OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: OHIO, *Appellant*, V. AKRON CENTER FOR REPRODUCTIVE HEALTH, ET AL.

CASE NO: 88 - 805

PLACE: Washington, D.C.

DATE: November 29, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

OHIO,

Appellant

v. : No. 88-805

AKRON CENTER FOR REPRODUCTIVE HEALTH, 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 10:00 a.m.

APPEARANCES:

RITA S. EPPLER, ESQ., Assistant Attorney General of Ohio, Columbus, Ohio; on behalf of the Appellant.

LINDA R. SOGG, ESQ., Cleveland, Ohio; on behalf of the Appellee.

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PROCEEDINGS

(10:00 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 88-805, Ohio v. Akron Center for Reproductive Health.

Ms. Eppler, you may proceed.

ORAL ARGUMENT OF RITA S. EPPLER

ON BEHALF OF THE APPELLANT

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

The case presented for review today concerns two central issues: First, does Ohio's parental notification statute as facially challenged ensure a minor's rights to due process under the Fourteenth Amendment; and second, does the Constitution require the state to provide a bypass procedure for a pregnant minor seeking to avoid parental notification.

The cardinal principle in our nation's laws is that states are entitled to enact laws designed to aid parents in discharging their responsibilities for the upbringing of their children. This Court has recognized that a state has a significant interest in encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the grave decision of whether or not to bear a child.

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This right has specifically been extended to permit states to allow parental consent for a minor seeking to have an abortion performed, provided that an expedient and confidential alternative to consent is provided for a mature minor or a minor whose best interest would not be served. If the state's interests are strong enough to justify parental consent, certainly they are strong enough to support also parental notification.

Parents can provide essential medical and other valuable information to physicians, including information about medical history, psychological history, data relevant to allergies, drug reactions, past diseases, family history. This information may not always be available to the minor or, if available, may not be forthcoming from the minor if she believes the information could in any way jeopardize her ability to have the abortion performed.

In addition, informed parents are in a position to provide for post-operative type of complications to assure that there is proper treatment and care in the event that post-operative complications arise, be that in the -- in the nature of physical complications or emotional.

Ohio's requirement of parental notification is clearly no more burdensome than a consent provision and balances the parents' responsibility for the upbringing of

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their children while preserving the minor's right to choose.

Ohio has adopted a parental notification statute that contains a judicial bypass procedure modeled on the guidelines provided by this Court in Bellotti II. While the lower courts have acknowledged that Ohio has the right and the authority to legislate parental involvement, they nonetheless struck down Ohio's statute based on judicially manufactured flaws.

In a facial challenge to a legislative act, this Court has given clear guidance on the rules of statutory construction. The challenger must establish that no set of facts or circumstances exist under which the act would be considered valid. The fact that the statute might operate unconstitutionally under some conceivable set of facts or circumstances is insufficient to render a statute invalid in a facial challenge.

Statutes must be interpreted in a manner to avoid constitutional difficulties such that if one among alternative constructions would provide for an unconstitutional interpretation, then that particular interpretation should be rejected in favor of another.

The lower courts here have failed to adhere to these fundamental principles of statutory construction when analyzing Ohio's statute presented for review.

Specifically, the judicial bypass provisions provide a framework for an expedient and confidential bypass that has, in fact, an -- an assurance of a timely resolution of the minor's petition based on a constructive authorization provision. The pleading forms allow the minor to put into issue either maturity or best interest but do not compel the minor to plead both if she does not so choose.

QUESTION: What about the clear and convincing evidence standard that's required?

MS. EPPLER: Your Honor, the clear and convincing standard of proof here does, in fact, provide for an ability -- since the parents are not going to be represented at the hearing, the state has decided not to turn this into an adversarial type process, so the state is not represented, and there needs to be in this nonadversarial ex parte type of proceeding some way to assure a reliable result in the outcome.

QUESTION: Well, what test do you apply? The Mathews/Eldridge test?

MS. EPPLER: Yes, Your Honor. When analyzing the three-part test laid out in Mathews v. Eldridge, specifically we first look to the private interest affected. In this instance, it's the minor's right to have an abortion performed without notification to her parent and not simply the right to have an abortion

performed, because she does retain her right to choose under a notification statute.

Secondly is the question of who bears the risk of an erroneous decision. Again, in an ex parte, nonadversarial process, the minor here is the only party and, therefore, is the only party that can bear the risk.

Thirdly, we look to the governmental interest or the state interest affected here, and that is in encouraging a pregnant minor to seek the help and advice of her parents in making this decision and in protecting the minor's health.

QUESTION: And what about the risk of erroneous deprivation?

MS. EPPLER: Your Honor, it is the state's position that the risk can only here be borne by the minor since she is the only party involved, based --

QUESTION: But it increases the risk of erroneous deprivation by increasing the burden of proof, of course.

MS. EPPLER: That is correct, Your Honor, and --

QUESTION: And you have an unsophisticated minor, presumably, trying to handle these things. What kind of evidence would suffice?

MS. EPPLER: Your Honor, the minor is here under the statute represented by counsel so is aided in her presentation before the court, and there is an ability to

present. We assume the evidence will go forward either in an in-chambers conference or in a -- in a in camera type of proceeding before the court and will most likely simply be the minor presenting her evidence with her counsel's aid, and there is no reason --

QUESTION: And what evidence would suffice to meet the standard of clear and convincing?

MS. EPPLER: Your Honor, it is the definition of clear and convincing evidence under Ohio law that it's more than a mere preponderance but not to the extent of such certainty as beyond a reasonable doubt. Specifically, the Ohio case is analyzing clear and convincing to say it does not mean clear and unequivocable.

So it's clearly simply more than a preponderance of the evidence which, in the state's position, is reasonable in light of the fact that there is no one there to present the other side of this issue.

In addition --

QUESTION: Well -- well, what kind of evidence does the minor adduce to show maturity?

MS. EPPLER: Your Honor, I -- I would posit that the minor would simply be able to tell her side to the judge. If she believes she is sufficiently mature, most likely her statements alone will suffice, and if the judge --

QUESTION: Well, what sort of factors do you take into account if you're a judge in order to tell if the minor is mature or not?

MS. EPPLER: I think the ability to answer questions, how well the minor is able to articulate what her particular concerns are if it is a best interest question. If it's maturity, I think the judge in many instances in juvenile proceedings have the need to assess maturity level to determine the validity of a minor's claims as they are raised before the juvenile court.

So this would not be anything different than a juvenile judge would traditionally be required to analyze.

QUESTION: Can -- can you tell us how long these hearings usually take to determine, say, maturity?

MS. EPPLER: Your Honor, specifically, the statute provides for the juvenile level to be heard within the fifth -- by the fifth business day but as soon as possible, but no later than the fifth business day.

QUESTION: I -- I meant how long does the hearing itself take?

MS. EPPLER: The time? Your Honor, since this is a facial challenge and we have not yet had the opportunity to put the statute into play, I would simply be speculating to answer your question.

My assumption is that the hearings would be rather

brief. The decision based on the evidence presented is to be provided immediately at the conclusion of the hearing by statute, so that would lend credence to believe that the hearing would be fairly brief in its duration.

In addition, the appellate level of review is scheduled to take place within nine days total, four days for filing the brief -- four days for filing the appeal, the notice of appeal, and then five days for appellate review including briefing, oral argument and disposition.

In addition, there are good cause provisions that allow for the appellate level of review to be expedited if good cause is shown.

Consequently, this is probably one of the most -- clearest examples of the lower court's overreaching. What they did is take a nine-day time frame at appellate level of review and turn it into 15 days by utilizing a hypothetical situation that could in essence only occur one time per calendar year and added in two weekends and two legal holidays to turn nine days into 15.

It is the state's position here that the 20 -- the 22-day time frame arrived at for determination of the entire level of review would in fact be inappropriate. But even assuming that the 22 days is correct, the statute is still sufficiently expeditious to comply with the Bellotti II standards.

This Court in Ashcroft looked to something akin to a 16- to 17-day time frame, plus an undetermined period of time for deliberation and decisionmaking at both the juvenile and appellate levels of review and found that to be sufficiently -- sufficiently expeditious.

In addition, the Ohio statute has the protection of a constructive authorization provision that provides for the minor to have a final disposition on her petition despite crowded dockets or any unforeseen delays or problems with the court. Disposition on the minor's petition under the Ohio statute cannot be delayed.

The lower courts here again speculated that physicians would be unwilling to perform abortions based on the constructive authorization and concluded that that provision was an undue burden on the minor's rights. This type of speculation again has no place in a facial challenge and as a factual matter is simply incorrect.

The Ohio courts speak through their journal. There is no reason why a copy of the complaint coupled with the journal could not be provided to a physician to provide tangible proof that constructive authorization has in fact taken place.

In addition, since the minor is in fact represented by counsel under the statute, the -- the ability to have an opportunity to confer with counsel to determine that

the constructive authorization has taken place also exists for the physician.

So to assume that the constructive authorization will create an undue burden.

So to assume that the constructive authorization will create an undue burden is another clear example of the lower court's failure to follow this Court's maxims on statutory construction.

With regard to the statute's provisions and the Ohio ethics laws governing the conduct of court employees, they both combine to assure the confidentially of the bypass proceeding.

The statute specifically prohibits the minor's parents from being notified of the proceeding. The hearings at both the juvenile and appellate levels of review must be conducted to preserve anonymity. All papers and records at both the juvenile and appellate levels of review are specifically to be kept confidential, and are exempt from the Ohio Public Records Law that would allow disclosure to the public.

In addition, the Ohio ethics laws subject court personnel who violate the confidentiality of these proceedings to criminal sanctions and fines, including imprisonment as well.

The minor here is required to sign her name and

provide an address where she can be reached if she is not already represented by counsel. If she is represented by counsel she need not provide either her name or an address where she can be reached.

While the form does require the name and addresses of the minor's parents, that is no different than the requirements of the -- of the consent statute that was examined by this Court in Planned Parenthood Association v. Ashcroft.

In Ashcroft, while the minor was permitted to use her initials and had the ability to have the petition signed by a next friend, she still was required to provide the name and address of her parents.

The Ohio statute here provides a proper framework to preserve the confidentiality of the proceedings. The lower courts here have failed to articulate how the statute would endanger the anonymity of the minor.

The plaintiffs here irrationally predict that court personnel facing criminal sanctions will cavalierly disregard the minor's rights. This type of speculation and prediction, again, have no place in a facial challenge.

Ohio has taken all necessary precautions to assure the minor's confidentiality, and the statute

provides a framework to fulfill its promise not to disclose the minor's identity to her parents or to the public.

In addition, the pleading forms allow the minor to file a complaint containing either an allegation of maturity or an allegation of best interest, or she can file a third form putting both into issue. But the minor is not compelled to put both into issue if she so chooses.

A minor here has the opportunity to raise both claims and, in fact, on the third form, is able to do so.

Under Bellotti II, a minor specifically is not compelled to put both claims into issue against her will.

As this Court recognized in Akron v. Akron Center for Reproductive Health, and in Ashcroft, the state must provide an alternative procedure whereby the minor may demonstrate that she is sufficiently mature, or that despite her immaturity, the abortion would be in her best interests.

The minor or counsel simply must indicate which claim she chooses to put into issue. Regardless of the form chosen, the minor is not locked into that choice.

In addition, there are extensive procedural safeguards provided for in the statute that ensure the minors opportunity to be heard.

There is a provision for appointed counsel. In addition, liberal amendments are provided for in both the Ohio Juvenile Rules of Procedures and the Ohio Civil Rules of Procedure. A minor would be permitted to amend her pleading even as late as at the hearing, if that was in fact appropriate.

QUESTION: Ms. Eppler, is the -- is the state arguing that you need not have a bypass procedure at all for just a notification statute, where consent isn't required?

MS. EPPLER: Yes, Your Honor. That was a question that was addressed by the lower courts. As a threshold matter, they did determine --

QUESTION: And you have addressed that in your brief, I take it?

MS. EPPLER: Yes, Your Honor. In fact, it is the state's position that there is no constitutional mandate to a bypass procedure in a notification context.

QUESTION: As compared with -- or contrasted with a consent?

MS. EPPLER: That is correct, Your Honor. It would be the state's position that there is no constitutional mandate in the context of a notification statute to require a bypass procedure. However, the Ohio statute does contain one, and is in fact constitutional as

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it is presented for review before this Court.

QUESTION: Would that be the state's position if the notification requirement were to both biologic parents?

MS. EPPLER: Yes, Your Honor. I don't see any reason why that would not be equally constitutional for review. But again, that is not the case presented for review from Ohio.

QUESTION: May I ask about the notification? Is this the -- is it correct that the notice must be given by the person who is going to perform the -- the abortion?

MS. EPPLER: Yes, Your Honor.

QUESTION: And not by any -- what -- what is the justification for that limitation? If the purpose of the statute is to enable the -- the pregnant minor to have the advice and counsel of the parent, what difference does it make who gives the notice?

MS. EPPLER: Your Honor, specifically, that is provided for the physician to provide notification to the parent to properly protect the minor's health interest here. It is the -- it is the state's position, that this Court has recognized in H.L. v. Matheson, that adequate medical and psychological history is important to the physician, and that specifically requiring the physician to obtain the information from a parent puts that

physician in the best possible position --

QUESTION: In other words, one of the justifications for this statute is to give the physician information that the state thinks the physician needs?

MS. EPPLER: Yes, Your Honor, to allow that physician to maximize information, to --

QUESTION: Well, if the physician thought the information was necessary, the physician could always call up and ask for it; that's clear. But you're saying the physician must do it even if the physician doesn't think the information is necessary?

MS. EPPLER: Yes, Your Honor. And the state's interest underlying that request is for the protection of the minor's health. If --

QUESTION: The protection being that the physician might not realize that there was information out there that he or she ought to get?

MS. EPPLER: That's correct, Your Honor. And here, specifically involving the physician, as opposed to an intermediary, again, protects against additional delays that could result if an intermediary, such as a subordinate or the alternative provider of information to the parent -- that could constitute a delay. If all information that was needed was not initially obtained by that intermediary, there could cause a need for multiple

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conversations. And it could delay the proceeding, and the minor's health could be put at risk.

QUESTION: Well, then, is that one of the factors that the judge has to take into account in the bypass procedure, whether there is need for the transmittal of this kind of information?

MS. EPPLER: No, Your Honor, because in each instance the requirement of the statute does have the physician directly communicating with the parent.

QUESTION: Well, not if the -- not if there's a bypass authorized?

MS. EPPLER: Oh, that -- yes, Your Honor (inaudible).

QUESTION: And does it -- how, in the bypass procedure, do you protect this state interest? How do you make sure that the doctor gets this important information?

MS. EPPLER: I -- I don't believe that is a question that is directly addressed by the bypass procedure. Rather, it is --

QUESTION: It's just -- is it a relevant consideration in the bypass procedure? Does the judge have a duty to make some kind of an inquiry into the need for this kind of information?

MS. EPPLER: It is not laid out for in the statute, Your Honor. It would be the state's position

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that the rationale or the state interest underlying the need for direct physician involvement would be present for any child that is going to have the abortion performed, because that child would not be in -- in a position necessarily to have all the information that would be relevant. Or, the state's position is if that information is available, the -- the minor may not be forthcoming with it if she believes it could in any way jeopardize her ability to have the abortion performed.

QUESTION: So you're -- the justification for -- for the particular procedure that Ohio has is not just to enable the minor and the parent to make an informed decision, but also to be sure the doctor acts wisely?

MS. EPPLER: In essence, Your Honor, but it is the minor's health that is the particular state interest that is articulated. It is the fact that a -- an informed physician will be able to --

QUESTION: Well, is the reason for the parents' participation primarily to protect the minor's health?

MS. EPPLER: And encourage parental involvement in the decision-making of the minor; both, Your Honor. And both have been recognized by this Court as significant interests for the state to in fact protect.

In addition, the lower courts, in looking at the physician notification, specifically relied on Akron v.

Akron Center for Reproductive Health to conclude that physician involvement in notification was unduly burdensome.

Akron involved a municipal ordinance that under the guise of informed consent, required physicians to recite a litany of information that was designed to deter abortions. This Court concluded that the information was in fact burdensome and involving the physician did not directly further the state's interest in informed consent.

The Ohio provision before the Court today, however, concerns very different state interest, that of protecting the minor's health by providing information to the physician that enhances his ability to provide for protection of the minor's health and exercise his best medical judgment.

The direct physician involvement here does enhance the state's interest and does permissibly further the state's legitimate interest here.

The Plaintiffs and the District Court have presumed that physician involvement may increase the cost of an abortion. There is no basis to presume any increase in cost will result from this typical type of physician/patient type of communication to a minor's parent.

To assume in this facial challenge that minor's

reactions will be to increase the cost to a minor seeking an abortion is unsupported in this record, and again, improper in a facial challenge.

With regard to the balance of the consideration of the pleading forums provided for in the Ohio statute, there are extensive procedural safeguards to ensure the minor's opportunity to be heard here, appointed counsel and the liberal ability to amend, in the juvenile and the civil rules, provide for the ability in this ex parte hearing to preserve the best interests of the child and give counsel wide latitude to amend whenever it's necessary.

The lower courts here, again, assumed incorrectly that once a pleading was filed, the minor would not be permitted to amend, and would be limited to the claims raised in her pleadings. The lower courts here simply again have failed -- have failed to adhere to the fundamental principles of statutory construction, and have looked for difficulties, rather than avoiding them.

Where a statute requires only parental notification prior to an abortion performed on a minor under the due process clause, the question of whether or not there is a need for a bypass procedure is the question that this court left open eight years ago in H.L. v. Matheson. It is the state's position that the lower

courts erroneously have assumed that notice is tantamount to consent, and that they have analyzed the Ohio statute under the requirements laid out by the Bellotti test.

QUESTION: Ms. Eppler, it isn't altogether clear to me why that question has to be decided, in view of the fact that the state has decided to have a bypass procedure.

MS. EPPLER: You are correct, Your Honor. It is the state's position that since the lower courts did look at this as -- as a threshold matter, that it is an alternative ground for the court to reach if they so choose.

QUESTION: But not necessary --

MS. EPPLER: That is correct.

QUESTION: -- to the decision?

MS. EPPLER: That is correct, Your Honor.

When reviewed facially, the statute here presents no undue burden. The Ohio legislature has drafted a statute that strikes a balance, allowing the opportunity for parental involvement when their daughter is facing possibly the most serious dilemma of her young life, while at the same time preserving the minor's rights to choose.

We would respectfully request this Court to reverse the Sixth Circuit determination and find the Ohio

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statute constitutional.

I would reserve the remainder of my time for rebuttal, Your Honor.

QUESTION: Thank you, Ms. Eppler.

Ms. Sogg, we'll hear now from you.

You can turn the lectern down if you want.

ORAL ARGUMENT OF LINDA R. SOGG

ON BEHALF OF THE APPELLEES

MS. SOGG: Either that or grow.

Mr. Chief Justice, may it please the Court:

Ohio properly determined that a bypass was constitutionally required in connection with its parental notification statute. But although Ohio claims here today that it followed the constitutional mandates expressly set forth by this Court in Bellotti, the fact is that both lower courts that have reviewed the statute have determined properly that Ohio failed miserably to implement the Bellotti standards in the development of its parental notification statute.

Indeed, what Ohio has accomplished by its bypass is to create a procedure that lulls a young, vulnerable minor into the belief that her rights and her safety will be protected, and then stacks the decks against her.

The Ohio bypass stacks the decks by imposing an unprecedented heightened burden of proof, a clear and

convincing standard, on the minor. And that burden of proof clearly increases the chances of an erroneous and harmful outcome for her when she comes before the court with her petition.

That same bypass stacks the decks against the minor woman by creating a pleading scheme that is not only absolutely contrary to the intent and the express purpose and language this Court set forth in Bellotti, but that is misleading, and literally encourages an erroneous outcome by prohibiting juvenile judges from themselves acting in conformity with Bellotti standards.

Now the state has attempted to justify before and has again today asserted as a justification for its clear and convincing standard, burden of proof, number one, that this is not a state-initiated proceeding. That's actually incorrect.

The fact is that but for House bill 319, no proceeding would be necessary.

The state also indicates that a clear and convincing burden is appropriate in this circumstance because of the ex parte nature of the proceeding, and because parents are not literally there to dispute their daughter's claim of maturity or best interest.

In the first instance, the very purpose of this bypass proceeding is to avoid hostile or harmful parental

involvement. It would be absurd; it would be a legal oxymoron to have that as the purpose of the proceeding, and then bemoan the fact that the parents are not present to be involved and to act as an adversary to the minor.

The clear and convincing standard, furthermore, goes contrary to every recent case decided by this Court that dealt with the imposition of a burden of proof, where that burden was most likely to deprive an individual of an important liberty interest.

Under the Mathews test that Justice O'Connor addressed earlier, it is clear that the minor has the private liberty interest, and a substantial interest at stake in this proceeding. And I think we can safely assume that this young woman would not have left school at a time of trauma to come down to a juvenile court, which may or may not be in her own county of residence, to fill out these forms if she did not believe deeply and strongly that she needed to avoid the involvement of her parents in this important decision.

Having done so, that liberty interest should not be the subject on a higher burden of proof risk of error, but, quite the contrary, if any greater burden was appropriate, it would clearly be on the state and not on the minor.

In the case of the pleading traps as they were

characterized by the Sixth Circuit, Bellotti could not be more clear in its language regarding the structure of the hearing at which a minor can either prove her maturity, or if her maturity is not demonstrated to the court, that the court -- the court must then assess whether even though the minor is not mature enough to make her own informed decision, whether or not that abortion is still in her best interests.

Most often, because the court will have determined that there has been a history or a pattern of abuse of that minor, Ohio in setting up its pleading scheme has taken that structure for evaluation from the judge and made it literally Russian roulette for the minor. By creating pleading forms for a young woman unsophisticated, unschooled and clearly --

QUESTION: Is there no right to counsel, here?

MS. SOGG: Your Honor --

QUESTION: Will there be a lawyer under the scheme who can address the pleading question on -- on behalf of the young woman?

MS. SOGG: Most probably not, Your Honor, at the point that the complaint is filed.

QUESTION: Can it be amended after it's filed?

MS. SOGG: It would appear that under Ohio civil rules, if a lawyer, once appointed, in appearing at the

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hearing moved the court for such an amendment it would be possible. However, there is certainly no guarantee that the court would grant that motion and allow the minor --

QUESTION: But under Ohio law, normally it would be granted. There is no one there to oppose it, right?

MS. SOGG: That's correct.

QUESTION: Yes.

MS. SOGG: The judge would have that discretion, but --

QUESTION: I mean, it just -- it strikes me that the argument is a bit strained that the pleading requirement is particularly onerous.

MS. SOGG: Well, the view that it's onerous, Your Honor, is based on the view that there is no justification for throwing up a barricade or an obstacle to a minor coming into the court and being able -- without getting a lawyer and without knowing about amendment, be able to present her case in a meaningful way to the judge.

While it is true that the pleadings could be amended, what we are doing is leaving to the discretion of the judge the issue of whether he or she is going to respond, and it is exactly that kind of discretion that this Court found inappropriate in Bellotti.

Certainly it is possible to cure what is otherwise an unconstitutional provision. It is our view,

however, that because we are dealing with a young minor and because the stakes are high for them, that we ought not to take those risks, that the law ought to be able to follow the lobby because nothing is accomplished by this pleading scheme.

If the state had a reason, an argument, to say, well, yes, we've got to do it this way -- it's the only way that works, it's appropriate -- that might be one thing. The state raises no such claim here. They have not made any attempt to justify this pleading scheme.

QUESTION: Ms. Sogg, can I ask you a question about Ohio law? Suppose a young woman in Ohio thinks she has a fatal disease and wants to get an operation which she thinks is necessary to eliminate it, and let's assume her parents are Christian Scientists, who are people who don't believe in -- in -- in medical procedures of that sort. Under Ohio law, could she -- and she's a minor -- could she go -- go into a medical facility and get that operation without having her parents notified?

MS. SOGG: Yes, Mr. Justice, she can.

QUESTION: She has -- she has a right to do it without --

MS. SOGG: Not by statutory law, Your Honor, but Ohio, as many if not most states in the Union, have case law that establishes what is known as the mature minor

rule, and that permits a minor to give consent for any medical procedure, whether emergency or not, if there is a determination that that minor is mature enough to do so.

QUESTION: Of whatever age?

MS. SOGG: Actually, of -- in fact, that is correct, Your Honor.

The cases in Ohio and -- and elsewhere tend to cluster around the upper teens and closer to the age of emancipation, but the fact is that the case law doesn't indicate any specific moment in time chronologically when a minor can take advantage of the mature minor rule.

Now, we're all aware that that rule is for the protection of the physician and of course part of our concern with this statute has been the protection of professionals -- physicians in the State of Ohio, who, should they make a slip under this statute and perform an abortion on an unemancipated minor without notification, for any number of reasons, that physician would be subjected to criminal penalties, to civil penalties -- actually, to civil, per se, liability, and to the loss of his or her license to practice. But the simple answer is that yes, a mature minor in Ohio can consent.

The flip side of that, interestingly enough, is that Ohio has really singled out the abortion issue for notification, because as a matter of fact, Your Honor,

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under Ohio law, a minor who goes to seek medical treatment for sexually transmitted diseases, the physician is prohibited by statute from notifying a parent.

In the same way, a minor who seeks treatment for drug abuse in Ohio, the physician is governed by a similar statute that prohibits that physician from notifying a parent that the minor has sought treatment for drug abuse, and the same is true, of course, as it is in every state that I know of, that a minor who seeks counseling because of mental health and suicidal tendencies is given absolute confidentiality for any treatment they receive from the suicide hotline.

QUESTION: It would be quite consistent with our cases, wouldn't it, to say that the state may encourage people to come for drug counseling, suicidal tendencies, but need not encourage abortion in the same way?

MS. SOGG: That is absolutely correct, Your Honor, and as a matter of fact, Appellees -- Plaintiffs have never disputed the fact that parents, loving parents, can play an important role in the guidance of vulnerable, immature children who benefit from -- from that guidance, and have recognized that this Court has indicated that certain health care areas ought to involve, wherever possible and appropriate, a loving, supportive parent.

This same Court, how -- however, has recognized,

in cases like J.R./Parham, that not all parents are loving, and in the intervening year since Matheson and Parham were decided by this Court, we have unfortunately been visited by too many stories, too many statistics, Your Honor, of how unloving parents can be. What a tragedy that this country has the type of parental abuse that we read about and hear about on a daily basis.

Consequently, although we have agreed that loving parents ought to be notified, and can be helpful to an immature minor who will benefit from that help, we have heartily disagreed that all parents, including abusive parents, should be notified and thereby place a minor into a zone of danger and the focus of this Court has repeatedly been on providing protections for minors not only from their -- for their parents' involvement but from their parents' abuse as well.

Perhaps no issue is as central to a fair, effective and meaningful bypass than the guarantee of anonymity. The Ohio statute does no more than rhetorically gloss over the question of confidentiality, and the folly of failing to provide specific guidelines to assure anonymity is nowhere better illustrated than in the complaint forms promulgated without the benefit of such guidelines.

Under the Ohio scheme, a minor who comes to

Court must sign her name to the complaint, and if she has no attorney with her -- and it's fair to assume that most young women will not come accompanied by an attorney -- she must also provide an address where she can be reached during the course of the Court proceeding, an address which presumably would be a home address.

QUESTION: Well, not necessarily. Maybe it could be the physician's address.

MS. SOGG: It could be, certainly, Your Honor. It could be either one.

That minor must also, no less than four times, provide the names of her parents on the complaint form. The state, although it insists that it has provided confidentiality, makes statements that ring hollow in the face of the forms that the minor must in fact deal with and, indeed, the state has offered no justification for not providing in the statute itself specific guidelines to be followed by the Juvenile Court in order to guarantee anonymity.

Even if Ohio's bypass was not so obviously defective, House Bill 319 must nevertheless be found unconstitutional, based solely on the requirement that the physician personally notify the parent.

There can be no justification whatsoever for requiring a highly paid professional to undertake this

time-consuming task that the state has admitted in earlier proceedings is merely ministerial. In fact, before the District Court in the Sixth Circuit, the state made no claim that the personal notice by the physician was to effectuate an interest in the health of the minor. That claim, that justification, has only just arisen before this Court.

However, the state does not explain here why it is that a physician interested in obtaining information, or a parent interested in providing information to a physician, cannot do so following the actual notification by some other competent individual such as a nurse or a counselor. Indeed, to ask physicians to sit down with telephone books, get on the phone, spend hours trying to locate a parent at home or at work -- and indeed the statute says if you can't get them on the phone, the physician is required to personally get in his car and go to their home because it must be accomplished personally.

To ask that, on the speculative justification that there may be in some instance some medical information transmitted, is a hollow meritless argument because that information can always be transmitted, and in the case of a mature minor presumably can be transmitted as well by her as by any parent.

This Court has already struck down a similar

statute in Akron I and must find this requirement equally, if not more, offensive. Moreover, even if this Court should hold that a bypass is not constitutionally required under Bellotti standards, the fact is Ohio has provided such a bypass. Once provided, the constitution demands that the bypass procedure be fundamentally fair.

QUESTION: Why is that, Ms. Sogg? I would think that if Ohio need not provide a bypass procedure at all under the federal Constitution, it wouldn't make much difference what kind of a one it actually provides.

MS. SOGG: The fact is, Your Honor, that this Court has held in Cleveland Board of Education v. Loudermill, in Goss v. Lopez and in a number of other cases that where a state need not choose to create an entitlement, it can choose not to do so.

However, once having chosen to provide that entitlement, that procedure, what is provided must be --

QUESTION: What is the entitlement that the state has provided here, in your view?

MS. SOGG: The state has provided a property interest for the minor in exercising her right to avoid hostile or harmful parental involvement.

QUESTION: Well, property -- what case of ours do you think comes closest to say that the state has provided a property interest by enacting this procedure

here?

MS. SOGG: I believe Goss v. Lopez, Your Honor, comes the closest. It also dealt with minors in the context of high school suspensions and as a former high school principal, I can tell you it's a case we all knew very well.

As a matter of fact, the property interest for the minor has particular significance and meaning in the context of the Ohio statute because the consequences of the bypass being unfair and unreliable for the minor are lifelong and in some cases can be disastrous.

Consequently, under a procedural due process standard, an examination of House Bill 319 can yield but one conclusion, and that is the bypass fails to meet even the most minimal rational standard of review. Once again, the clear and convincing standard of our burden of proof in this case can hardly be said to provide the minor with a meaningful manner of exercising her right to an exemption as that right is granted by the bypass.

Certainly the pleading traps are contrary to procedural due process and must fail under that test. Moreover, the expedition flaws in the statute run contrary to the minor's ability to get a fair hearing and at a meaningful time.

Ohio has recognized the competence of mature

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minors and has expressed that competence in recognition when it included a bypass for mature minors and in so doing acknowledged that a mature minor woman is by definition a woman and as such she is entitled to the constitutional right of privacy extended to all women by this Court.

Forced disclosure in any context and by any means for that woman is inarguably a substantial, unjustifiable, and undue burden on her privacy right, a burden which in the case of minors dealing with a parental notification law, is going to be only exacerbated by efforts by parents to interfere with the minor woman's abortion decision.

Efforts which this Court has recognized can be extremely effective where minors are financially dependent or susceptible to intimidation as was the case with the plaintiff in our case, Rachel Roe who, if her parents had been notified, faced not only abuse, but faced eviction not only for herself, but for her two-year-old son as well.

Nothing in this Court's history of balancing the interests of parents and the state against the individual liberties guaranteed to minors supports the conclusion that this Court will abandon a mature minor's privacy right any more than it will abandon a minor's First

Amendment right.

Certainly where no significant or compelling interest on the government's part justifies such an abandonment, this Court will not subject mature minors to such a deprivation.

Furthermore, it is absurd to suggest that this Court would risk the physical safety of immature minor women without some overarching justification, and surely no such justification exists here.

For young women like Rachel Roe, our discourse this morning is far removed from their need for confidentiality or their fear of parental retaliation or coercion.

QUESTION: Ms. Sogg, I'm -- I'm -- I'm -- I -- you went by me on the mature minor's First Amendment rights. I -- I don't -- the fact that a minor is mature doesn't make the minor no longer a minor, does it? I mean for First Amendment purposes, any -- any more than anything else?

MS. SOGG: That's correct.

QUESTION: I assume a parent, even a parent of a mature minor, can prevent that minor from publishing a newspaper if the parent says I don't want you to public the newspaper, no matter how mature the minor might be --

MS. SOGG: I agree with that, Your Honor.

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QUESTION: -- isn't that so?

MS. SOGG: I -- I -- I think that --

QUESTION: I mean, we are talking about minors, mature or not?

MS. SOGG: We are indeed. I think we limit -- and the Court has been willing historically to limit -- the rights of minors in recognition of their minority both intellectually, emotionally and chronologically.

What I'm suggesting is whether we look at Tinker or these cases, this Court has recognized that the more mature the minor, the less chronological age has to do with limiting a fundamental right.

QUESTION: Rights we just do limit at 18, I mean --

MS. SOGG: That's correct.

QUESTION: -- or at least permit the parents to exercise control over.

MS. SOGG: That's correct.

Young women like Rachel Roe welcome the support of loving parents, and they need no statute to seek that support, but they are counting on us to protect their personal integrity and their privacy where appropriate and to protect their safety wherever possible.

We cannot and we must not let them down. Thank you.

QUESTION: Thank you, Ms. Sogg.

Ms. Eppler, you have six minutes remaining.

REBUTTAL ARGUMENT OF RITA S. EPPLER

ON BEHALF OF THE APPELLANT

MS. EPPLER: Thank you, Your Honor.

Initially, in response to Justice Scalia's question regarding emergency treatment that a parent might oppose for religious reasons, the State of Ohio clearly does take a contrary position to that of the Plaintiffs in this case. The State of Ohio believes that there is no mature minor exception recognized in Ohio.

First of all, under the scenario that -- that you have presented, Your Honor, there would be an ability for the appointment of a guardian ad litem for temporary custody under Ohio Revised Code 2151, and, in fact, parents would then be required to go to court to determine if the temporary custody of their child should be withdrawn to permit the surgery to go forward.

In addition, with regard to general standards, in the --

QUESTION: Excuse me. I'm not sure you're saying -- you're saying that the -- that the child may be able to -- would be able to get the procedure but that it is inevitable that the parents would be notified?

MS. EPPLER: That is correct, Your Honor. Through

the juvenile court proceeding prior to taking temporary custody away from the parent under all situations, there would be a requirement of parental notification.

In addition, with regard to the general -- general standards in the medical profession that would govern, there would be a need for consent to be provided by a parent prior to any invasive medical procedure performed on a minor. As evidence of this fact are the statutes that have been cited to for specific exceptions provided for either emergency care for diagnosis and treatment of drug and alcohol rehabilitation and treatment and for sexually transmitted diseases.

These exceptions are, in fact, exceptions to the general rule requiring parental consent prior to invasive medical procedures being performed on a minor within the State of Ohio.

Clearly, the -- the law on informed consent has -- has evolved a great deal since the 1956 case that I believe my opponent relies on and cited to in her brief, that of Lacey v. Laird. And, in fact, that specific case dealt with an 18-year old who was requesting elective surgery without the consent of her parents. That was at a time when the age of majority was 21 within the State of Ohio, and, in fact, it was an allegation or a challenge by the minor claiming a technical battery.

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Clearly, the law has evolved considerably since that time period, and the general --

QUESTION: Claiming a technical battery against the physician?

MS. EPPLER: That is correct, Your Honor; for technical battery, assault and malpractice. And the case analyzed the question of -- of whether or not that physician was liable, found that he was not because this 18-year old minor was sufficiently mature to have consented to the procedure of -- of an elective nature, and also found that the parents should not be financially responsible for a procedure that was elective in nature or non-necessary and one that they had not already consented to.

In addition, with regard to the burden of proof questions raised, there is no question but that the private interest affected here should, in fact, be looked at as this Court similarly did in Parham v. J.R.

Under the Mathews interest, there was again a liberty interest claimed there, and the state's interest was found to be inextricably linked with the parents' interest in the custody and the obligations for the welfare and the health of the child. Particularly there, the conclusion of the Court was that the private interest at stake was a combination of both the child's and the parents' interest.

LIkewise is the case in the State of Ohio statute presented for review.

With regard to physician notification, my opponent has indicated that the physician would be required to spend hours attempting to locate parents. That simply is not what is anticipated by the Ohio statutory scheme. In fact, specifically Section 29 -- 2919.12(B)(2) that appears at page 49 to 50 in the jurisdictional statement appendix, would show otherwise.

There is an ability for constructive authorization -- or constructive notice -- excuse me, Your Honors -- to be presented by certified mail and ordinary mail to be sent, and that that would be sufficient if reasonable efforts fail at originally notifying the parent personally.

With regard to my opponent's questions raised on due process of whether the statute creates any -- any property interest, it is clearly the state's position that there can be no claim to a property interest in a benefit or foreign individual here unless there is more than an abstract right or a unilateral expectation. There must in fact be a legitimate claim of entitlement.

The Ohio statute here creates no such claim. If there is any expectation or entitlement created whatsoever by the statute, it would be for a parent expecting to be

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notified that a child was being -- was, in fact, going to have an abortion performed, not to the contrary.

Regardless, even if this Court does find any type of a property interest created by the statute, it does, in fact, provide the minor with notice and an opportunity for a meaningful hearing in a meaningful manner with all of the extensive procedural safeguards that are provided by the statute including appointed counsel and the ability to have an appellate level of review of the decision.

Clearly, it should be kept in mind that this is a facial challenge. Comments with regard to the particular Plaintiffs at issue here clearly have no place again in a facial challenge.

I see my time is up. Thank you, Your Honors.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Eppler. The case is submitted.

(Whereupon, at 10:58 a.m., the case in the above-entitled matter was submitted.)

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Docket No. 88-805

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BY Judy Freilicher

(REPORTER)