U.S. Department of Justice
Office of the Solicitor General

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MEMORANDUM

TO: Samuel A. Alito
Charles J. Cooper
Kenneth Cribb
Stephen Galebach
Carolyn Kuhl
William B. Reynolds
Richard Willard

FROM: Charles Fried

Enclosed please find Sam Alito's recommendation in the abortion cases and my draft of what might be an introduction to the brief. This material should provide background for our meeting later this week. I need hardly say how sensitive this material is, and ask that it have no wider circulation. My secretary will be contacting you regarding the meeting.

Memorandum

Subject	Date
Thornburgh v. American College of Obstetricians and Gynecologists No. 84-495; Diamond v. Charles, No. 84-1379.	June 3, 1985

To: The Solicitor General

From: Samuel A. Alito

TIME

In Thornburgh, the state's time to file its brief has been extended until June 29, 1985. In Diamond, appellants' brief is due, without an extension, on July 5, 1985.

RECOMMENDATIONS

The Civil Division and the Office of Legal Policy recommend amicus participation in support of the constitutionality of the state legislation. I agree.

DISCUSSION

A. The decisions below. These are appeals from decisions by two courts of appeals striking down state laws regulating abortions.

1. In American College of Obstetricians and Gynecologists v. Thornburgh, 737 F.2d 283 (1984), a divided panel of the Third Circuit (Sloviter, Higginbotham, Seitz) held unconstitutional numerous provisions of the Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. Ann. §§ 3201-3320 (Purdon 1983). The panel's approach was signalled by the opening section of the opinion (737 F.2d at 287-289), which can only be viewed as an effort to impugn the motives of the Pennsylvania legislature. After concluding (id. at 289-290) that the "customary discretion" accorded a district court's ruling on a preliminary injunction motion was inappropriate in view of the "unusually complete factual and legal presentation," the panel held unconstitutional or enjoined enforcement of seven major provisions of the Pennsylvania law. Former Chief Judge Seitz dissented on most points. The following is a summary of the panel's holdings:

(a) Section 3205 of the Pennsylvania law requires a physician or assistant to provide certain factual information to a woman seeking an abortion. This information includes the name of the physician performing the abortion, the probable gestational age of the fetus, the fact that certain benefits may be available to assist in child-rearing, and the fact that the father is liable for child support. The panel struck down this provision in its entirety (737 F.2d at 295-296), holding that it was intended to discourage abortions, rather than inform, and would interfere with the physician's prerogatives. Judge Seitz dissented (id. at 313), noting that much of the information had been termed "not objectionable" in Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 445 n.37 (1983). Judge Weis, dissenting from the denial of rehearing en banc, likewise criticized this holding (737 F.2d at 317) and observed that "[s]uppression of objective information highly pertinent to important decisions is indeed a disturbing and unwelcome concept in American law."

(b) Section 3206 of the Pennsylvania law requires unemancipated minors to obtain parental consent or a court order before having an abortion. The panel found this provision to be facially constitutional but enjoined enforcement until the Pennsylvania Supreme Court issues rules spelling out the court procedures in greater detail (737 F.2d at 296-297). "To pass constitutional muster," the panel pronounced, "the alternative judicial procedure must be an established and practical avenue" (id. at 297). Judge Seitz agreed with this disposition (id. at 313); Judge Weis concluded (id. at 318) that the provision satisfied the standards of Planned Parenthood Association v. Ashcroft, 462 U.S. 473, 490-493 (1983) (plurality); id. at 505 (O'Connor, J., concurring); and Akron, 462 U.S. at 439-442. 1/

(c) Section 3208 of the Pennsylvania statute provides for the publication by the state of materials regarding abortion. Under Section 3205, women were to be told that they could, but need not, view these materials. In an extraordinary ruling, 2/ the panel invalidated this printing provision, stating that it is "inextricably intertwined with section 3205" (737 F.2d at 298). Judge Seitz disagreed (id. at 313-314).

(d) Section 3210 makes it a crime knowingly or recklessly to induce or perform an abortion on a viable fetus but provides that a physician has a complete defense if, in his best medical judgment, the fetus is not viable or the abortion is needed to preserve maternal life or health. The panel found no constitutional flaw in this provision but suggested (737 F.2d at 299-300) that it might reach a different conclusion if there were "convincing evidence of unconstitutional chill." Judge Seitz objected (id. at 314) to this observation.

1/ See also H.L. v. Matheson, 450 U.S. 398 (1981); Bellotti v. Baird, 443 U.S. 622 (1979); Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976).

2/ The panel's ruling on this provision, while fairly included within the questions presented (84-495 J.S. i; Sup. Ct.R. 15.1(a)), is not discussed in the Jurisdictional Statement.

(e) Section 3210(b) provides that a physician performing an abortion of a viable fetus must use the method most likely to preserve its life unless the risks to the mother would be "significantly greater." Seizing on the word "significantly" and rejecting the state's saving interpretation, the panel held that the statute "traded off" the mother's health, in violation of Colautti v. Franklin, 439 U.S. 379, 400 (1979). Judge Seitz agreed (737 F.2d at 314).

(f) Section 3210(c) requires the attendance of a second doctor if the fetus may be viable. In Ashcroft, 462 U.S. at 482-486 (opinion of Powell, J.), 505 (opinion of O'Connor, J.), such a requirement was upheld on condition that there be an exception for emergencies. Refusing to infer such an exception, the panel struck down this provision (737 F.2d at 300-301) over Judge Seitz's dissent (id. at 314-315).

(g) Section 3214 requires reporting by physicians performing abortions. Distinguishing the reporting requirement upheld in Planned Parenthood v. Danforth, 428 U.S. 52, 79-81 (1976), the panel held Section 3214 unconstitutional because of its "nature and complexity" (737 F.2d at 302). It would increase the cost of abortion, the panel noted (ibid.), would interfere with medical discretion, produce a "profound chilling effect," and serve no compelling state interest. Judge Seitz dissented (id. at 315-316).

(h) Section 3215(e) requires health and disability insurers to offer policies, at lower cost, that exclude abortion coverage. Because it had been stipulated that the actuarial cost of these policies might be higher or lower, the panel struck down this provision on the ground that it might cause "insurance costs for women who wish abortion coverage [to] rise" (737 F.2d at 303). Judge Seitz agreed (id. at 316) with this extraordinary holding. 3/

3/ This issue falls within the questions presented but is not discussed in the Jurisdictional Statement. See note 2, supra.

The Third Circuit denied rehearing en banc with four dissents. The state appealed under 28 U.S.C. 1254(2). Appellees moved to dismiss for lack of finality. On April 15, the Supreme Court postponed consideration of the question of jurisdiction until the merits stage.

2. In Charles v. Daley, 749 F.2d 452 (1984), a Seventh Circuit panel (Wood, Pell, Campbell) held that three provisions of the Illinois Abortion Law of 1975 were unconstitutional. The court's zeal is indicated by the fact that two of these provisions had been substantially amended in 1984 prior to the time of decision.

The provisions that were amended (Sections 6(1) and 6(4)) made it a crime for a person performing an abortion on a fetus that is or may be viable intentionally to "fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted." Rejecting claims of mootness, the panel held that the challenge to Section 6(1) was a live controversy because the possibility of prosecutions based on events prior to repeal was "insufficiently speculative" (749 F.2d 452)--this despite the state's express disclaimer of any intent to initiate such cases. Although enforcement of Section 6(4) had been enjoined since the plaintiffs' initial challenge in 1979, the panel held that the constitutional challenge to this defunct provision survived as well because the state might at any time reenact the prior provision (739 F.2d at 457-458).

On the merits, the court invalidated Section 6(1) because it "does not specify that the attending physician's viability determination alone shall govern" (749 F.2d at 459). In the court's words (id at 460), Section 6(1) did not "afford due deference to the conclusive viability determination of the attending physician." 4/

4/ As previously noted, Section 6(1) was substantially amended in 1984. In 1983, a previous amendment was enacted making viability "a subjective determination based on the medical judgment of the attending physician" (749 F.2d at 455). The court found (id. at 469 n.5) that this amendment was insufficient.

The court held that Section 6(4), which pertained to potentially viable fetuses, was unconstitutional because it "purport[ed] to regulate the performance of abortions at a stage prior to viability" (749 F.2d at 460) and because "the State's interest in preserving fetal life * * * becomes compelling only at the stage of viability" (id. at 461).

Finally, the court struck down Sections 2(10) and 11(d), which (accurately) define the term "abortifacient" 5/ and require physicians to notify their patients when such substances or devices are prescribed. Brushing aside the assertion that these provisions "protect those women who oppose abortifacient methods of birth control for moral and/or religious reasons" (749 F.2d at 461-462), the court found that these provisions were "an attempt by the State of Illinois" to "foist[]" upon women "its view that life begins at conception" (id. at 462).

On May 20, the Supreme Court noted probable jurisdiction of the appeal from this decision.

2. Jurisdictional problems. Both cases pose substantial jurisdictional problems that may preclude the Supreme Court from reaching the merits of certain questions. Thornburgh poses the question whether 28 U.S.C. 1254(2) contains an implicit requirement of finality. In Slaker v. O'Connor, 278 U.S. 188, 189 (1929), the Court found such a requirement. See also South Carolina Electric & Gas Co. v. Flemming, 351 U.S. 901 (1956). More recently, the Court has questioned this construction. City of New Orleans v. Dukes, 427 U.S. 297, 301 (1976); Doran v. Salem Inn, Inc., 422 U.S. 922, 927 (1975). As noted by Stern and Gressman (Supreme Court Practice 67 (5th ed. 1978)), the Court has "finessed" this problem in recent years by treating appeal papers as a petition for certiorari and granting certiorari (28 U.S.C. 2103) or employing a liberalized standard of finality. Accordingly, it is possible but by no means certain that the conceded lack of finality in Thornburgh will preclude the Supreme Court from reaching the merits. The federal government has no institutional interest in the interpretation of 28 U.S.C. 1254(2), and I doubt that we should enter this fray. We may urge, however, that the Court grant certiorari if appellate jurisdiction is found to be lacking.

5/ See Dorland's Medical Dictionary 3, 493 (26th ed. 1980).

In Charles, it seems quite clear that the constitutionality of old Section 6(4) is a moot question, as appellants contend (J.S. 31-44). The cases on which the court of appeals relied (749 F.2d at 457)--involving the voluntary cessation of challenged conduct--are inapposite. None involved the repeal of a statute, an event quite unlike the temporary cessation of challenged conduct by a private party or even the repeal of a municipal ordinance. City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982). An effort to enact or reenact a statute activates the public scrutiny and safeguards of democratic government on a state-wide level. It is often procedurally difficult and uncertain, thereby militating against repeal and reenactment to avoid court scrutiny. (This is especially true here since the Illinois Abortion Law had to be passed over the governor's veto.) Moreover, principles of federalism and comity make it wholly inappropriate for a federal court to presume that a state legislature and governor will act in bad faith by repealing and then reenacting a statute for the purpose of evading federal court review. A state is not to be treated like a miscreant who will "'return to his old ways'" (City of Mesquite, 455 U.S. at 289 n.10 (citation omitted)) as soon as the federal courts turn their heads. I doubt that the Supreme Court will follow the Seventh Circuit's reasoning on this point or that it will reach out to adjudicate the constitutionality of a defunct statute. 6/

Appellees' claim for an injunction against enforcement of old Section 6(1) should also be dismissed for lack of justiciability. The possibility that appellees might be prosecuted under the old statute is too conjectural to satisfy Art. III requirements. See, e.g., Los Angeles v. Lyons, 461 U.S. 95, 101-110 (1983); O'Shea v. Littleton, 414 U.S. 488 (1974); Golden v. Zwickler, 394 U.S. 103 (1969); Poe v. Ullman, 367 U.S.

6/ Appellants argue (J.S. 43) that this case presents a live controversy regarding the constitutionality of the current version of Section 6(4) because the court of appeals' reasoning--"that any regulation of abortion in the interest of the fetus prior to viability is invalid"--dooms the current version as well as its predecessor. However, the court of appeals expressly "decline[d] to evaluate [the] constitutionality" of the current provision (749 F.2d at 455), and the Supreme Court "reviews judgments, not statements in opinions." Black v. Cutter Laboratories, 351 U.S. 292, 297 (1956).

497, 507 (1961). Appellees have not even alleged that they performed any late-term abortions to which old Section 6(1) might apply (see J.S. 42-43). And even if appellees could satisfy Article III, I do not see how they could show the irreparable injury required for injunctive relief. Lyons, 461 U.S. at 111-113.

To summarize on the jurisdictional points, no obstacle stands in the way of review of the constitutionality of Sections 2(10) and 11(d) of the Illinois law (notification regarding abortifacient); it is uncertain whether the Supreme Court will reach the merits of any of the issues in Thornburgh; it is unlikely, in my judgment, that the Court will reach the mertis of the remaining issues in Charles.

B. Participation. As Civil notes (memo 9), no one seriously believes that the Court is about to overrule Roe v. Wade, 410 U.S. 113 (1973). But the Court's decision to review these cases nevertheless may be a positive sign. Both court of appeals decisions purported to apply Supreme Court precedents in areas that the Court has already (and recently) explored. There are no conflicting court of appeals decisions. If the Supreme Court had agreed with the Third and Seventh Circuit decisions, it most likely would have summarily affirmed. Thus, by taking these cases, the Court may be signalling an inclination to cut back. What can be made of this opportunity to advance the goals of bringing about the eventual overruling of Roe v. Wade and, in the meantime, of mitigating its effects?

Civil is obviously correct (memo at 6) that we cannot repeat our approach in Akron. In Akron, we did not expressly acknowledge our position on Roe v. Wade. We decided not to discuss the specific provisions before the Court (See Br. 1) but rather argued in broad terms that the courts should review state and local legislation regulating abortion with greater deference. The Court rejected our argument, reaffirmed Roe v. Wade, and proceeded to slash--I am tempted to say reflexively--at the particular regulations before it. For example, it is almost incredible that the Court struck down an ordinance requiring the "humane and sanitary" disposal of aborted fetuses (462 U.S. at 451-452), a provision designed "'to preclude the mindless dumping of aborted fetuses onto garbage piles'" (id. at 451 (citation omitted)). The Court found that the terms "humane and sanitary" were impermissibly vague--a most remarkable conclusion in view of the countless laws containing those very terms. Congress has

even mandated the "humane * * * disposal of excess wild free-roaming horses and burrows" (43 U.S.C. 1901(6)).

The post-Akron cases now before the Court exhibit a similar approach by the courts of appeals, and the decision to review these cases may mean that a majority or near-majority of the Court is uncomfortable with what it sees. Accordingly, and in view of the lessons of Akron, I make the following recommendation. We should file a brief as amicus curiae supporting appellants in both cases. In the course of the brief, we should make clear that we disagree with Roe v. Wade and would welcome the opportunity to brief the issue of whether, and if so to what extent, that decision should be overruled. Then, without great formal discussion of levels of scrutiny or degrees of state interest, we should demonstrate that many of the provisions struck down by the Third and Seventh Circuits are eminently reasonable and legitimate and would be upheld without a moment's hesitation in other contexts. If the Court can be convinced to sustain these regulations, it may have to adjust its standard of review. This is essentially the opposite of the Akron approach; it is an argument from the specific to the general, rather than vice versa.

1. A striking example of the courts' refusal to allow breathing room for reasonable state regulation is the invalidation of the provisions of the Pennsylvania and Illinois laws requiring that a woman contemplating an abortion or use of an abortifacient be provided with certain relevant, accurate, factual, and non-inflammatory. A strong case can be made that this is an entirely legitimate state regulation, even within the confines of Roe.

What, for example, is the objection to informing a woman that certain methods of birth control are "abortifacients," i.e., that they do not prevent fertilization but terminate the development of the fetus after conception? Why cannot the State of Illinois require that this information be provided to patients, in the doctor's own words, so that women for whom the difference is morally significant can make an informed choice? Would a court hesitate for a moment before upholding government's authority to require that patients be informed about the operation of any other drug or medical device?

Similarly, the Commonwealth of Pennsylvania should be allowed to require that a woman contemplating abortion be told (737 F.2d at 305-306):

(i) the name of the doctor,

(ii) the fact that there may be unforeseeable detrimental effects,

(iii) the particular medical risks of abortion in the woman's case,

(iv) the probable gestational age of the fetus,

(v) the medical risks of childbirth,

(vi) that aid may be available to pay for prenatal and neonatal care and delivery,

(vii) that the father is financially liable for child support, and

(viii) that the woman may (but need not) review state-prepared materials describing the unborn child and agencies offering alternatives to abortion.

This is relevant, accurate, factual, and non-inflammatory information. No restriction is placed on physicians wishing to contradict or supplement it. If abortion is a woman's choice, as the Court has held, then surely the choice should be informed. It goes without saying that the woman is entitled to full information about what will be done to her and about the possible effects on her health. If only the woman is considered, abortion is like other surgery, and the states' power to enact detailed informed consent legislation regarding general surgical procedures can hardly be questioned. See, Note, Abortion Regulation: The Circumscription of State Intervention by the Doctrine of Informed Consent, 15 Ga. L. Rev. 681, 698-699 (1981); Gauvey, Leviton, Shuger, & Sykes, Informed and Substitute Consent

to Health Care Procedures: A Proposal for State Legislation, 15 Harv. J. Legis. 431, 464 (1978) (proposing detailed model act); 45 C.F.R. 46.101-46.401 (detailed informed consent for human experimentation).

While abortion involves essentially the same medical choice as other surgery, it involves in addition a moral choice, because the woman contemplating a first trimester abortion is given absolute and unreviewable authority over the future of the fetus. Should not then the woman be given relevant and objective information bearing on this choice? Roe took from state lawmakers the authority to make this choice and gave it to the pregnant woman. Does it not follow that the woman contemplating abortion have at her disposal at least some of the same sort of information that we would want lawmakers to consider?

Doctors may voluntarily provide this information. But they may also fail to do so in a large number of cases. A benevolent doctor may have a narrow idea about his patient's well-being. He may wish to spare his patient from having to confront an uncomfortable moral choice. Furthermore, many physicians, including those operating high-volume abortion clinics, have a financial interest in encouraging women to have abortions. Must the state entrust to them the sole responsibility to provide a woman with the relevant information bearing on her choice?

Most of the cases and commentary on this issue make a very weak case against the constitutionality of legislation like that challenged here. 7/ One of the few that rises above the level of jargon is Judge Coffin's argument in Planned Parenthood League v.

7/ See, e.g., Charles v. Carey, 627 F.2d 772, 779-786 (7th Cir. 1980); Freiman v. Ashcroft, 584 F.2d 247 (8th Cir. 1978), aff'd mem., 440 U.S. 941 (1971); Leigh v. Olson, 497 F. Supp. 1340, 1344-1347 (D.N.D. 1980); Margaret S. v. Edwards, 488 F. Supp. 181, 205-212 (E.D. La. 1980); Women's Services, P.C. v. Thone, 483 F. Supp. 1022, 1049 (D. Neb. 1979); Chemerinsky, Rationalizing the Abortion Debate: Legal Rhetoric and the Abortion Controversy, 31 Buff. L. Rev. 107, 161-162 (1982); Note, Toward Constitutional Abortion Control Legislation: The Pennsylvania Approach, 87 Dick. L. Rev. 371, 385-390 (1983); Note, Abortion Regulation: The Circumscription of State Intervention by the Doctrine of Informed Consent, 15 Ga. L. Rev. 681, 702 (1981).

Bellotti, 641 F.2d 1006, 1021-1022 (1st Cir. 1981), against the validity of a Massachusetts law requiring "'a description of the stage of development of the unborn child'" (id. at 1021). First, he contended (ibid.), the information is not "medically relevant." But it is very relevant to the extra-medical dimension of the abortion choice. Second, he argued (ibid.), that the information would cause "emotional distress, anxiety, guilt, and in some cases increased physical pain." These results, however, are part of the responsibility of moral choice. Any one confronting such a choice--a legislator voting on abortion legislation, a judge or juror pronouncing a sentence of death or imprisonment, a military officer commanding a mission that he knows will cost lives--may experience similar effects. This is not bad, although of course there is no justification for maliciously inflicting suffering. Third, he argued (ibid.) that the description "presents no information whose essence most if not all women do not understand before receiving it." This seems most dubious. It is not evident that most women thinking about abortion can provide a reasonably accurate trimester-by-trimester, let alone month-by-month, description, of fetal development. In any event, this is surely a factual issue. Finally, he maintained (id. at 1022), that most women thinking about abortion do not want to hear such a description. Does this mean that women have a right to make an uninformed choice--even though that choice involves something more than their own well-being? 8/

8/ In Akron, the American Psychological Association argued (Am. Br. 15-22) that detailed informed consent requirements are harmful because they do not allow the flexibility that good counselling requires. This is a more attractive argument, especially if one envisions a trained, psychological counsellor. Even in such cases, the counsellor may have an unduly narrow idea of his function. But in any event, the average first-trimester abortion is not likely to feature such counselling. As a doctor at one of the clinics in Akron testified, when a teenager showed up at the clinic he assumed the decision was made. In his words, "[w]hen you go to a bar, you go there to drink" (Resp. Br. 20).

A state should have the right to require that a woman contemplating abortion be given information regarding the procedure, the fetus, the effect of the procedure on her and the fetus, and the alternatives to abortion--provided that the information is factual; is accurate or, in the case of medical information, reflects the consensus of scientific opinion; and is not lurid or inflammatory. In addition, the state should not restrict the physician's ability to provide whatever other information he believes relevant. The Illinois and Pennsylvania statutes pass these tests.

In Akron, the Court largely side-stepped the issue. The Akron ordinance required that a woman be informed by a physician

(1) that she is pregnant,

(2) the probable age of the unborn child,

(3) that "the unborn child is a human life from the moment of conception" and "the anatomical and physiological characteristics of the particular unborn child at the gestational point of development,"

(4) that an unborn child more than 22 weeks old may be able to survive outside the womb,

(5) that abortion is a "major surgical procedure" that may result in certain "serious complications,"

(6) that numerous agencies are available to provide birth control information, and

(7) that numerous agencies are available to assist her during pregnancy and after birth if she chooses not to have an abortion.

The Court struck down the entire ordinance because the ordinance insisted that the information be provided by a physician rather than an assistant. 462 U.S. at 445 & n.37, 448. The Court also criticized Subsection 3 for adopting "one theory of when life begins" (462 U.S. at 444). It faulted Subsection 4 for requiring "speculation" by the physician regarding the "particular unborn child" (ibid.). And it criticized Subsection 5 as medically inaccurate (id. at 444-445). Neither the Pennsylvania nor Illinois provision shares these flaws.

The Akron Court went on to state (462 U.S. a 445-446 n.37) that the remaining subsections were "not objectionable." These subsections parallel many of the Pennsylvania provisions. The Court also stated, however, (462 U.S. at 445) that the Akron ordinance, "[b]y insisting upon recitation of a lengthy and inflexible list of information," intruded "upon the discretion of the pregnant woman's physician." The tension between this statement and the statement noted above may reflect disagreement or uncertainty on the part of the Akron majority and may account in part for the Court's decision to review the present cases.

The Court may well reject the argument outlined above, but I do not think it will find it a particularly easy argument to dismiss. The contrary position really does appear like a kind of censorship and a denial of informed choice. See Noonan, The Root and Branch of Roe v. Wade, 63 Neb. L. Rev. 668, 677-678 (1984). Thornburgh highlights this censorship-like quality by prohibiting the state from even printing certain materials, much less requiring that women be allowed to see them.

2. Another example of the courts of appeals' suffocating approach is the Third Circuit's invalidation of several statutory provisions based on flimsy and unsupported factual assumptions. The Third Circuit held that Pennsylvania may not require a doctor performing an abortion to report information such as the name of the physician and facility, the woman's age and marital status, the month of pregnancy, the type of procedure used, and any complications. The court relied (737 F.2d at 302) on (and may have distorted (see id. at 315-316)) a stipulation that these requirements would cause an unspecified increase in the cost of an abortion. The court also concluded (id. at 302) that such

reporting requirements would have "a profound chilling effect on the willingness of physicians to perform abortions." The invalidity of this reasoning hardly needs demonstration.

I would hate to have to compile a list of all the federal, not to mention state and local, recordkeeping and reporting laws. Many of these laws increase the cost of goods and services. No doubt there are instances in which these cost increases burden the exercise of constitutional rights. Recordkeeping and reporting laws applicable to the press--e.g., tax and safety laws--increase costs, may thereby increase the prices of printed materials, and may drive marginal publications into bankruptcy. Does this mean that these recordkeeping and reporting laws are unconstitutional? If we focus just on the abortionist, why single out abortion reporting requirements? Why not all regulation that increases his costs of doing business and thus his fee?

As for the "chilling effect" on physicians, it is hard to take this argument very seriously. Doctors are subject to a host of recordkeeping and reporting laws. In truth, what probably chills them is not the thought of filling out abortion reports or the wildly unlikely prospect of criminal prosecution for an abortion-related offense but the thought of a visit from an IRS agent investigating tax shelters.

Much like the Third Circuit's holding with respect to the reporting provisions was its invalidation of the Pennsylvania provision requiring insurers to provide lower-cost health insurance to those not wanting abortion coverage. The court struck down this provision without any evidence regarding the effect on the cost of insurance for women wanting abortion coverage (737 F.2d at 302-303). Instead, the court relied on a stipulation (id. at 302-303) that the actuarial cost of providing insurance without abortion coverage might be higher or lower. It seems to me that this stipulation proves nothing. If this provision's effect on costs was constitutionally significant, the cost question surely should have been remanded for trial.

(c) In several instances, both the Third and Seventh Circuits insisted on construing constitutional provisions so as to create constitutional problems instead of either adopting

entirely plausible alternative interpretations urged by the states or awaiting a definitive interpretation by the state courts. This is true of Sections 3210(b) and (c) of the Pennsylvania law (concerning the method of abortion and attendance of a second physician in cases of viable fetuses) and Section 6(1) of the Illinois law (with respect to the physician's absolute authority to decide on viability). 9/

(d) The Third Circuit enjoined enforcement of the Pennsylvania parental consent provision, although it found no constitutional defect. Instead, the court merely wanted to make sure that implementing rules were issued. 737 F.2d at 297. Under what authority can a federal court enjoin enforcement of a state law that does not contravene the Constitution or any federal law?

(e) Finally, the Seventh Circuit was so eager to overturn abortion laws and so deeply suspicious of the Illinois legislature that it insisted on reviewing and invalidating laws no longer on the books.

We need not raise all of these issues. Our point is that, even after Akron, abortion is not unregulable. There may be an opportunity to nudge the Court toward the principles in Justice O'Connor's Akron dissent, to provide greater recognition of the states' interest in protecting the unborn throughout pregnancy, or to dispel in part the mystical faith in the attending physician that supports Roe and the subsequent cases.

9/ Moreover, if the Court should reach the merits of the issue with respect to the Illinois law, I think we have a very strong argument that, contrary to what the Court said in Colautti, 439 U.S. at 396, viability cannot be a matter solely for the judgment of the attending physician; it must have an objective meaning. If the statement in Colautti were correct, states would be severely hampered in regulating late-term abortions because they would have to show that the physician actually believed that the fetus was viable. Moreover, if viability has no objective meaning, a physician could be prosecuted for thought crime--i.e., for performing an abortion on a predictably nonviable fetus while laboring under the mistaken belief that it was viable. Is there any doubt that the Court would not tolerate this?

I find this approach preferable to a frontal assault on Roe v. Wade. 10/ It has most of the advantages of a brief devoted to the overruling of Roe v. Wade: it makes our position clear, does not even tacitly concede Roe's legitimacy, and signals that we regard the question as live and open. At the same time, it is free of many of the disadvantages that would accompany a major effort to overturn Roe. When the Court hands down its decision and Roe is not overruled, the decision will not be portrayed as a stinging rebuke. We also will not forfeit the opportunity to address--and we will not prod the Court into summarily rejecting--the important secondary arguments outlined above.

10/ The case against Roe v. Wade has been fully and publicly made. See, e.g., A. Bickel, The Morality of Consent 27-29 (1975); A. Cox, The Role of the Supreme Court in American Government 112-114 (1976); Epstein, Substantive Due Process by Any Other Name, 1973 Sup. Ct. Rev. 167-185; Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920 (1973). In Akron, the Court's response was stare decisis and the "rule of law."

(a possible) INTRODUCTION

In Roe v. Wade this Court announced two doctrines: that the mother of an unborn child has a privacy interest in her decision whether or not to carry that child to term, and that the state has an interest to protect and foster unborn life. These two interests were to be adjusted according to whether the unborn child was viable, and if not whether the state's interest in that child took a form which was unduly burdensome to the mother's decision under the first doctrine. It is not surprising that in the dozen years since Wade this Court has had occasion to consider the validity of a variety of state regulations expressing the state's concern for unborn life. More often than not such attempts at regulation have been struck down. The two cases now before the Court present again a variety of detailed issues regarding the proper conjunction of these two constitutional values. It would be disingenuous for the United States to omit to state that cases such as these seem the inevitable entailments of a decision which we believe cut loose from traditional textual and doctrinal moorings of constitutional adjudication and thus led to indeterminacy in interpretation and response. Accordingly, if invited by the Court, we would stand ready to brief and argue the question whether and to what extent this Court should continue to adhere to Roe v. Wade. The instant cases, however, we recognize do not present this issue in terms and it is not clear that the Court would welcome an intervention of this order from an amicus.

What is clear is that so long as the Court adheres to the several doctrines announced in Roe v. Wade the difficulties and conflicts illustrated by the instant cases will continue to recur. It is possible, of course, to consider legislation such as that in Illinois and Pennsylvania with a good deal of impatience as simply bad faith sallies intended to impinge

whenever possible on the woman's right to choose an abortion. On this premise the task of the courts, including this Court is the policing of the original mandate in Roe against obstructionist tactics. The United States urges first of all that such a perspective is not only constitutionally unwarranted but denies a major premise of Roe v. Wade, that the state does have a legitimate interest in unborn and potential life. Every one of the challenged statutory provisions in these cases grows out of that interest. Just as the United States believes that this Court erred in sharply subordinating that traditional interest of the organized community in its own generational future, so a fortiori, we believe it would be a grave mistake to waive aside as mere obstructionism all legislation which has this interest as an important motivation.

A particularly striking example of this dismissive posture to the state's interest in unborn life is the casual way in which the majority of the court of appeals in Thornburgh waived aside a number of provisions of the Pennsylvania state without the benefit of a state court interpretation or even a full blown hearing below. Thus provisions regarding making available printed information about adoption, childcare and other services alternative to abortion were deemed unconstitutional on the ground that they were intended not just to inform a pregnant woman of her options but to persuade her how to exercise them. But surely if there is no impediment to choice and if, in contrast to the Akron case, the physician is not personally required to transmit, much less endorse this information, then the state asserts its interest in unborn life in the least intrusive manner imaginable by making reading material available which communicates its views. _/ The real burden of the

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_/ Indeed these and analogous provisions would seem to implement the Court's stated concern for the autonomy of a pregnant woman's choice. Surely it is reasonable for the State to be concerned that those whose profession it is to provide abortion services not be the only source of information relative to a woman's choice in these circumstances.

Thornburgh court's approach, therefore, is that the state really is not entitled to have a view about the importance of unborn life. The picture of political community embodied in this decision is one where the organized citizenry are to be disabled from having a corporate view on such fundamental issues and in seeking to persuade others of them. If matters are to be carried to this extreme, there is cause to wonder what meaning is left to the proposition that the state has an interest in unborn life.

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SCOTUS-ABORTION
BY RICHARD CARELLI
WASHINGTON (AP) -- THE SUPREME COURT TODAY AGREED TO CONSIDER REVIVING KEY PROVISIONS OF PENNSYLVANIA'S 1982 ABORTION CONTROL LAW.
THE JUSTICES SAID THEY WILL STUDY A RULING THAT MOST OF THE LAW'S PROVISIONS UNDULY INTERFERE WITH WOMEN'S CONSTITUTIONAL RIGHT TO END THEIR PREGNANCIES.
IN SEEKING SUPREME COURT REVIEW, PENNSYLVANIA ATTORNEY GENERAL LEROY ZIMMERMAN CALLED LAST YEAR'S RULING BY THE 3RD U.S. CIRCUIT COURT OF APPEALS "A STARK EXAMPLE OF JUDICIAL EXCESS."
SOME OF THE INVALIDATED PROVISIONS, SUCCESSFULLY CHALLENGED BY THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA AND OTHERS, WOULD HAVE REQUIRED:
--THAT A WOMAN SEEKING AN ABORTION BE TOLD ABOUT "DETRIMENTAL PHYSICAL AND PSYCHOLOGICAL EFFECTS WHICH ARE NOT ACCURATELY FORESEEABLE."
--THAT THE WOMAN BE TOLD MEDICAL ASSISTANCE BENEFITS MAY BE AVAILABLE FOR PRENATAL CARE AND CHILDBIRTH.
--THAT MINORS STILL FINANCIALLY DEPENDENT ON THEIR PARENTS GET THEIR CONSENT, OR A COURT'S PERMISSION, BEFORE OBTAINING AN ABORTION. THE APPEALS COURT BLOCKED ENFORCEMENT OF THIS PROVISION UNTIL THE STATE SUPREME COURT DEVISED RULES TO "RECTIFY THE PROCEDURAL INADEQUACIES."
--THAT DOCTORS WHO PERFORM ABORTIONS FILE REPORTS WITH STATE OFFICIALS EXPLAINING HOW THEY DETERMINED THAT A FETUS ABORTED IN A PREGNANCY'S SECOND TRIMESTER WAS NOT CAPABLE OF LIVING OUTSIDE THE WOMB.
--THAT DOCTORS FILE OTHER DETAILED INFORMATION ABOUT EACH ABORTION PERFORMED.
--THAT CERTAIN ABORTION PROCEDURES BE USED AT VARIOUS STAGES OF PREGNANCY.
THE 3RD CIRCUIT COURT SAID THE PROVISIONS "REPRESENT UNACCEPTABLE LEGISLATIVE ENCROACHMENTS UPON THE WOMAN'S CONSTITUTIONAL RIGHT, AND INTERFERE WITH THE PHYSICIAN-PATIENT RELATIONSHIP."
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Amer. College of Obs. & Gyns., Penn. Section v. Thornburgh

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