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IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 82-1785, 82-1846

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION, et al.,

Appellants
(Cross Appellees)

v.

RICHARD THORNBURGH, et al.,

Appellees
(Cross Appellants)

Appeals From Order of the
United States District Court
For The Eastern District of Pennsylvania
Dated December 7, 1982 in C.A. No. 82-4336

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

I. The District Court Properly Concluded That the 24-Hour Waiting Period Mandated By Section 3205 of the Act Would Impose Substantial Burdens On a Woman's Effectuation of Her Decision to Have an Abortion Which Cannot Be Justified By the Commonwealth.

Consistent with almost every court which has considered the issue, the district court concluded that the provision of Section 3205 of the Act which mandates a 24-hour waiting period between the time the woman is given information to secure her consent and the performance of the abortion is unconstitutional. (139a-141a) E.g., Planned Parenthood Ass'n v. Ashcroft, 655 F.2d 848, 866 (8th Cir. 1981), cert. granted, 50 U.S.L.W. 3934 (May 24, 1982); Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198, 1208 (6th Cir. 1981), cert. granted, 50 U.S.L.W. 3934 (May 24, 1982); Planned Parenthood League v. Bellotti, 641 F.2d 1006, 1014-16 (1st Cir. 1981); Charles v. Carey, 627 F.2d 772, 785-86 (7th Cir. 1980); Women's Medical Center v. Roberts, 530 F.Supp. 1136, 1145-47 (D.R.I. 1982); Margaret S. v. Edwards, 488 F.Supp. 181, 212-13 (E.D. La. 1980).[1]

1. The amici supporting defendants' position purport to distinguish these cases by suggesting that the waiting period imposed by the Pennsylvania Act occurs at a different time in the decisionmaking process than the waiting periods imposed by the statutes at issue in these cases. This distinction, however, is of no substance. A forced waiting

(Continued)

Despite this overwhelming weight of authority in which the very arguments advanced by defendants were rejected, defendants appeal that portion of the district court's order preliminarily enjoining the 24-hour waiting period.

Defendants initially suggest that the waiting period in the statute does not burden the abortion decision because some delay is already inherent in the current scheduling practices of medical providers. Such a comparison, however, misses the mark because the right of privacy protects the individual against delay imposed by governmental fiat. See Planned Parenthood League v. Bellotti, 641 F.2d at 1014 ("We consider first the question of burden, looking to whether this regulation burdens a woman's ability to make a decision regarding abortion free from governmental interference." (emphasis supplied))

Defendants also contend that any burden resulting from the one-day delay is de minimus because that delay, standing alone, imposes no particular increased risk to the

(Footnote continued)

period, whenever imposed, unconstitutionally burdens the abortion decision for the reasons stated in the text. The amici also reference Wolfe v. Schroering, 541 F.2d 523 (6th Cir. 1976), the only reported decision in which a waiting period was ultimately sustained. In Akron, supra, the Sixth Circuit enjoined a waiting period and explained that its earlier decision in Wolfe was based on the absence of a record demonstrating a burden on the abortion decision. 651 F.2d at 1208.

woman's health. The record establishes that each week of delay in performing an abortion increases the complication rate for the procedure by 15-30% and the death rate by 50%. (91a, ¶89) Thus, the district court properly concluded that a 24-hour delay increases health risks. Moreover, consistent with precedent, the district court considered the practical effect of the waiting period in combination with existing scheduling practices of abortion providers to determine that delays substantially in excess of 24 hours would result. See Planned Parenthood League v. Bellotti, supra, 641 F.2d at 1014; Charles v. Carey, 627 F.2d at 785; Women's Medical Center v. Roberts, supra, 530 F.Supp. at 1146; Margaret S. v. Edwards, supra, 488 F.Supp. at 212. Again, consistent with earlier decisions, the district court considered additional burdens such as the increased cost for transportation, meals and lodging or lost wages which the waiting period would impose upon women who must travel long distances and make two trips to secure an abortion.[2] (99a, ¶122, 123)

Conceding that the state's interest is not compelling, defendants attempt to avoid justifying these manifest burdens

2. The amici incorrectly argue that all women are already required to make two trips to the Elizabeth Blackwell Health Center, so that the 24-hour waiting period imposes no additional burden. The record establishes, however, that a woman can secure an abortion during one visit to Elizabeth Blackwell as well as to the clinics operated by Women's Health Services and Reproductive Health and Counseling Center. (74a, ¶19; 77a, ¶28; 80a, ¶38)

by arguing that they are not "undue" for some women. (Brief for Appellees at 24) Beyond relying on an inappropriate legal standard, the contention that the increased costs should be disregarded because some women may be able to bear them exhibits a callous disregard for the significant impact which even a small increase in the cost of an abortion can have on the indigent. The Constitution protects the rights of the woman with modest means who must travel hundreds of miles to secure an abortion to the same extent that it protects a wealthy woman or a woman who lives close to where abortion providers are located.[3]

Defendants contend that the mandatory 24-hour delay furthers the Commonwealth's legitimate interest in insuring informed consent on the theory that the abortion decision is often hurriedly reached and executed and that a period of reflection is necessary. This theory, however,

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3. Indeed, defendants' position regarding the increased costs which the 24-hour waiting period would impose on women graphically demonstrates the fundamental flaw in the undue burden test. Apparently, defendants are suggesting that this cost increase does not result in an undue burden because only a limited number of women seeking abortions will be affected, or because the average increase in costs for all women seeking abortions will be relatively small. These proffered rationalizations afford little comfort to the woman or teenager who is unable to miss two days of work or school or who cannot afford the increased cost of two trips to an abortion provider or the expense of overnight lodging. For these women, the "minimal" intrusion of the waiting period would have the same effect as a statute prohibiting abortion entirely.

totally ignores the record before the district court which establishes that most women have given a great deal of thought to the abortion decision before they ever seek medical care to terminate their pregnancy. (93a, ¶101; 95a, ¶109) Moreover, a forced delay serves no legitimate medical interest and may itself create additional anxiety, to the physical and psychological detriment of the woman. (100a, ¶125, 126) Thus, the asserted state interest, which not even defendants suggest is compelling,[4] cannot support the extraordinary harm which a forced waiting period would impose.

In short, the district court's conclusion that the 24-hour waiting period is unconstitutional is sound and the preliminary injunction against enforcement of that provision is fully warranted.

II. Defendants Contention That The Strict Scrutiny Standard Should Not Be Applied To Regulation Which "Enhances" The Abortion Decision Is Wholly Unworkable and Contrary to Roe v. Wade.

In a further attempt to support the constitution-

4. The amici, on the other hand, argue that this interest is compelling and that it warrants a forced waiting period applicable during all stages of pregnancy. Support for this novel assertion cannot be found in Roe v. Wade, 410 U.S. 113 (1973), or in any of the cases which have considered mandated waiting periods. The reliance of the amici on Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), is misplaced. In Danforth, the Supreme Court concluded that a requirement that the woman sign a voluntary consent form was constitutional, not because it was supported by a compelling state interest, but because it did not have a legally significant impact on the abortion decision in the first instance.

ality of the 24-hour waiting period, as well as other provisions of the Act, defendants and the amici contend that the strict scrutiny standard announced in Roe v. Wade should not apply to regulation which "enhance[s], rather than burden[s], the intelligent exercise of the constitutional right to decide whether or not to have an abortion." (Brief for Appellees at 12) Rather than measuring all regulation which has a legally significant impact on the abortion decision by the strict scrutiny standard, defendants would have the court apply the rational relationship test to those provisions which the state asserts have a positive impact.[5]

Indeed, such an analysis, which has never been applied by any court, is the antithesis of the constitutional right of privacy which protects from governmental interference the woman's ability to make and to effectuate the abortion decision in consultation with her physician. Thus, it is not for the sovereign to conclude that particular intrusions will enhance the decisionmaking process and thereby subvert the woman's own assessment of her best interest. Nor can the state relieve itself of the obligation to justify regula-

5. The proposition that the impact of a particular regulation can be characterized as "positive" or "negative" in the first instance is itself fatally flawed. As the preceding discussion of the 24-hour waiting period shows, that provision's purported "enhancement" of the decisionmaking process would be achieved only with the imposition of severe restrictions.

tion on the basis of its own claim that the regulation has a positive impact.

The only analytic framework which assures the protection of the privacy right mandated by the constitution is the strict scrutiny analysis of Roe v. Wade, which requires the state to justify any regulation which has a legally significant impact by reference to a compelling state interest. Defendants' advocacy of a standard which would relieve the Commonwealth of that responsibility here is a tacit admission that the district court failed to apply the strict scrutiny standard and that the Act cannot withstand such scrutiny.

III. The Equal Protection Challenge To The Parental/Judicial Consent Provisions of Section 3206 Is Not Controlled By the Plurality Opinion in Bellotti II.

Defendants recognize in their brief that the Equal Protection Clause mandates the application of a strict scrutiny standard when the classifications drawn by a statute impinge upon the exercise of fundamental rights. Further, as the Supreme Court has squarely held, pregnant minors do have a fundamental right to choose an abortion. E.g., Planned Parenthood of Central Missouri v. Danforth, supra, 428 U.S. at 72-75. Defendants nevertheless contend that the legislatively-created distinction between pregnant minors who seek medical assistance to terminate a pregnancy and

pregnant minors who seek other pregnancy-related medical care need not be justified by a compelling state interest because those provisions do not burden the minor's exercise of her fundamental right.[6]

Defendants' reliance on Justice Powell's plurality opinion in Bellotti v. Baird (II), 443 U.S. 622 (1979), to support this contention is misplaced. Bellotti II did not hold that statutory requirements for parental or judicial consent do not burden the minor's exercise of her right to seek an abortion. Indeed, such a holding would be contrary to common sense and to the record in this case, given the severe burdens which a minor must endure if she is required to seek parental consent or, alternatively, to navigate the judicial process. (101a-107a, ¶¶132-165) What Justice Powell concluded in Bellotti II was that, under certain circumstances, the state may be able to justify additional burdens on minors' rights which would otherwise be unconstitutional when applied to adults because of significant state

6. Both defendants and the amici suggest that plaintiffs have abandoned their other constitutional challenges to the parental/judicial consent provisions, as well as challenges to certain other provisions of the Act because they are not addressed specifically on appeal. Contrary to this suggestion, plaintiffs do not abandon or otherwise waive any claim regarding the Act's unconstitutionality asserted in their complaint or in the proceedings below. The arguments presented here and in plaintiffs' opening brief are sufficient to establish the error in the district court's denial of a preliminary injunction, which is the only issue on appeal.

interests which relate solely to the protection of minors.

The gravamen of the equal protection claim in this case is not that the Act discriminates against pregnant minor women in relationship to pregnant adult women. Rather, this claim arises because the parental/judicial consent provisions of the Act would treat minors who are similarly situated (i.e., pregnant minors who seek medical care related to their pregnancy) differently for purposes of consent. Because the burden of the additional regulation falls upon the pregnant minor exercising her constitutionally protected right to choose an abortion, the legislative classifications plainly impinge upon fundamental rights and, consequently, can be justified only if supported by a compelling state interest. San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 17 (1973).[7] Those interests identified by Justice Powell in Bellotti II which might support legislation which distinguishes minors from adults are not sufficiently compelling to justify the discrimination here between similarly situated minors.

7. In Planned Parenthood League v. Bellotti, supra, 641 F.2d at 1012-13, the First Circuit incorrectly applied the rational relationship test, rather than the compelling state interest test, to uphold the constitutionality of legislation which required parental or judicial consent for abortion by minors, but not for other medical care. The Court's reasoning is also flawed because it concludes that those state interests which might support burdens upon a minor's exercise of fundamental rights not otherwise constitutional when applied to adults are sufficient to support discrimination among minors.

It is this discrimination which the opinions in Planned Parenthood Ass'n v. Fitzpatrick, 401 F.Supp. 554 (E.D. Pa. 1975), aff'd mem. sub nom. Franklin v. Fitzpatrick, 428 U.S. 901 (1976), and Doe v. Zimmerman, 405 F.Supp. 534 (M.D. Pa. 1975), addressed when the courts concluded that the parental consent provisions of the 1974 Pennsylvania Abortion Control Act were unconstitutional. The conclusion reached in these cases is not inconsistant with Bellotti II as defendants contend. Indeed, because the Court in Bellotti II concluded that the parental/judicial consent statute before it was unconstitutional for other reasons, it expressly declined to consider the challenges to that statute based upon the Equal Protection Clause. 443 U.S. at 650 n.30.

Thus, plaintiffs' equal protection challenge to the parental/judicial consent provision of the Act is as valid today as it was when the challenges to the 1974 Act were brought. The district court's failure to consider this challenge and the import of Fitzpatrick and Zimmerman constitutes error which must be reversed.

IV. The Status Quo Should Be Maintained Until the Serious Constitutional Questions Arising from the Language of the Act Are Resolved.

The district court recognized, and defendants and the amici effectively concede, that serious constitutional

infirmities would exist if the Act were to preclude osteopaths from performing abortions, if the definition of "abortion" failed to import an intent standard, or if the term "significantly greater medical risk" in Section 3210(b) would require physicians to choose an abortion technique which is riskier to the woman than other available techniques. Rather than recognizing these infirmities as compelling reasons for maintaining the status quo until a full consideration of the merits, the district court strained to construe the offending provisions constitutionally so as to deny preliminary relief.

As discussed in plaintiffs' opening brief, the district court's attempts at construction constitute positive legislative enactment beyond the power of the federal courts.[8]

8. The arguments advanced by defendants and the amici to support the district court's various constructions differ materially from each other and from the district court's own rationale. The fact that several different analyses of the same language are presented points up the difficulty of construing the language in a constitutional manner and the absence of direct support in the statute for the proffered constructions. Compare Brief for Appellees at 38 (arguing intent standard exists in definition of abortion because of "with knowledge" language) with Brief for Amici Curiae at 30 (arguing intent standard arises from use of the term "to terminate"). Compare District Court's Memorandum at 51-53 (179a-181a) (finding osteopaths included in definition of physician because of use of term "medicine") with Brief for Appellees at 34 (arguing that the underinclusive definition of physician should simply be excised from the Act). Compare District Court's Memorandum at 40-43 (168a-171a) with Brief for Appellees at 35-37 and Brief for Amici Curiae at 29-30 (proposing three different definitions of "significantly" to cure the unconstitutionality of §3210(b)).

(Brief for Appellants at 35-43) More importantly, the district court's extraordinary efforts to resolve serious constitutional problems by statutory construction at a preliminary stage of the proceedings raise serious problems for medical providers forced to comply with the Act and threaten to restrict women's access to safe, legal abortions. These problems can be avoided if the status quo is maintained (i.e., if the present framework of abortion regulation in Pennsylvania remains in effect).

For example, the district court's preliminary conclusion that osteopaths are included in the definition of "physician," despite the strong evidence to the contrary, offers little comfort to an osteopathic physician confronted with the decision whether or not to continue to perform abortions. If osteopaths are not covered by the Act, performance of an abortion would constitute unauthorized practice of medicine and surgery subjecting the osteopathic physician to criminal penalties, including a fine of not less than $10,000 and imprisonment for 5 years. 63 Pa. Stat. Ann. §421.3 Thus, allowing the Act to take effect on the basis of the district court's tentative conclusion, which avoided consideration of the serious equal protection problems, would present an osteopathic physician with the frightening prospect of a criminal prosecution in which his only defense

would be the uncertain claim that the Act deprives him of equal protection of the law. The chilling effect of such a prospect on osteopaths who currently perform abortions and the concomitant restriction on women's access to safe, legal abortions is manifest.[9]

A ruling on a motion for preliminary injunction is not a final adjudication on the merits of the asserted claims. Rather, it is a tentative and temporary decision until the ultimate adjudication can be completed. The district court conceded that its ruling here was made under the pressure of the Act's effective date and that the issues presented are both complex and important. (131a) Thus, it was particularly anomalous for the district court to avoid important constitutional questions by straining to construe

9. Similar problems are created for the physician or counselor by the argument of the amici that the informed consent provisions of Section 3205(a) are constitutional because they do not forbid the physician's providing additional information for informed consent or preclude him from tailoring the dialogue to meet the particular needs of the woman. This argument is belied by the amici themselves when they contend that the requirements of Section 3205(a)(2)(i) and (ii) do not mandate the furnishing of legal advice because, "The statute states exactly what the woman must be told . . . ." (Brief for Amici Curiae at 22) The inconsistency in the arguments graphically illustrates the dilemma facing the physician or counselor forced to apply these provisions correctly, on pain of license suspension or revocation or criminal liability. 18 Pa. C.S.A. §3205(c). The Act fails to inform physicians and counselors to what extent they may deviate from or add to the mandated information to meet the particular needs of their patients without violating the letter or spirit of the Act.

the Act constitutionally without considering the serious impact which such a tentative construction would have upon abortion providers and women who seek to exercise their fundamental right to choose abortion.

As this Court concluded in Constructors Ass'n v. Kreps, 573 F.2d 811, 815 (3d Cir. 1978), "On the basis of the data before it, the district court must attempt to minimize the probable harm to legally protected interests between the time that the motion for a preliminary injunction is filed and the time of the final hearing." The district court failed to discharge that responsibility here, and its decision must be reversed.

CONCLUSION

For the reasons set forth above and in appellants' opening brief, that portion of the district court's order of December 7, 1982 denying plaintiffs' request for a preliminary injunction must be reversed and that portion of the order of December 7, 1982 granting a preliminary injunction against the enforcement of the 24-hour waiting period must be affirmed. This matter should be remanded to the district court with instructions to enter a preliminary injunction against enforcement of all provisions of the Pennsylvania Abortion

Control Act pending a final hearing on the merits of plaintiffs' claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the Reply Brief for Appellants were served upon counsel for appellees and for the amici curiae in the manner set forth below this 8th day of February, 1983.

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