

The arguments that support this position are, again, well known to the Court from the dissenting opinions in Thornburgh, in Akron, and in Roe itself. See also Br. of the United States as Amicus Curiae. Again, we do no more than summarize them here.

First and most importantly, Roe's holding that abortion is a fundamental constitutional right is untenable. The text of the Constitution obviously creates no such right; the text of the Constitution does not even mention abortion. Nor can such a right plausibly be located among the unenumerated, but still fundamental, rights protected by the Due Process Clause. The hallmark of such rights is that they are grounded in

> some source of constitutional value that reflects not the philisophical predilections of

> individual judges, but basic choices made by the people themselves in constituting their system of government... [Fundamental rights are located] either in the traditions and consensus of our society as a whole or in the logical implications of a system that recognizes both individual liberty and democratic order.

Thornburgh, 476 U.S. at 791 (White, J., dissenting). The holding in Roe has no such grounding--not in history and tradition, Roe, 410 U.S. at 174-177 (Rehnquist, J., dissenting), not in the necessary implications of a system of ordered liberty, Thornburgh, 476 U.S. at 793 (White, J., dissenting), and most certainly not in any consensus of society as a whole.

Nor can Roe be defended as the logical extension of the Court's "privacy" decisions. See Eisenstadt v. Baird, 405 U.S. 438 (1972); Stanley v. Georgia, 394 U.S. 557 (1969); Loving v. Virginia, 388

U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). The Court's decision in Roe underlined the difference between itself and these earlier privacy cases:

> The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus.... The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which Eisenstadt and Griswold, Stanley, Loving, Skinner, and Pierce and Meyer were concerned.

Id., 410 U.S. at 159. The decision in Roe was thus in no way preordained by the decisions in Eisenstadt, Griswold and the rest of the cases cited.[44] Roe's creation

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[44]By the same token, Roe's demise would in no way undermine those other decisions.

of a "fundamental" right which has no sound basis in the Constitution, in history, in a societal consensus, or even in the Court's own precedents, is simply an illegitimate exercise of "raw judicial power," Doe v. Bolton, 410 U.S. at 222 (White, J., dissenting), which the Court should disavow for this reason alone.

Second, the key points in Roe's analysis of the abortion right--viability and trimesters--are themselves arbitrary. As Justice White pointed out in his dissenting opinion in Thornburgh, the Court has never explained satisfactorily why the state's interest in protecting fetal life is "compelling" at the point of viability but not before. Id., 476 U.S. at 794-795. And as Justice O'Connor pointed out in her dissenting opinion in Akron, the trimester approach depends upon medical and technological factors which

are of no constitutional significance, and which in turn make the trimester approach so unreliable that the Court has already been forced to abandon it in part. Id., 462 U.S. at 454-456.

Third, Roe has had an "institutionally debilitating effect," Thornburgh, 476 U.S. at 814 (O'Connor, J., dissenting), on several levels. Roe stands as an anomaly among the Court's cases on fundamental constitutional rights, Akron, 462 U.S. at 452 (O'Connor, J., dissenting), working "a major distortion in the Court's constitutional jurisprudence." Thornburgh, 476 U.S. at 814 (O'Connor, J., dissenting). Far from being a source of stability in the law, Roe's arbitrariness has forced the Court to return to the issue of abortion time and time again, drawing ever finer lines to govern the states' attempts to regulate

in this area. Webster, 492 U.S. at 518 (opinion of Rehnquist, C.J.). This arbitrariness at times has infected other areas of the law as well, making it "painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion." Thornburgh, 476 U.S. at 814 (O'Connor, J., dissenting). In addition, by reinforcing the idea that the Court's proper function is to impose its own notions of sound public policy, Roe "continuously distorts the public perception of the role of this Court," Webster, 492 U.S. at 535 (Scalia, J., concurring in part and concurring in the judgment), in a way that in the long run is bound to damage the Court as an institution.

That damage is not to the Court

alone, but also to the very "principles of self-governance" in a democracy. Id. at 536 n.*. Abortion is "a field where [the Court] has little proper business since the answers to most of the cruel questions posed are political and not juridical." Id. at 532. "Leaving the matter to the political process is not only legally correct, it is pragmatically so. That alone...can produce compromises satisfying a sufficient mass of the electorate that this deeply felt issue will cease distorting the remainder of our democratic process." Ohio, 110 S.Ct. at 2984 (Scalia, J., concurring). For all these reasons, the Court should overrule Roe.

The petitioners protest, however, that "[n]ever before has this Court bestowed, then taken back, a fundamental right that has been part of the settled rights and expectations of literally

millions of Americans...." Pet. Br. at 20. This, of course, is not true, and the parallel with the earlier case is instructive. Lochner v. New York, 198 U.S. 45 (1905), was, before Roe, the Court's last venture into substantive due process.[45] In Lochner as in Roe, the Court began with an undoubted liberty interest--in Lochner, the right of the individual to work as "may seem to him appropriate or necessary for the support of himself and his family," id., 198 U.S. at 56--which the Court then elevated into a fundamental right immune from state regulations which today seem innocuous indeed. In phrases that might have come from Thornburgh, the Court struck down New York regulations that allowed bakers to

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[45]The suggestion that Roe and Lochner have much in common is, of course, not a new one. See Roe, 410 U.S. at 174 (Rehnquist, J., dissenting).

work "only" ten hours per day and "only" sixty hours per week, as "mere meddlesome interferences with the rights of the individual," Lochner 198 U.S. at 61, enacted from "some other motive...than the purpose to subserve the public health or welfare." Id. at 63. Cf. Thornburgh, 476 U.S. at 759 (disparaging the motives presumed to underlie measures regulating abortion).

The Court has long since disavowed Lochner--in the petitioners' terms, it "took back" the right it had "bestowed"--see Ferguson v. Skrupa, 372 U.S. 726 (1963), and it should do the same with Roe. The petitioners' very phraseology betrays their, and Roe's, error. In this country, rights are not "bestowed" by this Court, but by the people, through the Constitution which they have ordained. When the Court finds itself usurping this

function, as it did in Lochner and as we think it did in Roe, it is time to change course.

CONCLUSION

Respondents ask the Court to reverse the Court of Appeals' judgment that the Act's spousal notice provisions are unconstitutional, and in all other respects to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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