OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: JANE HODGSON, ET AL., Petitioners,

v. MINNESOTA, ET AL.; and

MINNESOTA, ET AL., Cross-Petitioners

v. JANE HODGSON, ET AL.

CASE NO: 88-1125 AND 88-1309

PLACE: Washington, D.C.

DATE. November 29, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

JANE HODGSON, ET AL.,
Petitioners
v. : No. 88-1125
MINNESOTA, ET AL.; and
MINNESOTA, ET AL.,
Cross-Petitioners
v. : No. 88-1309
JANE HODGSON, ET AL.

Washington, D.C.

Wednesday, November 29, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:00 a.m.

APPEARANCES:

JANET BENSHOOF, ESQ., New York, New York; on behalf of the Petitioners/Cross-Respondents.

JOHN R. TUNHEIM, ESQ., Chief Deputy Attorney General of Minnesota, St. Paul, Minnesota; on behalf of the Respondents/Cross-Petitioners.

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PROCEEDINGS

(11:00 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 88-1125, Jane Hodgson v. Minnesota; No. 88-1309, Minnesota v. Jane Hodgson.

Ms. Benshoof, you may proceed whenever you're ready.

ORAL ARGUMENT OF JANET BENSHOOF

ON BEHALF OF THE PETITIONERS/CROSS-RESPONDENTS

MS. BENSHOOF: Mr. Chief Justice, and may it please the Court:

This case presents the constitutionality of a 1981 criminal Minnesota statute requiring both biological parents to be notified prior to a minor's abortion. The issue here is not one of parental involvement. The heart of our case is the two-parent requirement which not only is out of step with the reality of family life but which tramples on the integrity of many families.

Because the statutory scheme was written in the alternative, there are two statutory schemes before the Court today. Subdivision 2, where we are the appellees, requires that both biological parents be notified 48 hours prior to any teenager's abortion. This notification requirement is imposed across-the-board regardless of whether the minor lives in a no-parent, one-parent or two-parent household, regardless of whether she is mature,

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or whether it would be in her best interest to have a private abortion, regardless of whether she has ever met the absent parent.

Under subdivision 2, no bypass option is possible with this notice even when the minor, her natural parent and her stepparent together agree that abortion is the best choice and to notice to the absent family is likely to be destructive to the family.

Subdivision 6, where we're the appellant, was in effect for five years. It imposes the same notice and waiting period requirement but contains a judicial bypass. After five weeks of trial and hearing the testimony of some 57 witnesses, the trial court federal court judge in Minnesota made comprehensive findings of fact as to the impact and the operation of this law on minors, on medical practice, on their privacy rights and on their families.

50 percent of minors in Minnesota who are seeking abortions do not live with both biological parents.

QUESTION: Was this all testified to at that trial, Ms. Benshoof?

MS. BENSHOOF: Yes, it was,

QUESTION: It wasn't just studies or -- but witnesses got on the stand and said that?

MS. BENSHOOF: Absolutely.

Far from helping minors or families, this statute

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tries to force a parental role where one may never have existed. It undermined families that do exist and drove minors from timely, critical medical care.

I would first like to address subdivision 2, where we are the appellees. The state argues that biological parents have a right to know, a right which they contend is older in history than any privacy or bodily integrity rights of minors. They further argue that having a judicial bypass defeats these constitutional rights of parents.

However, in Ashcroft, Akron and Bellotti, this Court clearly held that an effective bypass mechanism had to be held for any parental involvement requirement in order to ensure that mature minors and best interest minors were not forced to forego those privacy rights recognized in Danforth.

This Court has consistently recognized both the unique and the non-postponable nature of the abortion decision, and the fact that imposition of unwanted motherhood on a teenager is particularly devastating to her future. This state's right-to-know theory ignores Danforth in which this Court said that any independent right of the parent that may exist is no more weighty than a minor's privacy right; and, in fact, even the dissent in Danforth in this Court looked at the minor's welfare, not

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at some independent, completely right of the parent absent any consideration of the welfare of the minor.

Apart from this right-to-know theory in this case, this Court has never supported the idea of giving fundamental due process rights to any sort of parent who's never lived with the child, acknowledged the child, supported the child, or whose abusive actions to the other parent or the child are destructive.

This Court has been repeatedly skeptical of the claims of absentee fathers. In Lehr, for example, an unmarried father with no ongoing relationship with the child, was not even entitled to notice of a pending adoption.

QUESTION: Well, Ms. Benshoof, weren't -- those were claims where the absent father asserted a constitutional claim --

MS. BENSHOOF: Yes --

QUESTION: -- which we rejected. We certainly didn't say that the state couldn't recognize such an interest.

MS. BENSHOOF: In this particular case, the State of Minnesota is arguing that these parents have liberty interests which the state has to promote or otherwise they are in effect vetoed.

QUESTION: Well, but whether -- whether or not -- they are -- they are constitutional interests, the

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state might choose to promote them, might it not?

MS. BENSHOOF: Well, the state could promote interests that are not constitutional interests, but then they would be balanced against rights and constitutional interests in the minor and, I might add, her single mother, so that those rights would even be less cognizable than if they would be liberty interests.

And I do agree that at -- you know, biological parents may have some degree of liberty interests, but this Court has always looked at those interests along a spectrum.

QUESTION: But when the Court looks at those interests, it's generally looking at them in terms of a constitutional challenge. Someone is saying, I have a liberty interest, the absent parent, the single mother.

But when the state comes to legislate, it doesn't have to protect -- it's not limited to protecting just constitutional interests. It can protect interests of its citizens as it sees them so long as it doesn't run up against some other constitutional barrier, can't it?

MS. BENSHOOF: It absolutely can. But in this instance they are framing those in terms of rights and constitutional interests of the parents that are more weighty than the privacy interests of the minor at hand, and they are saying that a bypass procedure, in effect,

cuts off those interests.

Even parents with recognized liberty interests don't have a right to protective state legislation to impinge on privacy interests balanced on the other side.

QUESTION: How -- how do you define the privacy interest that the child has here in her nontraditional family, say, with the stepfather and -- and -- and a natural mother apart from any interest she has in medical treatment? What is her privacy interest that you're protecting here, and what are the cases that you rely on?

MS. BENSHOOF: Well, there's two sorts of privacy interests. First of all, there is the privacy interest recognized in Roe and Danforth that a mature minor and a minor whose best interest it is has an interest independent of her parents to be able to ineffectuate an abortion decision.

QUESTION: No, no. Quite -- quite apart from that --

MS. BENSHOOF: Apart from --

QUESTION: -- because you began by saying that -- that this interferes with the ongoing family relation.

MS. BENSHOOF: Absolutely. I think that the family integrity cases such as Moore, informational privacy cases, for example, when a minor and her mother agree that an abusive ex-husband -- and we have a named plaintiff in

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that situation, for example -- and I think this example illustrates your point -- a named minor and her mother are both plaintiffs in this suit where the father was divorced, she lives in a family with a stepfather, the natural father has held a gun to the mother's head several times, and she only speaks to him with a policeman present. Yet, the state --

QUESTION: Well, my -- my question is what is the definition of the privacy interest that you're asserting here? Is it an interest to live in a -- a home without -- without disruption? Is that how you phrase it?

MS. BENSHOOF: It would be phrased, first of all, in the --

QUESTION: Or can you be more specific than that?

MS. BENSHOOF: -- privacy interest to be able to choose to have the abortion --

QUESTION: No, quite apart from that.

MS. BENSHOOF: -- then there would be --

QUESTION: Quite apart from that.

MS. BENSHOOF: -- a privacy interest in informational privacy such as this Court recognized in Whalen v. Roe, a private to make -- to keep independent information personal to oneself.

There's also the privacy interest in being able to live in a new -- in a family setting of your choosing,

which this Court recognized in Moore.

So, in essence, this Court doesn't even need to look at the abortion cases to find that the rights of minors of natural parents, of single parents, are violated in this case by the state in forcing -- in effect, forcing unrelated adults to give very personal information, often inflaming information, to each other.

Nothing in this statute forbids minors from voluntarily telling one parent. In fact, most do. Single parents under the statute are free to talk to ex-spouses. This is not the doctor -- the state coming in and cutting out any rights.

In fact, nothing precludes a doctor from making an independent judgment in this case that a particular minor needs a parent or adult to be involved. Minnesota law has a specific statute which we mentioned in our brief which provides that when a doctor sees a health need and he's treating a minor for a confidential matter, he may inform the parents if failure to do so would jeopardize the minor's health.

The district court in this case made very clear findings of fact about single parent homes and about intact homes which are, in effect, violent or dysfunctional families. Yet, the statute requires that the second parent be notified regardless of the living

situation, the minor and her single mother or the minor and her parents may be living in.

In many instance we have divorced mothers as plaintiffs where the divorce took place under very abusive situations. There is no state interest for the state to force the parent who has been a sole custodian for 16 years to go to an ex-husband and reveal this personal information. The state interest in this case is helping immature minors. If they have the loving support of one parent, often who has to under considerable trauma, expense, go to a state court judge with that minor, there is no state interest achieved.

The statute is very overbroad, in that it requires two parents across-the-board. We have even instances in the record where they've never met this parent that they have to ferret out and give this very, very personal information.

QUESTION: Ms. Benshoof, you appear to be arguing in the brief that applying a compelling interest standard would result in striking the two-parent requirement. What result would you reach under a rationality standard?

MS. BENSHOOF: Well, Your Honor, I believe that when minors' rights are at stake because, as this Court recognized in Bellotti and I think Justice Stevens particularly recognized in Carey, minors who are pregnant

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need more protection from this Court than even in other areas because they only have two options left in their life at that point.

However, under any standard of review, this is irrational. For example, in Turner v. Safley, you scrutinized the factual record very carefully to show that there was no fit between forbidding inmate marriages and relating that to the penological concerns of the State of Missouri.

Moreover, in Castle v. Consolidated Freightways, which was a 1981 case of this Court, there was a 14-day trial on the safety effects of banning 65-foot trailers in Iowa, and you found that although there was some slight safety benefit, there was not much and it didn't -- it wasn't reasonable or rational to require that ban because of its burden on interstate commerce.

QUESTION: That was a commerce clause context in which we were not depriving the state of the authority to legislate. We were just saying that the state or the national government could -- could regulate. So I -- it seems to me that's inapt.

MS. BENSHOOF: I think that's very apt because first of all we're not saying the state is deprived of authority here, we're not disputing the legitimacy of the state interest. Certainly, parental involvement is a

laudable and beneficial goal. What we have proved in this case is that the means chosen not only don't achieve that goal, but they undermine that goal; they undermine the very thing the state wants to achieve.

And in Castle you did use a rational basis test. If the test used on trucks in Iowa were applied to minor's health rights, we would win this case.

The state argues that somehow notice is different than consent; that somehow notice is less burdensome than consent, and that's another reason why a lesser standard of review should be used by this Court.

I would submit that the facts show the exact opposite. That notice is not less burdensome than consent. While parents may perceive a difference in a consent law versus a notice law, from the point of view of minors, whose rights are at stake in this case, there is no difference between them for three reasons.

First -- first of all, there's no difference between notice and consent for the potential for provoking obstruction and violence. The district court reported that there are 31,000 cases of family assault every year in Minnesota, making it the most prevalent violent crime in the State of Minnesota.

The district court further found that notice in these kind of violent, dysfunctional families was nearly

always disastrous. In fact, the only two expert witnesses put on trial by the State of Minnesota admitted on cross-examination that yes, it's true in these kinds of cases it would not be beneficial, and yes, it's true, violence could occur.

Now there's no reason to believe that parents who would veto an abortion though -- through threatened or actual violence, would not equally obstruct a minor's access to a clinic or a court after being notified.

In fact, that was precisely what this Court recognized in Bellotti. They said, in looking at the fact that the State of Massachusetts required you to be notified -- required parents to be notified before going to court said, wait, minors must have the right to go to court first and anonymously, because parents may block access if -- to the court itself if they were notified.

So violent reactions, such as beating, being thrown out the home, which are not uncommon, are precipitated by the knowledge, not by whether the minor says hey, wait a minute, I'm not asking for consent.

Second, the burden on informational privacy, the having to give this very personal information to someone who may be a stranger, both on mature minors and on their single parents, is the same under a notice or consent statute.

Minors and single parents have compelling reasons for not to disclose a pregnancy for a second biological parent. Several of our class members, and this is all in the record, had dying or disabled parents. One had a father who just had a stroke whose father's doctor said, do not tell him. And her mother totally agreed. Yet the state wouldn't even give them a bypass; they would force this father with his stroke to be told.

Now it makes no difference telling that father with the stroke whether or not you're asking him for consent or asking him to sign a form that yes, he has been notified. There is no difference whatsoever.

Finally, this Court's cases invalidating parental notice were based on the right of mature minors to decide not to become teenage mothers. And the trial in this case makes clear that a notice requirement imposed on minors, and in this case nearly half went through the bypass, which was no easy task, but the notice requirement itself is such a deterrent that it is an equal deterrent to any form of consent.

Now the Defendants argue that while all of this may very well be true, that -- that there may be some burdens imposed by a notice that -- a 72-hour notice that can extend into a week, and there may be some burdens imposed by having to notify an absent parent who is in a

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mental hospital, a fugitive to justice, dying, or beats the family regularly, or is under an order of protection, that may be true, but there is always the judicial bypass.

But I would submit that the district court was correct in saying that a judicial bypass cannot immunize the underlying notice requirement from judicial scrutiny. Yes, it is necessary. It is necessary because there are situations even in intact families where there is violence occurring.

And in fact, most of the -- as the district court found, many of the families which are violent families, are intact families, there is a notice -- a reason for this bypass. But the two-parent requirement is clearly overbroad because the bypass itself is burdensome. And you can't just impose this burden without looking at the notice.

The bypass is burdensome because it takes minors about an average of a week to go through the bypass in Minnesota, which the district court judge found to be medically significant.

And this is no small matter for minors. A week increases the mortality risk about 50 percent. Oftentimes this stretched into more than a week, and we have several instances of our brief with named plaintiffs who went two or three weeks.

It also increases other risks, pushing many minors into second trimester abortions, which are offered only in one city in the entire State of Minnesota. Some minors had to go out of state, in fact.

This makes abortions much more expensive and much more dangerous for minors.

Moreover, the judicial bypass, especially when one parent has to go along, the court found undermined the kind of communication and support that a single parent was trying to offer her daughter during this time of trouble.

For example, one of our named plaintiffs, who had not seen her ex-husband for over 10 years, was -- and had sole custody, was forced to go to court with her daughter and reveal immediately before the abortion where she was trying to be completely supportive -- reveal before a state court judge that well, she had to divorce her husband for abuse, which her daughter didn't know about. So that she had -- she had her choice of notifying an abusive ex-husband, going to a state court judge and letting this information come out before her daughter, who was pregnant and who she was just taking to the clinic.

This is not a real choice. But more importantly, this is not necessary. This does not achieve anything. Even an immature minor, if they have the loving support of one parent, there's no reason for the state to

impose such a draconian requirement that the district court found imposed burdens on real families, on real people, that not only interfered with communication, but impaired the health of young people.

QUESTION: What was the district court's holding with respect to the constitutionality of the bypass procedure? Did it uphold it?

MS. BENSHOOF: The district court struck down the statute in its entirety because they found the two-parent requirement was overbroad. They found that the bypass was a burden, but they would not strike that down under this Court's previous opinions, and felt that because it was a burden, it had to be narrowly tailored, and not imposed on people who should not have to go through it, such as people who had the support of one parent.

QUESTION: So it construed in a particular way and up -- upheld the bypass part?

MS. BENSHOOF: It invalidated the entire statute, it -- because of the two-parent requirement not being severable.

And I would want to add that besides the two-parent requirement, this statute pretends to exempt two other categories of minors for whom this would do -- would accomplish no state interest, and those are

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emancipated minors and abused minors.

This statute pretends on its face to apply only to unemancipated minors. But there's no definition of emancipation. In fact, the case law in Minnesota says it's a question for the jury. Well, of course, the only way to get a declaration would be to bring your parents into court, which makes it an impossible exemption.

Because this is a criminal statute, the clinics are very reluctant to look at a minor's situation, and say, I'm guessing that you're emancipated. So emancipated minors, in effect, have to go through court. Many minors who have children go to court. There have been married minors going to court, and minors living completely separated from their parents going to court.

Moreover, this statute says well, abused minors, victims of incest. If they've reported this and they're past victims, they don't have to notify. But it turns out that the reporting statute in Minnesota requires that after it's reported to the welfare department, the welfare department has to do an assessment and tell the parents about the assessment. This could all be done in a time frame even before the abortion occurs.

So, in effect, the two exceptions which the state relies on in their brief for narrowly tailoring their statute, are not exceptions at all, which we've

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showed in practice.

QUESTION: Is it mandatory that the authorities notify both biological parents of the abuse?

MS. BENSHOOF: It doesn't say both biological -- nothing ever says both biological; this is new to this statute. It says parents, and I imagine they are referring to functional parents.

QUESTION: Thank you.

MS. BENSHOOF: That is an assessment after the welfare -- welfare department has assessed the situation. That does not mean, however, that they will necessarily reveal where their source came from. But there was testimony in the record that the source is found out and the district court made a clear finding of fact that this leads to them finding out that the minor indeed revealed this during the --

QUESTION: The minor is often the only source?

MS. BENSHOOF: Right. But somebody has to report it, and when the clinic reports it, it gets back to where the reporting came from. Although there's nothing in the statute that says notify the parents that you've done an investigation of abuse, and tell where you got the information. That is not in there, but that is what happens in practice. And it is in practice with what we showed the court.

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The state has argued that this Court's previous cases involving the facie validity of consent statutes preclude any looking at the facts in this case. But first of all, this statute is written in a completely different way than any statute previously before this Court.

Although the Massachusetts statute in Bellotti, which did look at a consent statute which talked about two-parent consent, there was an exception in that for fathers, let's say, who had deserted the family and, moreover, there was an exception in that in the opinion itself in which you spoke of at least when the minor is living at home with two parents. That is not the case in this particular situation.

No other case has demonstrated the actual burdens and the benefits based on actual experience. As this Court pointed out in Sable Communications, no matter what deference to legislative findings the court must engage in, you cannot forego examining the facts in constitutional cases.

There were clear findings in this case on the burdens which were almost entirely imposed on mature and best-interest minors, including medically significant delays and including the fact that some minors had to forego the opportunity to have an abortion entirely and had unwanted teenage motherhood imposed on them, which

this Court has repeatedly said is a life-stifling burden.

This is not the case of a statute that just may be imprecise or unjust in a few cases. We're not asking for that. In fact, the district court judge said, "I cannot after five weeks of trial find that any benefits outweigh the burdens imposed, nor were the state interests in this case promoted more than they were undermined."

I would like to save five minutes for rebuttal.

QUESTION: Very well, Ms. Benshoof.

MS. BENSHOOF: Thank you.

QUESTION: Mr. Tunheim.

ORAL ARGUMENT OF JOHN R. TUNHEIM

ON BEHALF OF THE RESPONDENTS AND CROSS-PETITIONERS

MR. TUNHEIM: Thank you, Mr. Chief Justice, and may it please the Court:

The primary issue in this case is whether a state can require a reasonably diligent effort to notify the parents of an unemancipated minor 48 hours prior to the performance of an abortion.

Also before the Court is the question of whether the substitute version of the law, in effect for over five years with the court bypass, is constitutional.

QUESTION: Would you explain just what -- what -- what is this substitute provision of the law, Mr. Tunheim?

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MR. TUNHEIM: The -- the law provides, Mr. Chief Justice, that parental notification is required in all cases 48 hours prior to performance of an abortion. But in the -- in the event that that provision is even enjoined by a court, then the substitute provision of the law would go into effect which provides a judicial bypass alternative.

Now, decisions of this Court in five cases involving laws construing parental involvement in minors' abortions have established two clear principles -- that for immature and non-best interest minors, states may require parental notice and even consent. For mature and best interest minors, states may condition abortions on parental consent or judicial approval.

Now, with respect to Minnesota law, certainly the Minnesota notice bypass law is constitutional if the Court finds that the bypass adheres to the Bellotti standards, and certainly the notice law is constitutional as applied to immature and non-best interest minors.

Unresolved is the issue whether the notice law is constitutional as to minors who claim to be mature or who claim that their best interests are served by having an abortion without parental notification.

Now, although I intend to direct my argument to the notice law, I'd like to address briefly several of

Petitioners' claims.

The Petitioners are asking this court to overturn decisions in Matheson, Bellotti II and Ashcroft. They're asking this Court to significantly limit parents' rights and responsibilities by finding that minors have constitutional privacy rights as against their parents and a right to withhold important information from parents.

Petitioners in effect are asking this court to second-guess a state legislature that has made a reasonable value judgment that it is beneficial for parents to know when minor daughters are pregnant and seeking an abortion, that parents can in effect be very helpful to minors during a time of serious trauma.

QUESTION: Well, Mr. Tunheim, the statute with its absolute two-parent notice requirement does sweep broadly and pick up some cases, does it not, where a parent would have to be notified even though possibly that parent had been denied custody of the child because the court had found that it was not in the best interests of the child?

I mean, are there a high percentage of -- of children in Minnesota living with a divorced -- in a divorced family?

MR. TUNHEIM: Your Honor, the evidence in the case shows that approximately 50 percent of minors in

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Minnesota live with both biological parents.

QUESTION: Put the other way, 50 percent do not.

(Laughter.)

MR. TUNHEIM: That's correct, but that -- that 50 percent doesn't include minors who live in families in which they've been adopted or there have been other circumstances.

With respect to --

QUESTION: I think to get right to the heart of it, the statute just doesn't provide for any exceptions on the notice, even though clearly there are some circumstances where it would not be in the best interests of the child to notify one of the two parents. How do you --

MR. TUNHEIM: Your Honor, the statute --

QUESTION: How do you defend the state's interest as to that?

MR. TUNHEIM: Your Honor, the statute does not require notification of -- to a parent whose rights have been terminated, termination of parental rights; does not require notification to a parent or a father who has not been adjudicated as a -- as a parent.

It does require notification to a non-custodial parent, and I submit that there's no evidence in this record or no reason for the belief that a non-custodial

parent is no longer fit to assist a minor during a difficult time in her life.

A custodial proceeding does not determine that a parent is not fit to -- to be a parent. It's still -- that person is still a parent with significant rights and responsibilities, and there's no reason for a presumption that that parent would not act in the best interests of the minor if notified.

QUESTION: Mr. Tunheim, I -- I had assumed that the purpose of this provision -- I mean, maybe -- maybe you will tell me otherwise, but I had assumed that its purpose was not just to -- to assist the child, but that the legislature also thought that apart from whether it would do the child good or not, the biological parents were presumed to have the right to provide advice on this matter if they -- if they wanted to to the child.

MR. TUNHEIM: That's correct, Justice Scalia.

QUESTION: I mean, there -- there -- there's a -- there's a parental interest involved as well as a -- as a filial interest, isn't that so?

MR. TUNHEIM: There certainly -- there are interests involved in which the state is concerned for the best interest of the minor and has found that parents are best able to help minors in -- in a very difficult and traumatic time, but there's also --

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QUESTION: You're not saying what I'm saying -- oh, oh, okay.

MR. TUNHEIM: There is also the separate and distinct interest that parents have in -- in actually knowledge about important events in -- in minors' lives. Both parents have those rights and responsibilities. It's a protected liberty interest, as this court has found in a -- in a long series of cases.

It's a significant state interest in preserving parents' traditional responsibilities for the nurturing and upbringing of minor children, and it's based upon the concept that minors are peculiarly vulnerable and that parents in most cases act in the best interests of their minor children.

QUESTION: Well, that might be true in general, but probably you would concede that there are some circumstances in which it would not be in the best interests of a child to tell one of the two parents of her problem and intention.

MR. TUNHEIM: Certainly, Your Honor, and I submit to the Court --

QUESTION: And yet there is no mechanism provided at all whereby the best interests of the child can be considered.

MR. TUNHEIM: Your Honor, I submit that the

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legislature has made determinations that are within the law itself as to those minors whose best interests may not lie in notifying their parents of having a desire to seek an abortion. There is an abuse exception in this law that is extensive. If a minor simply declares that she is a victim of sexual abuse --

QUESTION: Well, it has to be reported to a state agency that then, in turn, notifies the parents, is that right?

MR. TUNHEIM: What the law requires is simply that, in order to avoid notification, a minor declare that she is a victim of sexual abuse or physical abuse or neglect.

If that abuse has occurred within the previous three years, there is a provision which requires, under a separate law in Minnesota, the reporting of the child abuse to child protection authorities, but there is no assurance, as counsel for the Petitioners has stated, that the parents are going to find out in that instance.

QUESTION: Do you think those exceptions are constitutionally required?

MR. TUNHEIM: Justice Kennedy, I do not believe that they are constitutionally required.

QUESTION: So, in your view, the state can require notification to a parent who has been declared

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unfit and who has been denied the custody of the minor by reason of the parent having sexually abused the minor?

MR. TUNHEIM: Your Honor, if you're talking about a parent whose rights have been terminated as a parent, a finding that they are unfit, then that's a different story.

QUESTION: No, I'm saying that custody has been taken away from the parent because the parent is unfit and has sexually abused the minor, and I'm asking you whether or not your position is that the state has the constitutional right to require the minor to notify that parent in all circumstances?

MR. TUNHEIM: Your Honor, I think a state has the constitutional right to do that, but it is not mandated under the Minnesota law in any stretch of the imagination.

QUESTION: General Tunheim, does any other state have the two-parent notification?

MR. TUNHEIM: There are, I think, 11 or 12 parental notification statutes that have been enacted around the country and I'm not aware of another one that has a two-parent notification requirement, but I could be wrong about that.

QUESTION: So your answer is no?

MR. TUNHEIM: I'm not aware of another one that

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does.

QUESTION: Well, your answer is no, then?

MR. TUNHEIM: Yes.

QUESTION: Does Minnesota have a two-parent requirement with respect to any other medical procedure whatsoever?

MR. TUNHEIM: The general rule in Minnesota for minor treatment medical procedures is that there is no autonomy on the part of the minor to make those decisions by himself or herself. It's a one-parent consent requirement that is the general rule under Minnesota law.

QUESTION: So your answer is no again, after all those words?

MR. TUNHEIM: Justice Blackmun, my answer is no, but I submit that a notification requirement is not the equivalent of a consent requirement, and, in fact, let me address that issue. That's a pivotal distinction in this case, that notice is not the equivalent of consent, either factually or at law.

Factually, I think it's helpful to analyze the issue from the standpoint of control. A consent requirement transfers ultimate control over the decision to the parent. Despite a minor's best wishes, no abortion is performed until the form is signed by the parent. It grants a veto power to a parent, and a parent can exercise

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that veto power passively by simply ignoring a minor's request to even discuss the issue.

Notice, on the other hand, retains the ultimate control in the minor. This law is directed at the process of ensuring an informed decision, and not the end result, like a consent law is directed. The law merely postpones for a brief period of time in order to permit the parents to consult with minors, and even if a parent disagrees, the minor is the one that ultimately makes the decision.

Now, I submit that this Court has not equated notice with consent in the parental involvement cases, and that is confirmed by a footnote in the Matheson case, which indicates the Court's view that in Bellotti II, the Court had not equated notice with consent.

I think indisputably, notice is a much less intrusive form of parental involvement. Danforth found that the veto is the constitutional problem with the parental involvement law, and the Minnesota law does not permit a parent to exercise that veto.

Now, with respect -- let me return to the second parent requirement. I submit that the legislature could reasonably insist that both parents be notified, and reasonably believe that a two-parent notice system would serve the significant state interests that are inherent in a parental notification law and maximize the benefits

that --

QUESTION: May I stop you there with one question?

MR. TUNHEIM: Yes.

QUESTION: Going back to your dialogue with Justice Scalia earlier, just focusing simply on the parental interest in knowing what's happening to the child as one of the justifications for the two-parent requirement, does Minnesota vindicate that interest in any other statute?

MR. TUNHEIM: Justice Stevens, there are other statutes which require notice to both parents, a statute that requires notice to both parents when a minor seeks a name change, so there's one instance of an indication in which notice is required to both parents.

QUESTION: How about Minnesota as compared to Ohio, in the area of drug treatment, sexually transmitted diseases and things of that character?

MR. TUNHEIM: Well, Minnesota law does provide exceptions to the general rule of consent for certain kinds of medical treatment.

QUESTION: I understand that, but what about -- do they also require that the parents be notified, to vindicate this interest in keeping the parents informed about what happens to the children?

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MR. TUNHEIM: In other areas?

QUESTION: In the sexually transmitted disease area and in the drug treatment area. Really, in any area other than name change.

MR. TUNHEIM: Justice Stevens, the state does not. I submit to the Court that there are very different interests involved there. With respect to the exemptions to the consent law that are in the statute, there are compelling medical reasons in each of those instances for treatment and a very strong societal interest in the person gaining treatment.

QUESTION: There's a concern that the parents might object to the treatment, is that it?

MR. TUNHEIM: The concern that by notifying parents that a minor is undergoing drug abuse treatment, that that might keep a minor from coming in to get treatment.

QUESTION: I see.

QUESTION: From many medical procedures in general -- and perhaps this is what you've been over with Justice Blackmun -- I understand you to say that in Minnesota the requirement is not simply notification on the part of a minor, but consent of one parent?

MR. TUNHEIM: Yes, Your Honor.

But in following up with Justice Stevens'

question, I submit that the abortion situation is different and states are entitled to treat abortion differently.

There, the issue is a decision whether or not to undergo elective surgery that is not medically indicated for any particular reason, and the state's interest there does not lie in getting the minor in to get treatment, like it might in the drug abuse area, but the state interest there is in a thoughtful and informed decision on the part of the minor.

This Court has indicated many times that abortion is different and unique and states may come up with different rules to treat it differently.

Now, going back to the issue of claims raised by petitioners, I submit that the record in this case does not undercut in any respect the longstanding cardinal premise that parents generally act in their childrens' best interests.

The record does show that minors and parents don't always agree. The record does show that minors don't like to tell their parents unpleasant facts, and the record shows that parents often react normally with --

MR. TUNHEIM: The record shows that parents often react normally with grief and anger and fear and anguish and other sorts of normal parently reactions.

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QUESTION: Mr. -- Mr. Tunheim, what is the point of a record in a case such as this? Do trial courts ordinarily redetermine for themselves the facts that the legislature may have taken into consideration in passing a statute?

MR. TUNHEIM: I submit, Mr. Chief Justice, that that is not the appropriate role of a trial court in a case like this. But what --

QUESTION: Why did the trial court here do it, do you know?

MR. TUNHEIM: Well, I'm not -- I'm not entirely clear, Your Honor. I think what the Petitioners are asking is that this Court reassess the factual premises that underlie the Matheson, Bellotti II and Ashcroft decisions. And -- and the district court permitted the petitioners to try to establish a record for this Court to look at the issue of whether the earlier factual premises were correct or not.

The district court, after all, determined that the notice bypass law was constitutional facially and as it was applied. It struck it down after looking at the two-parent requirement and the 48-hour waiting period requirement in isolation, in holding that that entire statute had to be struck down because of those two provisions, despite the fact that he was ruling on a

statute that had a bypass in effect, which would enable minors to entirely avoid those two particular requirements.

I submit that the record in this case shows absolutely no tangible threat to the health of the minor as a result of this law. The pain -- Plaintiffs have failed to demonstrate that any minor suffered abuse or obstruction as a result of this law, that any minor suffered any medical harm as a result of this law, that the minimal delays engendered by the statute caused any kind of statistically significant risk or that minors were forced into unwanted motherhood or second-trimester abortions.

Simply put, this is not a record that should convince this Court that well-established constitutional standards should be overturned or that an important legislative value judgment should be second-guessed.

I submit that Petitioners do have a heavy burden to show this Court that it was incorrect earlier and that its judgments on such a fundamental area of law are now archaic. All the arguments that have been raised and considered in this case were raised and considered in the context of the earlier decisions. There have been no new facts of substance that have been presented. And none of the dire consequences predicted in the earlier cases have

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occurred.

And I'd ask this Court to reaffirm that states are entitled to rely upon the premises underlying well-settled law of this Court as interpreted by this Court, when they enact important legislation.

Now, let me address briefly the issue of what the district court found as -- as to the purposes of the law.

The district court found in -- in finding of fact number 67, as a factual matter, that the state had not proved that the law serves state interest in fostering family communications and protecting pregnant minors; not that the law didn't serve its purposes, but the state had not proved that the law didn't serve its purposes.

I submit that this is not a factual finding, but a conclusion of law, or, at -- at the very least, a mixed finding of law and fact that's due no deference by this Court.

And I submit that it is not the state's obligation to reprove the factual premises of strongly established constitutional law, especially in a case in which there is a summary judgment order which recognizes that this Court has concluded that such a law serves state purposes.

In fact, the -- the language out of the Bellotti

II case leaves little doubt about the question. The Court said that there can be little doubt that states further a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child.

QUESTION: Yes, but isn't -- isn't it true that the district court did say that although that's a -- that's a legitimate purpose and a -- and a -- a worthwhile goal, that in some situations this statute actually disserves that goal because there will be cases in which the minor is willing to tell one parent if that's going to be the end of the situation, but not to tell both. And the requirement of telling both will cause the child not to tell either, and therefore, that in some situations, the statute is counterproductive, and that the state didn't sustain the burden of overcoming that -- proof to that effect?

MR. TUNHEIM: I submit, Justice Stevens, that that particular finding simply doesn't make any sense. If a minor is predisposed to -- to tell -- voluntarily tell one parent of her desire to have an abortion, and -- and then obviously does not want to tell the other parent, so it goes through the court bypass procedure, why -- why would -- after -- after going through the court bypass

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procedure, the minor is at the same place where she was before. That -- that there is -- that she has one parent that she's willing to talk to.

QUESTION: Well, maybe she doesn't want to go through the bypass procedure.

MR. TUNHEIM: Pardon?

QUESTION: Maybe she doesn't want to go through the bypass procedure. She's willing to tell one parent, provided that that's the end of the matter. But if telling one parent will merely require her to go to court anyway, perhaps she'd tell -- tell neither. I think that's the thrust of the finding.

MR. TUNHEIM: That -- that's correct, Your Honor.

Let me just point out though, Your Honors, that the -- the finding as to the purpose of the law is plainly incorrect. The law's purpose, as -- as has been recognized by this Court, is to increase the potential for communication between parents and children at a critical time. Even with the bypass in effect, the record shows a doubling of parents who were notified during the time that the law was in effect.

The Webster case teaches us that the legitimate purposes of a law are not undercut if the law is not always helpful in every -- every situation.

And I submit also that the finding does not contradict the conclusion that a -- that notice is reasonably designed to serve state interests. The finding demonstrates what happens when you -- when a court goes beyond such an inquiry to weigh the costs and benefits of legislation.

The Eighth Circuit rejected that finding and -- and so should this Court.

Now, with respect to mature and best-interest minors. As I have indicated, this Court has not yet decided the issue of whether a notice law requires a bypass as it applies to mature and best-interest minors.

And I submit that since a notice law imposes no such veto, that a bypass is not constitutionally mandated for any category. And I will point out again that Minnesota law does provide, however, certain significant exceptions for minors that the legislature has deemed mature.

For -- with respect to mature minors, the law provides an exception for emancipated minors. No notice is required for that category. Members of this Court, however, have noted that even mature minors can benefit from parental advice and support. And members of the Court have also recognized that mature minors are better able to resist the pressure that a parent can put on.

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And the Court has also recognized that the legislature -- legislatures can set chronological ages which may be imprecise.

Now, with respect to the best-interest category, as I indicated earlier, there is a broad exception for abuse victims. And to get back to the issue of parents -- of parents eventually finding out about a report of suspected abuse, there exists that possibility, but under no situation could that occur until after the abortion takes place.

I remind the Court that under Minnesota law, the source of the report is confidential, and the -- the -- the notification of parents, if it does occur, is -- is a decision that -- that can be made by child protection authorities, and they may withhold knowledge -- may withhold that notification if they feel that would be in the best interest of the child in the situation.

MR. TUNHEIM: There's also a -- a -- an emergency exception in the law which allows an abortion to take place where it is necessary to prevent the death of the mother.

If the Court somehow believes that -- that notice is more burdensome to a mature and best-interest minor, I would point out that the legislature has exempted those with truly compelling needs.

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Now, with respect briefly to the waiting period of 48 hours, there is a significant state interest in a reasonable waiting period following the notification. It provides an opportunity for a parent to react to the notice, for the parent to communicate with the minor, and for the minor to reflect upon that communication. And there is no reason shown in this record or elsewhere why 48 hours is not a reasonably -- reasonable time to -- to wait following the notification, especially in situations such as -- as Minnesota, where parents may live in outlying communities and may receive the notice of the abortion after the minor has left for a metropolitan area to have the abortion take place.

And with respect to the burden of a waiting period --

QUESTION: Well, isn't -- isn't that true in almost every other state? We have rural areas in -- even in Virginia and Maryland.

MR. TUNHEIM: Certainly, Your Honor. That -- that's true. In Minnesota, the evidence suggests that abortions are provided only in the metropolitan areas of Minneapolis, St. Paul and Duluth, and it -- it takes some period of time to travel to those areas at times, and I suspect that that's the situation in most states.

The district court somehow viewed the 48-hour

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waiting period as causing a possibility of a delay of -- of more than one week.

What the court, however, failed to recognize, is that the waiting period can start simply by a phone call to an abortion provider and that it can run concurrently with any other delay that might be imposed on the process.

And, as a matter of fact, the scheduling practices of the providers suggests that most abortions will not take place immediately, but generally it takes two or three days before the -- the abortion is scheduled.

QUESTION: May I ask you, what is -- what does the statute provide with respect to the identity of the person who must give the notice?

MR. TUNHEIM: Justice Stevens, notice is provided under the Minnesota law by either the physician or an agent of the physician.

QUESTION: Is it required to be in-person or by telephone or can it be written notice?

MR. TUNHEIM: It can be written notice. It can be -- it can be personal delivery of the notice, or it can be mailed delivery with the presumption.

QUESTION: So, if the -- if the pregnant minor makes an appointment at the same time the clinic could send a notice out while the appointment is being scheduled, so you -- you in effect don't waste -- don't

have two successive time periods involved?

MR. TUNHEIM: That's correct, Justice Stevens, and, in fact, the law includes a presumption that -- that the delivery is mailed and received at noon on the day following delivery. So, there's a conclusive presumption of delivery.

In concluding, Your Honor, I'd like to urge this Court to find that Minnesota's notification law represents an appropriate and constitutional balance among significant state interests in parental communication, in parents' rights and responsibilities and minors' interests in choosing an abortion. Thank you very much.

QUESTION: Thank you, Mr. Tunheim.

Ms. Benshoof, you have five minutes. Is it Bens hoof or Ben shoof?

MS. BENSHOOF: Ben shoof.

QUESTION: Ben shoof.

You have five minutes remaining.

MS. BENSHOOF: Thank you.

REBUTTAL ARGUMENT OF JANET BENSHOOF

ON BEHALF OF THE PETITIONERS/CROSS-RESPONDENTS

MS. BENSHOOF: First of all, the state has argued that we want this Court to abandon Bellotti, and that is not true. We're asking this Court only to apply the principles that it's articulated in previous cases.

What we are objecting to here are the means and what we had the trial on are whether the particular means, this particular statute drafted by the legislature in Minnesota, achieves the goals and what the district court found in very arduous and careful fact-finding was not only they were not achieved, but that they were undermined.

QUESTION: But is that an ordinary thing you would expect a district court to do, to hold a factual trial on whether a statute "achieves" the goals that the legislature set out to achieve? I -- I frankly never heard of that.

MS. BENSHOOF: Absolutely. For -- I think this Court in many cases -- I think the whole basis of constitutional review is whether or not there's a fit between the articulated purposes and the -- and whether or not those purposes are achieved.

QUESTION: Well, did --

MS. BENSHOOF: In Craig v. Boren you looked as to whether the differential between men and women contributed to highway safety.

Certainly in Buckley v. Valeo you pointed out that you're upholding the campaign financing laws, but should we come back later and show that minor parties are, in fact, discriminated against, you would reexamine that.

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QUESTION: But that -- that was a -- that was a First Amendment case. I mean, where -- where you -- where there may be a different rule, in the ordinary case do you think the legislature is simply subject to being second-guessed on the facts by a trial in the district court?

MS. BENSHOOF: Well, certainly the legislature of the state of Iowa was second-guessed on a 65-foot truck.

QUESTION: Well, there was some dispute within our Court as to whether that should have been done.

MS. BENSHOOF: Well, there may have been dispute, but I --

(Laughter.)

MS. BENSHOOF: I'm sorry you weren't on my side.

(Laughter.)

MS. BENSHOOF: But I'm citing the majority.

(Laughter.)

MS. BENSHOOF: In response to Justice Stevens' question about abortion being different, I'd like to point out that, yes, you've allowed abortion to be treated differently, but never have you not looked at all the state interests to see whether this really is a state interest.

For example, in Griswold, you said is the state really protecting marital fidelity? Let's look at their

other statutes.

Justice White, in his dissent in Michael H., said is this really protecting against the stigma of illegitimacy? Let's look at the fact that a father can raise it.

Well, in Minnesota, are they really protecting the parents' rights to help a child when they let -- they have specific minors' consent to health care where minors can have complete privacy in pregnancy testing, V.D. testing and treatment, penicillin, which is more dangerous than an abortion, prenatal care, childbirth -- you can consent to a cesarean section at age 14 in Minnesota, and yet you have to notify a father you may never have seen.

I would not say that you have to treat abortion differently because that's not what this Court has said, but certainly the strength and integrity of the state interest in this case I would submit is a bit suspect.

And going to the emergency exception, there really is no emergency exception in this statute for health problems.

One class member that we represent, for example, was aborting spontaneously. She came in with a health problem with her mother. They were forced to go to court because they could not notify the absent father, and they were forced to go to court, taking a nurse with them while

they aborted in court, to go through the bypass in order to comply with this statute. Certainly that doesn't achieve any interest that anyone could possibly imagine.

Fourth, I think --

QUESTION: Your opponent said the emergency was confined to the possible death of the mother. Is that true?

MS. BENSHOOF: Yes. Emergency is not only confined to death, but you have to die within three days.

(Laughter.)

QUESTION: And so there's nothing there as to the health of the mother?

MS. BENSHOOF: Absolutely not, and death has to be within three days. So that moreover, even -- even minors who have dead parents are burdened under this statute because this statute requires in its penalty provision that the clinics collect written proof, so you have to bring in funeral certificates or death certificates which take for some of our minors -- it's in the record -- two or three weeks.

QUESTION: Why is it death within three days? I suppose that's the amount of time that they think the notification will take?

MS. BENSHOOF: Because it -- yeah, the written notice. Yes, the time within the written notice which the

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district court judge made a finding of fact that 72 hours was the normal time.

QUESTION: Well, that doesn't seem so absurd, then. I mean, if -- if you don't -- you don't need the exception, if -- if though your life may be at risk, it's -- it's not going to be at risk by the notification.

MS. BENSHOOF: Well, I think the point is that that exception was never used when this statute was in effect for five years, but certainly the health exception, I think, is a more ordinary exception, particularly when one parent comes in. And minors do have health problems.

I think what we have to remember here is that for a young person childbirth, for example, for a girl under the age 15, is ten times as risky as death as for a woman in her twenties.

CHIEF JUSTICE REHNQUIST: Thank you. Thank you, Ms. Benshoof. Your time has expired.

The case is submitted.

(Whereupon, at 11:59 a.m., the case in the above-entitled matter was submitted.)

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James Hodgson, et al Petitioners v. Minnesota, et al.; and Minnesota, et al., Cross Petitioners v. Jone Hodgson, et al Docket Nos. 88-1125 & 88-1309

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Judy Freilicher

(REPORTER)