No. 91-902

In the Supreme Court of the United States

October Term, 1991

ROBERT P. CASEY, et al.,
Petitioners

v.

PLANNED PARENTHOOD OF
SOUTHEASTERN PENNSYLVANIA, et al.,
Respondents

Petition for Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether the "spousal notice" provision in Pennsylvania's Abortion Control Act, which with certain exceptions requires a woman to notify her spouse before she undergoes an abortion, violates the Due Process Clause?

2. Whether the court should adopt a standard of review of state abortion law that affords the states greater latitude in the regulation of abortion?

LIST OF PARTIES

The petitioners 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.

The respondents 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.[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. Pet. App. 130a n.

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The opinion of the Court of Appeals is not yet reported but is reprinted in the Appendix at p. 1a. The opinion of the District Court is reported at 744 F. Supp. 1323 and is reprinted in the Appendix at p. 104a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on October 21, 1991 and this petition is being filed within 90 days thereafter. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

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. Section 3209 of the Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. § 3209 (1990), provides as follows:

> § 3209. Spousal notice
>
> (a) Spousal notice required.--In order to further the Commonwealth's interest in promoting the integrity of the marital relationship and to protect a spouse's interest in having children within marriage and in protecting the prenatal life of that spouse's child, no physician shall perform an abortion on a married woman, except as provided in subsection (b) and (c), unless he or she has received a signed statement, which need not be notarized, from the woman upon whom the abortion is to be performed, that she has notified her spouse that she is about

to undergo an abortion. The statement shall bear a notice that any false statement made therein is punishable by law.

(b) Exceptions.--The statement certifying that the notice required by subsection (a) has been given need not be furnished where the woman provides the physician a signed statement certifying at least one of the following:

(1) Her spouse is not the father of the child.
(2) Her spouse, after diligent effort, could not be located.
(3) The pregnancy is a result of spousal sexual assault as described in section 3128 (relating to spousal sexual assault), which has been reported to a law enforcement agency having the requisite jurisdiction.
(4) The woman has reason to believe that the furnishing of notice to her spouse is likely to result in the infliction of bodily injury upon her by her spouse or by another individual.

Such statement need not be notarized, but shall bear a notice that any false statements made therein are punishable by law.

(c) Medical emergency.--The requirements of subsection (a) shall not apply in a case of a medical emergency.

(d) Forms.--The department shall cause to be published forms which may be utilized for purposes of providing the signed statements required by subsections (a) and (b). The department shall distribute an adequate supply of such forms to all abortion facilities in this Commonwealth.

(e) Penalty; civil action.--Any physician who violates the provisions of this section is guilty of "unprofessional conduct," and his or her license for the practice of medicine and surgery shall be subject to suspension or revocation in accordance with procedures provided under the act of October 5, 1978 (P.L. 1109, No. 261), known as the Osteopathic Medical Practice Act, the act of December 20, 1985 (P.L. 457, No. 112), known as the Medical Practice Act of 1985, or their successor acts. In addition, any physician who knowingly violates the provisions of this section shall be civilly liable to the spouse who is the father of the aborted child for any damages caused thereby and for punitive damages in the amount of $5,000, and the court shall award a prevailing plaintiff a reasonable attorney fee as part of costs.

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 most of the Act, but struck down the Act's "spousal notice" provision, which with certain exceptions requires a woman to tell her husband before she undergoes an abortion. Petitioners, the Governor of Pennsylvania and other state officials, ask the Court to review that holding.

1. Spousal notice is governed by Section 3209 of the Act, 18 Pa. Cons. Stat. § 3209 (1990).[3] Enacted "to further the Commonwealth's interest in promoting the integrity of the marital relationship and to protect a spouse's

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[3] Section 3209 is reprinted in full at p. 3-5, supra.

interests in having children within marriage and in protecting the prenatal life of that child," ibid, Section 3209 requires 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(a).

The spousal notice requirement does not apply in the case of a medical emergency, id., § 3209(c). Nor does it apply where the woman provides a statement that she has not notified her husband because he is not the father of the child or could not, after diligent effort, be located; or because the pregnancy resulted from a reported incident of spousal sexual assault; or because she has reason to believe that notifying her spouse will likely subject her to bodily injury. Id., § 3209(b).

These statements -- that the woman has notified her husband or that she is invoking one of the statutory exceptions -- need not be notarized, but must bear a notice that false statements are punishable by law, id., § 3209(a),(b); the Pennsylvania Department of Health is required to prepare and furnish forms for this purpose. Id., § 3209(d). A knowingly false statement is punishable as a third degree misdemeanor, id., § 3218(c).[4] A physician who violates Section 3209 does not face criminal prosecution, but may be subject to professional licensure sanctions and to civil liability to the woman's spouse. Id., § 3209(e).

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[4] Under Pennsylvania law, a third degree misdemeanor is punishable by up to one year in prison and a fine of up to $2500. Id., §§ 1101(5), 1104(3).

2. The Abortion Control Act was enacted in 1982 and substantially amended in 1988, in the wake of the Court's decision in Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (striking down 1982 Abortion Control Act). Before the amended Act could go into effect, the respondents 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 Act's provisions. Pet. App. 105a-106a. The District Court issued a preliminary injunction. Pet. App. 108a. In 1989, while the case was still pending in the District Court, the Pennsylvania legislature further amended the Act by, inter alia, adding the spousal notice provision. Respondents amended their complaint to encompass the

1989 amendments, and the District Court likewise expanded the preliminary injunction. Pet App. 109a-110a.

After a bench trial, the District Court issued a permanent injunction granting respondents virtually all the relief they had requested. The District Court permanently enjoined the implementation of the spousal notice provisions of Section 3209, Pet App. 406a-429a; as well as those provisions of the Act relating to informed consent (Section 3205), Pet. App. 377a-395a; parental consent for abortions on minors (Section 3206), Pet. App. 396a-406a; public disclosure of certain information (Sections 3207 and 3214), Pet. App. 435a-441a; and the collection of certain other information (Section 3214), Pet. App. 447a-450a, 452a-453a. In addition, the District Court enjoined the implementation of all provisions of the

Act that contain an exception for medical emergencies, on the ground that that exception was inadequate (see Section 3203, defining "medical emergency"), Pet. App. 371a-377a. The petitioners, but not the respondents, appealed.[5]

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. The sole exception was the spousal notice provision, on which the panel divided:

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[5] The respondents 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. Pet. App. 429a-434a, 442a-444a, 450a-452a, 453a-462a. These were the only respects in which the respondents were unsuccessful in the District Court, and they did not appeal.

the two judges of the majority held Section 3209 unconstitutional and therefore affirmed the District Court's judgment on this point, while the dissenting judge, believing Section 3209 to be constitutional, would have reversed the District Court on this point as well.

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, 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." Pet. App. 10a, quoting Roe, 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. Pet. App. 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", Pet. App. 20a; and second, that "the controlling opinion in a splintered decision is that of the Justice or Justices who concur on

the 'narrowest grounds'", Pet. App. 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. Pet. App. 29a-30a. 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." Pet. App. 30a.

b. Applying this undue burden standard to the Abortion Control Act, the Court of Appeals held that most of the challenged provisions did not impose an undue burden and did have some rational basis on their face.[6] Pet.

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

App. 33a-60a. The sole exception was Section 3209's provision for spousal notice.

The two judges of the majority held that spousal notice exposed married women to economic and psychological abuse from hostile spouses intent on preventing or penalizing their abortions, and that this imposed an undue burden. Pet. App. 60a-70a. They went on to hold that at least some of the interests served by spousal notice were legitimate, but none were compelling, and the provision thus could not survive strict scrutiny. Pet. App. 71a-74a.

Judge Alito, dissenting in part, agreed that it was "doubtful" that Section 3209 could pass strict scrutiny, Pet. App. 87a, but would not have subjected it to that test. In his view,

the respondents had not satisfactorily established that Section 3209 would have the "broad practical impact," Pet. App. 91a, of severely limiting the availability of abortions for large numbers of women. Pet. App. 90a-96a. He would therefore have held that Section 3209, on its face, does not impose an undue burden and that it passes rational basis review. Pet. App. 99a-103a.

REASONS FOR GRANTING THE WRIT

The issue in this case--the validity of spousal notice provisions in state laws regulating abortion--is one of first impression for the Court, and is of substantial public importance. In addition, this case presents the Court with the opportunity to provide much-needed guidance on the legal standard against which such laws should be reviewed.

I. THE VALIDITY OF SPOUSAL NOTICE PROVISIONS IS A SUBSTANTIAL ISSUE OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, ADDRESSED BY THE COURT.

Controversies about the extent to which the States permissibly may regulate abortion are among the most recurrent and intractable in the contemporary legal landscape. Pennsylvania's legislature, for example, has been struggling for 17 years to

enact an abortion control law that will pass constitutional muster; each effort has been immediately challenged and --so far--ultimately invalidated. See Colautti v. Franklin, 439 U.S. 379 (1979)(Abortion Control Act of 1974); Thornburgh (Abortion Control Act of 1982). The Court, too, has addressed this issue on innumerable occasions, issuing eight decisions just on the validity of parental consent and notification provisions. See Ohio v. Akron Center for Reproductive Health, No. 88-805 (June 25, 1990)(parental notice); Hodgson, slip op. at p. 15, n. 22 (parental notice; listing six previous decisions).

The Court, however, has never addressed the validity of a spousal

notice provision. In Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 67-72 (1976), the Court struck down a provision of a Missouri statute that required spousal consent to an abortion, but this is of little relevance to the validity of requiring spousal notice. In the related context of parental notice and consent provisions, four members of the Court have recognized that

> [t]he difference between notice and consent ...is apparent.... Unlike parental consent laws, a law requiring parental notice does not give any third party the legal right to make the minor's decision for her, or to prevent her from having an abortion should she choose to have one performed. We have acknowledged this distinction as "fundamental" and as one "substantially modify[ing] the federal constitutional challenge."

Hodgson v. Minnesota, slip op. at p. 17 (Kennedy, J., concurring and dissenting),

quoting Bellotti v. Baird, 428 U.S. 132, 145, 148 (1976). The Court's decisions on consent statutes are thus not easily applied to notice statutes.

Similarly, while the Court has devoted substantial attention, as noted above, to the issue of parental notice of abortions on minors, these decisions are of only limited help on the issue of spousal notice, with its very different calculus of interests.

Given the history of abortion litigation since Roe, it seems likely that this issue will continue to recur until the Court addresses it; and the decision of the Court of Appeals produced thoughtful and detailed opinions on each side. There is therefore little reason to delay the resolution of this issue, and the Court should take this opportunity to resolve it.

II. THE COURT SHOULD TAKE THIS OPPORTUNITY TO FORGE A NEW CONSENSUS ON THE PROPER REVIEW OF ABORTION LEGISLATION.

In its most recent decisions reviewing state laws regulating abortion, the Court was deeply divided over the outcomes, but still more deeply divided over the nature of the review process itself. In Webster v. Reproductive Health Services, five Justices voted to uphold the challenged Missouri statute, on three different grounds: three Justices would have held that the right to obtain an abortion is a liberty interest subject only to rational basis review, id., 492 U.S. at 513-521 (Opinion of Rehnquist, C.J.); one Justice applied the undue burden standard, id., 492 U.S. at 522 (O'Connor, J., concurring in part and concurring in the judgment); and one

Justice would have overruled Roe outright, id., 492 U.S. at 532 (Scalia, J., concurring in part and concurring in the judgment). Four Justices voted to invalidate the statute: three Justices would have applied strict scrutiny, id., 492 U.S. at 537 (Blackmun, J., concurring in part and dissenting in part); and one Justice did not specifically discuss the standard of review, id., 492 U.S at 560 (Stevens, J., concurring in part and dissenting in part).

In Hodgson v. Minnesota, the result was the same: the Chief Justice, with Justices White, Scalia and Kennedy, applied rational basis review; Justice O'Connor applied the undue burden standard; and Justices Brennan, Marshall and Blackmun applied strict scrutiny. Justice Scalia, although joining in the application of the rational basis test,

again called for overruling Roe, and Justice Stevens again did not argue for any specific standard of review.

The Court of Appeals in this case thus faced the task of sorting through these splintered decisions to find, and then apply, the correct legal standard. Finding the correct standard was fairly simple: the Court of Appeals correctly relied on the principles of Marks v. United States to guide it through this tangle, and correctly identified the opinions of Justice O'Connor as embodying the currently binding rule.

Applying that standard, once it had been identified, proved far more difficult. No other member of the Court has endorsed Justice O'Connor's undue burden standard. Consequently, in applying that standard, the Court of Appeals was forced to rely upon the views, and conjectures as to the possible

views, of a single Justice, a task which the Court of Appeals aptly compared to "read[ing]...tea leaves." Pet. App. 34a, n.

This is obviously unsatisfactory. The lower courts, and state legislatures as well, need some surer benchmark to guide them in this difficult and contentious area. The Court should review this case, continue the journey it began in Webster and Hodgson, and attempt to arrive at a new consensus.

Should a majority of the Court coalesce around the undue burden standard, the petitioners submit that that standard, properly applied, requires that Pennsylvania's spousal notice provision be upheld. The petitioners believe that the approach of Judge Alito in the Court of Appeals is the correct one, and that the respondents did not demonstate that the statute, on its face, imposes an undue burden.

Another approach is to subject all abortion legislation to rational basis review; this approach has already attracted the support of four Justices. See Hodgson (Kennedy, J., concurring in part and dissenting in part). Under this approach as well, Pennsylvania's spousal notice provisions would be upheld.

Still another approach is to overrule Roe altogether. See Webster, 492 U.S. at 532 (Scalia, J., concurring in part and concurring in the judgment). Under this approach, it is not clear how, or whether, review of abortion legislation would differ from review under the rational basis standard, but it presumably would be more deferential to state regulation than either strict scrutiny or undue burden review. Again, Pennsylvania's statute would survive such a regime.

Regardless of which approach is destined eventually to command a majority of the Court, the petitioners submit that it is imperative that the Court end the current uncertainty in the law of abortion. To that end, the Court should review this case.

CONCLUSION

For these reasons, the Court should grant this petition for certiorari and, upon review, the judgment of the Court of Appeals should be reversed in relevant part.

Respectfully submitted,

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