No. 91-744

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.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals correctly applied Marks v. United States, 430 U.S. 188 (1977), to the fragmented decisions of Webster v. Reproductive Health Services, 492 U.S. 490 (1989), and Hodgson v Minnesota, No. 88-1125 (U.S. June 25, 1990), to identify the undue burden standard as the currently binding standard of review of abortion legislation?

LIST OF PARTIES

Petitioners are Planned Parenthood of Southeastern Pennsylvania; Reproductive Health and Counselling Center; Women's Health Services, Inc.; Women's Suburban Clinic; Allentown Women's Center; Northeast Women's Center; and Thomas Allen, representing himself and a class of similarly situated physicians.

Respondents are Robert P. Casey, the Governor of Pennsylvania; Allan S. Noonan, Acting Secretary of the Pennsylvania Department of Health[1]; and Ernest D. Preate, Jr., the Attorney General of Pennsylvania.[2]

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[1] Substituted for former Secretary of Health N. Mark Richards, see Sup. Ct. R. 35.3.

[2] The caption on the opinion of the Court of Appeals reflects the presence of Michael D. Marino as a party, but in fact the parties stipulated to his dismissal in the District Court. (A. 117a).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTION:

STATUTES and RULES

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment's Due Process Clause provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const., Amend. XIV, §1.

2. The following amendments to the Pennsylvania Abortion Control Act of 1982, 18 Pa. Cons. Stat., §§3201-3220 (1990) are involved: §3203 (definition of medical emergency), §3205, §3206, §3207(b), §3208, and §3214(a),(f). (A. 298a-300a, 302a-304a). Section 3209 (spousal notification) (A. 301-302a) is not involved. (See Pet. at 5 n.2.)

STATEMENT OF THE CASE

This action challenges the constitutionality of Pennsylvania's Abortion Control Act, 18 Pa. Cons. Stat. §§3201-3220 (1990). The Court of Appeals upheld all but one section of the Act after concluding that the provisions did not unduly burden a woman's right to have an abortion. Petitioners, abortion facilities and a class of physicians, challenge the "undue burden" standard of review applied by the Court of Appeals, although the question they present is whether this Court has overruled Roe v. Wade, 410 U.S. 113 (1973).

1. But for abortions sought solely because of the sex of the fetus (18 Pa. Cons. Stat. §3204(c)), Pennsylvania's Act does not prohibit pre-viability abortions. Rather, enacted to further the Commonwealth's interests

in protecting, inter alia, maternal and fetal health and parental involvement with a woman's abortion decision, 18 Pa. Cons. Stat. §3202(a), the Act requires abortion providers to take certain steps prior to performing an abortion.

Informed consent provisions require that, twenty-four hours before an abortion, a physician provide the pregnant woman with certain medical information, and that either a physician or counselor advise the woman of possible childbirth and paternal support benefits. 18 Pa. Cons. Stat. §3205(a)(2). A woman also must be advised of the availability of printed materials describing the fetus and listing agencies offering alternatives to abortion. Id., §§3205(a)(2)(i), 3208 (A. 289a-292a, 298a-300a.)

Section 3206 of the Act requires the informed consent of one parent for a minor who desires an abortion, but

provides a judicial bypass option if the minor does not, or cannot, obtain a parent's consent. Id., §3206. (A.292a-297a). Section 3209 requires, with certain exceptions, that a married woman who is about to undergo an abortion notify her husband and provide her doctor with a signed statement that she has done so. Id., §3209.

In cases of medical emergencies, defined in Section 3203 of the Act, id., §3203 (A. 289a), compliance with the various consent and notice requirements is excused.

To the extent a facility receives state-appropriated money, the Act directs that certain facility and statistical reports be available for public inspection. Id., §§3207(a), 3214(f). (A. 298a, 304a). The Act also has confidential recordkeeping and

reporting requirements. Id., §3214(a). (A. 302a-304a).

2. The Abortion Control Act was amended in 1988. Before the amendments could go into effect, petitioners brought this action in the United States District Court for the Eastern District of Pennsylvania, seeking declaratory and injunctive relief against a wide array of the provisions. The District Court issued a preliminary injunction. In 1989, while the case was still pending in the District Court, the Pennsylvania legislature again amended the Act. Petitioners amended their complaint to encompass the 1989 amendments, and the District Court likewise expanded the preliminary injunction.

After a bench trial, the District Court issued a permanent injunction granting petitioners virtually all the relief they had requested. The

District Court enjoined implementation of provisions of the Act relating to informed consent, parental consent for abortions on minors, spousal notification, public disclosure of certain reports, and the collection of certain other information. (A. 238a-262a, 266a-279a, 285a-287a). In addition, the District Court enjoined implementation of all provisions of the Act that contain an exception for medical emergencies on the ground that the exception was inadequate. (A. 235a-237a, 286a). Respondents, but not the petitioners, appealed.[3]

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[3]Petitioners had asked the District Court to enjoin the collection of virtually all information on abortions, and to enjoin the Act's requirement that the gestational age of the unborn child be ascertained, but the District Court was unwilling to go so far. (A. 263a-266a, 269a-279a). These were the only respects in which the petitioners were unsuccessful in the District Court, and they did not appeal.

3. The Court of Appeals largely reversed the District Court, the three-judge panel unanimously holding that most of the challenged provisions of the Act are constitutional. (A. 1a-86a). The sole exception was the spousal notice provisions, on which the panel divided with two judges of the majority holding Section 3209 unconstitutional. (A. 60a-80a). The dissenting judge, believing Section 3209 to be constitutional, would have reversed the District Court on this point as well. (A. 96a-103a).

a. The Court of Appeals first considered the issue of the appropriate standard of review. The Court of Appeals observed that in such cases as Roe v. Wade, 410 U.S. 113 (1973), and Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986), a majority of the Court held that all

abortion legislation must be measured against "strict scrutiny"; that is, "it must be justified by a 'compelling state interest' and 'must be narrowly drawn' to serve that interest." (A. 10a, quoting Roe v. Wade, 410 U.S. at 155). However, after a painstaking analysis of the Court's more recent decisions, particularly the fragmented decisions in Webster v Reproductive Health Services, 492 U.S. 490 (1989), and Hodgson v. Minnesota, No. 88-1125 (June 25, 1990), the Court of Appeals concluded that a majority of the Court had abandoned the strict scrutiny standard, but that no majority had coalesced around any single alternative standard. (A. 24a-30a).

The Court of Appeals then turned for guidance to Marks v. United States, 430 U.S. 188 (1977), on which it relied for two principles: first, that "a legal standard endorsed by the Court ceases to

be the law of the land when a majority of the Court in a subsequent case declines to apply it"; and second, that "the controlling opinion in a splintered decision is that of the Justice or Justices who concur on the 'narrowest grounds'." (A. 20a-21a). In light of Marks, the Court of Appeals identified Justice O'Connor's concurring opinions in Webster and Hodgson as embodying the controlling standard of those cases. That standard, which the Court of Appeals called the "undue burden" standard, "appl[ies] strict scrutiny review to regulations that impose an undue burden [on the right to abortion] and rational basis review to those which do not." (A. 30a).

b. Applying this undue burden standard to the Abortion Control Act, the Court of Appeals held that all but one of the challenged provisions did not impose

an undue burden and did have some rational basis on their face.[4] The court unanimously held that the Act's informed consent provisions, 18 Pa. Cons. Stat. §3205(a) (A. 289a-291a), rationally related to the Commonwealth's interest in ensuring both an informed and well-considered decision, thus furthering maternal health and the potential life of the fetus. Any burdens created were either "insignificant" (A. 46a, 49a), no greater than those found in sanctioned judicial bypass provisions, (A. 52a-55a), or failed to impose absolute obstacles or severe limitations on a woman's ability to have an abortion.[5] (A. 44a-55a).

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[4] Since the Act has never been allowed to go into effect, the petitioners' attack on it could only be a facial one.

[5] The Court of Appeals also upheld the informed consent provisions against petitioners' First Amendment challenges. (A. 50a-52a).

The Court of Appeals further held that Pennsylvania's one-parent consent provision with a judicial bypass option comported with prior decisions of this Court in all respects. (A. 55a-60a). To the extent Section 3206 required a parent's "informed" and, thus, possible in-person consent, the judicial bypass option alleviated any undue burden. (A. 58a n.23).

As to confidential reporting requirements regarding medical actions taken under the Act, id. §3214(a) (A. 302a-304a), the Court of Appeals found no undue burden created by cost increases of "at most a few dollars per abortion." (A. 78a). The only "chilling effect" occurred with those physicians who did not comply with the Act. (A. 75a-80a). Likewise, since Sections 3207(b) and 3214(f)(concerning public inspection of certain reports of facilities receiving

state-appropriated funds) (A.298a, 304a) had never been in effect, the Court of Appeals found no clear nexus between public disclosure of certain information and increased public protests or violence at clinics that publicly advertised or listed themselves in the phone book. (A. 82a-83a).

Additionally, the Court of Appeals unanimously upheld the Act's definition of medical emergency, id., §3203 (A.289a), concluding that the petitioners' interpretation of the definition to exclude certain medical situations was "unduly restrictive." (A. 39a, 35a-41a). Thus, the court found the definition neither unconstitutionally narrow nor void for vagueness. (A. 35a-43a).

In the only provision enjoined, spousal notification, id., §3209 (A. 300-303a), the Court of Appeals divided,

with the majority holding that spousal notification exposed women to economic and psychological abuse from hostile spouses intent on preventing or penalizing their abortions, and that this imposed an undue burden. Though some of the interests served by spousal notification were legitimate, none were compelling to survive strict scrutiny. (A. 62a-74a). The dissent, however, found no "broad practical impact" of severely limiting the availability of abortions for large numbers of women and would have upheld Section 3209. (A. 96a-103a).

4. The petitioners have now asked the Court to review the Court of Appeals' judgment insofar as it upholds the Act. The respondents, simultaneously with this brief in opposition, have filed

their own petition asking the Court to review the Court of Appeals' judgment that Section 3209's spousal notice provision is unconstitutional.[6]

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[6] The Court may wish to defer action on this petition until the respondents' petition is also ripe for disposition.

SUMMARY OF ARGUMENT

Putting aside the rhetoric of the petition for certiorari, petitioners ask whether the Court of Appeals properly applied Marks v. United States, 430 U.S. 188 (1977), to the splintered decisions of Webster and Hodgson to determine the current standard of review of abortion regulations. This is not a terribly difficult question--in recent cases a majority of the sitting Justices clearly abandoned the strict scrutiny test, with Justice O'Connor's "undue burden" test presently reflecting the controlling standard. Disagreement over the application of well-settled legal principles to a specific case, particularly absent a conflict among the Court of Appeals, does not merit this Court's discretionary review.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY IDENTIFIED THE STANDARD OF REVIEW FOR ABORTION LEGISLATION BY THE ROUTINE APPLICATION OF WELL-ESTABLISHED LEGAL PRINCIPLES

1. This petition for certiorari is an extraordinary document, all too obviously constructed more for political than for legal purposes. Petitioners first lecture the Court on the "symbolic importance" of one of its own decisions, Pet. at 6-8; then they make the bizarre accusation that the Court has "fostered" firebombings and other crimes, Pet. at 12-13; and in a final burst of illogic, they invoke the protections of majority rule even as they ask the Court to strike down the act of a democratically elected legislature. Pet. at 13.

Just as extraordinary is what the petitioners do not say. They do not ask the Court to reconsider Webster v. Reproductive Health Services, 492 U.S.

490 (1989), or Hodgson v. Minnesota, No. 88-1125 (June 25, 1990); nor do they ask the Court to review the Court of Appeals' application of the "undue burden" standard derived from those decisions. Rather, the question the petitioners present--putting aside all their posturing and melodrama--is quite simple and quite narrow: did the Court of Appeals correctly apply Marks v. United States, 430 U.S. 188 (1977), to the fragmented decisions in Webster and Hodgson to identify the current standard of review of abortion legislation? That petitioners gloss over the Court of Appeals' supposed misapplication of Marks in a few lines of a footnote (Pet. at 9-10 n.6) demonstrates that this narrow question does not warrant the

court's review.[7]

2. Contrary to petitioners' contentions, the Court of Appeals did not reverse Roe, (Pet. at 5), and create a new, more lenient undue burden standard of review (id. at 8). Rather, the Court of Appeals recognized that the majority of this Court had abandoned the strict scrutiny test in Webster and Hodgson.

a. In a painstaking analysis of these fragmented decisions, the Court of

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[7] Unlike the petitioners, the respondents in their petition do not challenge the Court of Appeals' holding that the undue burden standard embodies the currently binding rule. Instead they ask that the Court provide guidance on the proper application of that standard or, alternatively, that the Court move to a more deferential standard of review. Petition for Certiorari at 22-26, Casey v. Planned Parenthood of Southeastern Pennsylvania, No. 91-____ (filed Dec. 9, 1991).

Appeals applied well-recognized principles expressed in Marks, 430 U.S. at 193. (A. 18a-24a). See supra at 7-9. The Court of Appeals then correctly concluded that a majority of this Court had abandoned the strict scrutiny test. Though no majority coalesced around a single alternative standard, Justice O'Connor's "undue burden" test reflected the narrowest ground commanding the Court's majority.[8] (A.24a-30a).

b. In Webster, five Justices upheld Missouri's viability testing provision in three opinions. Chief

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[8] Petitioners' claim that the Court of Appeals ignored the Court's admonishment that only this Court can overrule one of its precedents, (see Pet. at 8-9, citing Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989)), obviously misunderstands the holding of Marks and the Court of Appeal's careful application of it. (A. 15a-32a & n.13).

Justice Rehnquist, joined by Justice White and Kennedy, upheld the provision under a "permissibly furthers", or rational basis test. 492 U.S. at 519-20 (A. 24a). Justice Scalia concurred, similarly rejecting strict scrutiny review and stating that Roe should be explicitly overruled. Id. at 532 (Scalia, J. concurring) (A. 24a). The deciding vote was cast by Justice O'Connor, who concluded that the testing requirements did not impose an undue burden on a woman's abortion decision.[9] Id. at 530 (O'Connor, J., concurring in part and concurring in judgment)(A. 24a-27a & n.10).

Likewise, in Hodgson, the same five sitting Justices upheld a two-parent

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[9] Petitioners argue that Justice O'Connor did not apply an undue burden

(... continued)

notification statute with a judicial bypass option. Again, Justice Kennedy, joined by Chief Justice Rehnquist, and Justices White and Scalia, found the provision constitutional under rational basis review. Slip op. at 1-22. (Kennedy, J., concurring in the judgment in part and dissenting in part). Justice O'Connor concurred in the judgment,

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9. (... continued)

test in Webster, quoting her statement that the viability testing provision did not conflict with the Court's past decisions. (Pet. at 9 n.6, quoting 492 U.S. at 525). First, petitioners disregard the fact that Justice O'Connor's comment was in response to the plurality's discarding of Roe's trimester framework. 492 U.S. at 525-30 (O'Connor, J., concurring in part). Second, petitioners ignore the fact that Justice O'Connor herself has cited her Webster concurrence as relying on the undue burden standard. See Hodgson, slip op. at 2 (O'Connor, J., concurring in part). The Court of Appeals did not similarly disregard these points. (A. 25a-27a n.10).

specifically resting on the undue burden standard:

> It has been my understanding in this area that "[i]f the particular regulation does not 'unduly burde[n]' the fundamental right, ... then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose." Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 453 (1983)(O'Connor, J., dissenting); see also Webster v. Reproductive Health Services, 492 U.S. _____, _____ (1989)(O'Connor, J., concurring in part and concurring in judgment) (slip op. at 9).

Hodgson, slip op. at 2 (O'Connor, J., concurring in part and concurring in judgment in part). As in Webster, therefore, the majority rejected strict scrutiny--with the undue burden standard of review being the narrowest ground commanding the majority. (A. 26a-30a).

The Court of Appeals' straightforward application of Marks to these fragmented decisions was neither "unusual," "unprecedented," nor

"aberrational" (Pet. at 4, 10, 12)--nor, we add, was it particularly difficult. It was, rather, the routine application of a long-settled principle which, as the Court of Appeals pointed out, has been applied in a wide variety of contexts. (A. 21a-23a) (collecting cases).

It bears repeating that petitioners do not ask the Court to reverse Webster and Hodgson, nor to determine whether the Court of Appeals correctly applied the undue burden standard it derived from them. The narrow question which they do present--a challenge to the application of well-settled legal principles to a specific case--does not merit the Court's discretionary review.

II. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS.

To date, the Third Circuit's decision that Webster and Hodgson altered

the standard of review of abortion regulations is the only detailed analysis of the issue. Contrary to petitioners' assertions, there is no conflict among the Courts of Appeals on this issue.[10]

1. Petitioners miscite five Court of Appeal decisions as holding that "neither Webster nor Hodgson established a new standard of review...." (Pet. at 11). Two of these decisions have been vacated: Planned Parenthood Federation of America v. Sullivan, 913 F.2d 1492 (10th Cir. 1990), vacated and remanded, 111 S.Ct. 2252 (1991), vacated, 940 F.2d

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[10] Petitioners' assertion that the Court of Appeals decision contravenes this Court's rulings in Roe v. Wade, 410 U.S. 113 (1973), Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983), and Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. (1986), is meritless in light of the changed standard of review. (A. 30a-32a).

608 (10th Cir. 1991), and Massachusetts v. Sullivan, 899 F.2d 53 (1st Cir. 1990)(en banc), vacated and remanded, 111 S.Ct. 2252 (1991). Both decisions, moreover, addressed First and Fourteenth Amendment challenges to Title X funding regulations prohibiting abortion counseling; neither addressed the standard of review in light of Webster and Hodgson.

Likewise, none of the other cited Court of Appeals decisions address the issue here: the application of Marks to Webster and Hodgson concerning the applicable standard of review. See Ragsdale v. Turnock, 941 F.2d 501, 505 n.1 (7th Cir. 1991)(observing that recent Supreme Court decisions did not alter the state's lack of likelihood of success in upholding Illinois' settlement of a class action challenge to its statute); Glick v. McKay, 937 F.2d 434,

441 (9th Cir. 1991)(holding a parental bypass provision inadequate because, inter alia, judicial review could be of indefinite duration); Arnold v. Board of Education, 880 F.2d 305, 311 n.6 (11th Cir. 1989)(noting that Webster did not affect its conclusion that a minor's allegation that school officials coerced her into undergoing an abortion stated a claim under 42 U.S.C. §1983).

2. Respondents are aware of only two Court of Appeals decisions that discuss the issue here to any degree. In Planned Parenthood of Minnesota v. Minnesota, 910 F.2d 479, 480 (8th Cir. 1990), the Eighth Circuit commented that it appeared the Supreme Court adopted a less rigorous standard of review in Webster. The Court of Appeals did not reach the issue, though, because the challenged regulation did not burden the abortion decision.

Similarly, the Eleventh Circuit acknowledged that Hodgson suggested a more lenient standard of review. Planned Parenthood Association of the Atlanta Area, Inc. v. Miller, 934 F.2d 1462, 1469-70 n.11 (11th Cir. 1991). Although the Court of Appeals observed it did not "believe" a majority of this Court had "authoritatively" abandoned the narrowly tailored apsect of strict scrutiny, it went on to admit that "the applicable standard may be lower." Id. at 1470 n.11. The court did not resolve the issue, however, since Georgia's act was, in fact, narrowly drawn. Id.

Therefore, there is no conflict among the Courts of Appeals, with two circuits, in fact, acknowledging that Webster and Hodgson may have lowered the standard of review. Accordingly, there is no need for the Court to step in to settle a "conflict" that does not exist.

CONCLUSION

For the foregoing reasons, the respondents ask that the writ of certiorari be denied.

Respectfully submitted,

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