

The Burger Court Opinion Writing Database

Simopoulos v. Virginia

462 U.S. 506 (1983)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

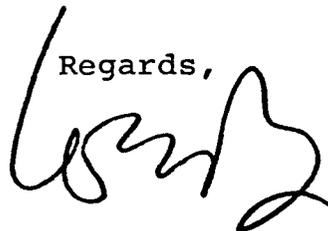
March 11, 1983

Re: No. 81-185, Simopoulos v. Virginia

Dear Lewis:

I am with you but will have a few small suggestions
that will give you no trouble.

Regards,

A handwritten signature in black ink, appearing to be 'Lewis Powell', written in a cursive style.

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

PERSONAL

April 4, 1983

Re: No. 81-185, Simopoulos v. Virginia

Dear Lewis:

I am not at rest on the two "Akron" cases yet. I am generally on the above. However I am "uncomfortable" with the declaratory statements in note 10, page 7. They are, of course, attributable to the source cited at the end of the statements. But would it not help if a "said to be" were inserted early in Note 10, with a similar qualifier in the second paragraph of note 7? Quoted out of context it could appear the Court is making the statements, as to which we are not informed first hand.

Regards,

A handwritten signature in black ink, appearing to be "W. E. B. DuBois", with a long, sweeping underline that extends to the right.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 16, 1983

Re: 81-185 - Simopoulos v. Virginia

Dear Lewis:

I join.

Regards,

A handwritten signature in black ink, appearing to be 'W. Powell', written in a cursive style.

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 9, 1983

No. 81-185 Simopoulos v. Virginia

Dear Harry:

What would you think of sending something like the attached to Lewis, but without circulating to the conference?


WJB, Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

March 9, 1983

No. 81-185 Simopoulos v. Virginia

Dear Lewis:

As with your Akron opinion, I am impressed with the effort and thought you have so clearly devoted to this case. Your opinion makes a very strong case that Virginia's hospitalization requirement, as you interpret it, meets our constitutional standard, and it generally conforms to the view I expressed at conference. However, after giving the matter some thought, I am inclined to agree with Harry and John that we should not be the ones to interpret the Virginia statute in the first instance.

Sorry though I would be to see your careful work go for nought, I ask you to consider whether it wouldn't be a good idea to dispose of this case with a brief per curiam vacating and remanding for reconsideration in light of Akron. I make this suggestion for two reasons. First, although there is no absolute bar to interpreting the Virginia statute for the first time in this Court, and although I think your interpretation is correct, surely if all other things were equal we would prefer to let the Virginia Supreme Court say what "hospital" means before we addressed the constitutionality of the statute. Second, given the likely outcome in Akron, Simopoulos will be a very important case, for it will tell the states what they can do by way of regulating abortions. If we can avoid it, I think we should not let such a crucial opinion issue without a clear majority.

At the same time, I believe (and I'm sure you agree) that the states should have some guidance. A per curiam opinion in Simopoulos might well serve that function. In vacating and remanding, we could focus attention on the possibility that Virginia's hospitalization requirement, if in fact it is what you say, would pass muster under the Akron standard. A remand would also permit full airing of the issues involved in regulating outpatient second-trimester abortions. I am afraid that many pro-

fessional groups and other amici have overlooked the importance of Simopoulos in this year's trilogy.

Accordingly, I offer the following rough suggestion as something that might prove acceptable to a majority-- indeed, perhaps to all of us:

The only substantial federal question presented by this appeal is similar to one addressed today in City of Akron v. Akron Center for Reproductive Health, ante, at 12-20: Is Virginia's statute requiring doctors to perform all second-trimester abortions in a hospital constitutional? We are informed, however, that the relevant statute, Va. Code §18.2-73, may incorporate by reference a definition of "hospital" in Va. Code §32.1-123.1 and regulations promulgated thereunder, which include as "hospitals" certain facilities providing surgical services primarily on an outpatient basis. If so, the Virginia hospitalization requirement differs materially from the corresponding provision in Akron. The Virginia statute so interpreted may burden women and their doctors far less than a statute requiring that all second-trimester abortions be performed in an acute-care hospital. In the opinion under review, however, the Virginia Supreme Court did not adopt or even address the interpretation of §18.2-73 pressed in this Court by Virginia's Attorney General. Rather, it relied on grounds much like those we reject today in Akron. See 221 Va. 1059, 277 S.E.2d 194 (1981). If we were to consider the Attorney General's argument, we would have to interpret the statutory law of Virginia in the first instance. Prudence suggests that the highest court of the Commonwealth should have the opportunity to address the crucial question of what the word "hospital" in §18.2-73 means before we do. Therefore, we vacate the judgment of the Virginia Supreme Court and remand for reconsideration in light of our opinion today in Akron.

Sincerely,


WJB, Jr.

Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

May 2, 1983

No. 81-185 Simopoulos v. Virginia

Dear Harry:

It seems to me that Lewis has gone a long way to accomodate us in his most recent draft. I still think, however, there is one more suggestion we ought to make. The following is a draft of a new footnote I would like to ask Lewis to insert after the second sentence of the paragraph that begins on page 12 of his third draft:

Ordinarily the State must bear the burden of showing that the restrictions it imposes on second-trimester abortions are sufficiently related to its concerns for maternal health. City of Akron, ante, at 12; Doe v. Bolton, 410 U.S. 179, 195 (1973). As a prima facie matter, however, the Virginia regulations meet the constitutional standard described in City of Akron and Ashcroft, because they appear to be generally in accord with sound medical practice. Therefore, it was incumbent on appellant to come forward with evidence that specific aspects of these regulations were so unrelated to the State's legitimate interests and sound medical practice as to render unconstitutional his conviction under a statute which incorporates the regulations. Cf. Bunting v. Oregon, 243 U.S. 426, 438 (1917).

Before I send a letter to Lewis, would you mind giving me your reaction?

Sincerely,


WJB, Jr.

Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 4, 1983

Re: No. 81-185, Simopoulos v. Virginia

Dear Lewis:

As you know, my original and preferred vote in this case was to vacate and remand. In my letter of March 8, I noted my discomfort with the Court's reaching out to consider the constitutionality of the Virginia regulations when they had not been interpreted by the Supreme Court of Virginia. I do think, however, that it is important that we have an opinion for the Court in this case, or at least an opinion that commands a substantial plurality. Thus, although I would still prefer to vacate and remand, I could join a narrowly-written opinion affirming the judgment. Your third draft comes a long way toward assuaging my concerns -- a fact I deeply appreciate -- but I am still somewhat troubled by it.

My major concern is that you still come out to uphold the regulations, although now only on the basis of the record before us. I am reluctant to affirm on this ground. I do not mean to suggest that I think the regulations are unconstitutional, or that I would not vote to uphold them in an appropriate case, but I do not regard this case as an appropriate one. Because neither the parties nor the courts below have addressed the constitutionality of the particular regulations adopted by Virginia, we have no really firm basis on which to determine whether these regulations are justified by the State's interest in protecting maternal health. Ordinarily, we would not make such a decision without the benefit of a record, briefing, and argument. If the record is inadequate, we would remand for further proceedings. It is not our practice to decide constitutional questions on the basis of an insufficient record, while noting that a better record might lead to a different result.

My second concern is with the way in which you uphold the regulations. You conclude that the regulations appear to be medically reasonable, and you then rely on the fact that appellant has failed to introduce evidence to the contrary. The problem I have with this approach is that I am not sure appellant has the burden of proof on this point. Ordinarily, the State must bear the burden of demonstrating that its regulations on the practice of abortion are sufficiently related to its interest in protecting maternal health. See City of Akron, at 12; Doe v. Bolton, 410 U.S. 179, 195 (1973). In this case,

because the constitutionality of the regulations was not litigated below, the State has introduced no evidence whatsoever to show that the regulations promote maternal health. As you pointed out in your letter of April 12, this is "a record containing no evidence as to the unreasonableness of individual regulations." I would only add that the record is equally devoid of any evidence as to the regulations' reasonableness. It is not enough for me just to place the regulations side-by-side with the ACOG standards; I think our adversary system demands that the parties be permitted to put in evidence and litigate the issue.

I would prefer to take a slightly different approach. You say that appellant failed to introduce evidence regarding the constitutionality of the regulations, and that we therefore should uphold them. I would say, rather, that appellant failed to raise the issue, and that we therefore need not reach it. As you pointed out in your April 12 letter, appellant was aware of the regulations by the time of trial but chose not to challenge them. In fact, it appears to me that appellant has expressly declined to contest the constitutionality of a clinic-licensing scheme like Virginia's. He challenged Virginia's abortion statute on the sole ground that a restriction to full-service general hospitals was unconstitutional, and he repeatedly asserted that the proper course would be for Virginia to permit second-trimester abortions in appropriately licensed outpatient clinics. This, of course, is just what Virginia has done. It seems to me that we justifiably could hold appellant to this choice of litigation strategy, and conclude that the constitutionality of the regulations is not at issue. This would make it unnecessary for the regulations to be addressed at all, other than to note that they permit second-trimester abortions to be performed in outpatient clinics as well as in full-service general hospitals.

Your opinion appears to be inconsistent with this approach at only a few points. I do not know whether you feel inclined to make any further changes, but if what I have outlined above would be acceptable to you, and in an effort to be helpful, I offer on the following pages suggestions for your consideration.

This is a large and difficult task. I am grateful for your efforts.

Sincerely,

Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 23, 1983

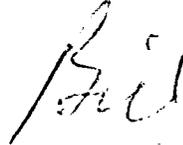
Re: No. 81-185

Simopoulos v. Virginia

Dear Lewis,

I deeply appreciate the way you've
accommodated my problems. I am
delighted to join your circulation of
May 23rd.

Sincerely,



Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 6, 1983

Re: 81-185 Simopoulos v. Virginia

Dear Sandra:

Please add my name to your opinion in this case.

Sincerely,



Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 23, 1983

Re: No. 81-185-Simopoulos v. Virginia

Dear Lewis:

Please join me.

Sincerely,

J.M.
T.M.

Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 8, 1983

Re: No. 81-185 - Simopoulos v. Virginia

Dear Lewis:

After reading and reflecting upon your proposed opinion for this case, I have settled down at the alternative position I took at conference. I now have concluded to vote to vacate the judgment and remand the case for reconsideration in the light of Akron.

I am inclined to this conclusion because your opinion deals at length with the Virginia regulations. Yet those regulations were not really considered by the Supreme Court of Virginia. They are hardly mentioned in their opinion, and the regulations, of course, were issued long after the statute was enacted. I would be far happier to have the Virginia Supreme Court consider those regulations, their meaning, and their reach and application in the first instance, and then let the case return here.

Sincerely,



Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 18, 1983

Re: No. 81-185 - Simopoulos v. Virginia

Dear Lewis:

I very much appreciate what you have done with the uncirculated fourth draft of your opinion in this case. You certainly and most graciously have accommodated most of the concerns expressed in my letter of May 4. I am deeply grateful for all this.

I could, and if necessary would, join your fourth draft in its present form. I must confess, however, that I remain very uncomfortable with the combination of the presence of both footnotes 9-17 and the sentence on page 11 to the effect that the regulations appear to be generally compatible with accepted medical standards. Under your analysis in Akron, this phrase does have constitutional significance; regulations that accord with accepted medical standards carry a presumption of constitutionality. Although the Virginia regulations may well turn out to be constitutional upon closer examination, I do not want to create the impression that we have prejudged the question.

Footnotes 13 and 15 provide an example of the problem. There is nothing wrong with any of the tests mentioned in footnote 13, but it is not at all clear to me that each and every one of those tests is necessary prior to every abortion. Moreover, when coupled with footnote 15's requirement that test results be received before an abortion is performed, the result may be a mandatory waiting period of several days prior to the abortion. (I am always disturbed when people in Washington tell me about how long they must wait for laboratory results. I was spoiled by the Mayo system where results are available either immediately through frozen sections or, in almost all cases, within 24 hours.) I think it is at least open to question whether such a result would be consistent with good medical practice, yet this is what the footnotes and the sentence on page 11 imply.

Would you be willing to compromise by omitting the footnotes and have the sentence on page 11 remain? I could then join with enthusiasm and contentment.

I say again that I am grateful for your sympathetic consideration.

Sincerely,

Justice Powell



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 23, 1983

Re: No. 81-185 - Simopoulos v. Virginia

Dear Lewis:

Please join me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", with a long horizontal flourish extending to the right.

Justice Powell

cc: The Conference

MAR 3 1983

Justice Brennan
 Justice White
 Justice Marshall ✓
 Justice Blackmun
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: Justice Powell

Circulated: ^{MAR} 3 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-185

CHRIS SIMOPOULOS, APPELLANT *v.* VIRGINIA

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

[March —, 1983]

JUSTICE POWELL delivered the opinion of the Court.

We have considered today mandatory hospitalization requirements for second-trimester abortions in *City of Akron v. Akron Center for Reproductive Health, Inc.*, *ante*, p. —, and *Planned Parenthood Ass'n. of Kansas City, Mo., Inc. v. Ashcroft*, *ante*, p. —. The principal issue here is whether Virginia's mandatory hospitalization requirement is constitutional.

I

Appellant is a practicing obstetrician-gynecologist certified by the American Board of Obstetrics and Gynecology. In November, 1979 he practiced at his office in Woodbridge, Virginia, at four local hospitals, and at his clinic in Falls Church. The Falls Church clinic has an operating room and facilities for resuscitation and emergency treatment of cardiac/respiratory arrest. Replacement and stabilization fluids are on hand. Appellant customarily performs first-trimester abortions at his clinic. During the time relevant to this case, the clinic was not licensed, nor had appellant sought any license for it.

P.M. was a 17-year old high-school student when she went to appellant's clinic on November 8, 1979. She was unmarried, and told appellant that she was approximately 22 weeks pregnant. She requested an abortion but did not want her parents to know. Examination by appellant confirmed that

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 15, 1983

81-185 Simopoulos v. Virginia

Dear Bill:

Thank you for your recent letter and kind remarks on my opinion in this case.

I believe your concerns are similar to those expressed by Harry in his letter of March 8. I recognize, of course, that vacating and remanding in light of Akron is an available option. As you note, however, the case is properly before us on appeal. The issue has been briefed and argued. I remain of the opinion that we should decide it.

The primary focus in this case has been, as appellant describes it, on the "mandatory hospitalization requirement of Virginia law". Appellant had good reason to refrain from making the distinction under Virginia law between general, acute care "hospitals" and "outpatient surgical hospitals" where second-trimester abortions may be performed. Appellant had made no effort to comply with the implementing regulations. Moreover, appellant has not denied that he knew about the regulations.

As footnotes 6 and 7 in the second draft of my opinion show, the regulations became effective two years and five months before the abortion at issue. They had been fully considered at public hearings. Moreover, it is clear from the Virginia statutes that the term "hospitals" includes outpatient clinics though they are characterized as "outpatient surgical hospitals", and that Part II of the regulations applies to second-trimester abortions. See nn. 7 and 9. As the Attorney General of Virginia stated in his brief:

"[U]nder Virginia law, a second-trimester abortion may be performed in an outpatient surgical clinic provided that [the] clinic has been inspected and licensed as a hospital by the State". Brief of Appellee 19.

The opinion of the Supreme Court of Virginia, as Harry notes, apart from a reference to the relevant Virginia

statutes, did not address the outpatient hospitals separately from general, acute care hospitals. This is understandable in view of appellant's position that all "mandatory hospitalization requirements" for second-trimester abortions are invalid. He elected, apparently as a tactic, not to challenge separately any of the applicable regulations.

If we were to remand this case for reconsideration in light of Akron, it is not clear what the Virginia Supreme Court can do that we properly cannot do as well. There is no factual evidence with respect to the regulations as distinguished from appellant's general challenge to all mandatory hospitalization requirements, because no specific regulations were questioned. There certainly is no basis for a new trial.

There are also prudential reasons to decide the case: Any remand would leave the law unsettled as to the validity of requiring that second-trimester abortions be performed in state-licensed outpatient clinics that conform generally to accepted medical practice and requirements. A decision by us in all three of these cases should go far to resolve the existing uncertainties.

Sincerely,



Justice Brennan

lfp/ss

cc: Justice Blackmun

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall ✓
 Justice Blackmun
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

Changes: 1, 5-21

MAR 13 1983

MAR 15 1983

From: Justice Powell

Circulated: _____

Recirculated: MAR 16 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-185

CHRIS SIMOPOULOS, APPELLANT *v.* VIRGINIA

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

[March —, 1983]

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I

Appellant is a practicing obstetrician-gynecologist certified by the American Board of Obstetrics and Gynecology. In November, 1979 he practiced at his office in Woodbridge, Virginia, at four local hospitals, and at his clinic in Falls Church. The Falls Church clinic has an operating room and facilities for resuscitation and emergency treatment of cardiac/respiratory arrest. Replacement and stabilization fluids are on hand. Appellant customarily performs first-trimester abortions at his clinic. During the time relevant to this case, the clinic was not licensed, nor had appellant sought any license for it.

P.M. was a 17-year old high-school student when she went to appellant's clinic on November 8, 1979. She was unmarried, and told appellant that she was approximately 22 weeks pregnant. She requested an abortion but did not want her parents to know. Examination by appellant confirmed that

April 8, 1983

81-185 Simopoulos v. Virginia

Dear Chief:

Thank you for your recent note. I am making some clarifying changes in note 12, page 10 (note 10, page 7 of the 1st draft) that I think will meet your suggestions. I have the documentation that assures the accuracy of these notes.

Your letter gives me an opportunity to bring you down to date on the situation with respect to the three abortion cases as I understand it.

Simopoulos

First as to Simopoulos. You are the only member of the Court who has approved it even informally. Bill Brennan has suggested in a letter to me that we should vacate and remand the case for reconsideration by the Supreme Court of Virginia. Harry and John have the same view - at least tentatively.

They make the point that the Virginia court did not specifically address the validity of the regulations, and neither did the parties below. In my view, the reason that court wrote as if it were reviewing acute care, general hospitalization requirement without specifically addressing the regulations, is that Simopoulos elected to challenge Virginia's hospitalization requirements as if they were the same as those reviewed in City of Akron and Ashcroft. He did not distinguish between full service hospitals and the ambulatory surgical hospitals (clinics) that Virginia law contemplates.

We are entitled, I think, to decide the case on the record on which Simopoulos chose to rest his defense. I therefore have no disposition to remand rather than affirm the conviction.

I have spoken briefly to Sandra who is writing in all three of these cases. She indicated that though she did

not expect to join in my analysis, she would affirm the conviction. I believe Bill Rehnquist also is of this view, and Byron voted at Conference to affirm. If the case were vacated and remanded it would be back here in a year or two, and meanwhile we would have given no guidance as to the validity of performing abortions in outpatient clinics.

I am considering making some revisions in section III that now may address the Virginia regulations in too much detail.

* * *

Akron and Ashcroft

It is also important that you join as much of these two cases as you can. The "hospitalization" issue is the principal one. It also is the issue that has caused the greatest confusion - a confusion arising primarily as to how Roe would be construed. I have a bare Court for Akron, and presumably will have a Court on the hospitalization issue in Ashcroft that is identical to the hospitalization requirement in Akron.

When you reread Roe, I think you will agree that I have written the hospitalization issue as narrowly as possible consistently with that case.

* * *

You noted when you asked me to write these opinions that you and I were in accord on most of the numerous issues. I know that you have had strong feelings as to parental notice, and yet - also as we mentioned - the combination of what I wrote in Bellotti II (a plurality of four) and our combined opinions in Matheson have settled the rule with respect to parental notification. It is not the rule for which HAB contended in Bellotti II.

Forgive this "long winded" letter. These are important cases, and the Court needs the authority of the Chief Justice in deciding them.

Sincerely,

The Chief Justice

lfp/ss

April 12, 1983

81-185 Simopoulos v. Virginia

Dear Bill and Harry:

I enclose for your consideration a substantially revised draft of an opinion.

The basic change is the elimination of the discussion of particular regulations. This draft also makes clearer that we would be deciding the case only on the record before us - a record containing no evidence as to unreasonableness of individual regulations.

With full knowledge of the regulations, appellant elected to ignore them - apparently as a trial strategy - and to analogize Virginia's overall regulation of abortions to those before us in City of Akron and Ashcroft. This is even clearer to me now than at the time of my first circulation.

As your Chambers know, we have since obtained the entire available record including the history of the adoption of the regulations almost two and a half years before the abortion at issue was performed. Appellant had a full opportunity to attack the reasonableness of the regulations. My guess is that since he had made no effort to obtain a license, he chose the strategy of arguing that the entire Virginia scheme is invalid.

In these circumstances, I remain persuaded that it is appropriate and desirable to affirm. Appellant should not benefit from his own choice of defense strategy. The opinion as now drafted clearly holds only that on the basis of the record before us the regulations appear to be compatible with accepted medical standards.

I add that our clerks have been collaborating - constructively I think. Of course, I do not suggest "politicizing" of any kind: merely that they have been mutually helpful.

I add one caveat. The Chief Justice has indicated that he approved my prior drafts. As the enclosed is a major revision, I would have to submit this to him.

Sincerely,

Justice Brennan
Justice Blackmun

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 28, 1983

81-185 Simopoulos v. Virginia

MEMORANDUM TO THE CONFERENCE:

Here is another draft of my opinion in this case. There are a number of changes throughout.

The principal change is the elimination of specific consideration of each of the regulations individually. The record contains no evidence as to the unreasonableness of individual regulations. Rather, with full knowledge of the regulations (see n. 19, p. 12), appellant elected - apparently as a trial strategy - to challenge Virginia's over-all regulations of abortions, arguing that in effect they were comparable to those in City of Akron.

Since my earlier circulation, I have obtained the entire available record including the history of the adoption of the regulations almost 2-1/2 years before the abortion at issue was performed. (See n. 6, p. 6-8).

The opinion as now drafted would hold that, on the basis of the record before us, the regulations on their face appear to be compatible with accepted medical standards.

L.F.P.
L.F.P., Jr.

Justice Brennan
 Justice White
 Justice Marshall ✓
 Justice Blackmun
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

APR 27 1983

Changes throughout the
 entire opinion.

From: Justice Powell

Circulated: _____

Recirculated: APR 28 1983

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-185

CHRIS SIMOPOULOS, APPELLANT *v.* VIRGINIA

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

[May —, 1983]

JUSTICE POWELL delivered the opinion of the Court.

We have considered today mandatory hospitalization requirements for second-trimester abortions in *City of Akron v. Akron Center for Reproductive Health, Inc.*, ante, p. —, and *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft*, ante, p. —. The principal issue here is whether Virginia's mandatory hospitalization requirement is constitutional.

I

Appellant is a practicing obstetrician-gynecologist certified by the American Board of Obstetrics and Gynecology. In November, 1979, he practiced at his office in Woodbridge, Virginia, at four local hospitals, and at his clinic in Falls Church. The Falls Church clinic has an operating room and facilities for resuscitation and emergency treatment of cardiac/respiratory arrest. Replacement and stabilization fluids are on hand. Appellant customarily performs first-trimester abortions at his clinic. During the time relevant to this case, the clinic was not licensed, nor had appellant sought any license for it.

P.M. was a 17-year old high-school student when she went to appellant's clinic on November 8, 1979. She was unmarried, and told appellant that she was approximately 22 weeks pregnant. She requested an abortion but did not want her parents to know. Examination by appellant confirmed that

May 17, 1983

81-185 Simopoulos v. Virginia

Dear Harry:

Here are two copies of a proposed fourth draft of an opinion in this case. The margins are marked to indicate changes.

All of these changes are made to accommodate the suggestions in your letter and accompanying memorandum of May 4. Jim Browning, my clerk, has indicated in the margins of your memorandum the extent to which I have adopted your suggestions.

In summary, I have retained the footnotes on pp. 9 and 10 that describe the Virginia regulations. On page 11, I retained the first sentence in the third (run-over) paragraph. And I made modest revisions in your suggested language for pages 12 and 13.

In all other respects (unless inadvertently I have overlooked something), I have accepted your suggestions.

As the Chief joined an earlier draft, I felt I owed him the duty to show him these changes. You have seen his join note of yesterday. Apparently, he thought I had circulated this fourth draft to the Conference. I had discussed the general nature of the changes with him previously. In any event, although he said to me that he would prefer my first circulation, he recognizes the importance of putting together a solid Court.

I would very much prefer to retain the first sentence in the third paragraph on page 11. It is not a holding sentence. It merely states that on their face the Virginia regulations appear generally to be "compatible with accepted medical standards". In view of the qualifying language, I do not think there can be any doubt as to the accuracy of the sentence.

I am happy to discuss any of this with you. Our exchange of views has been constructive. On the basis of talks with him, I believe we can persuade the Chief also to join Akron. With six of us agreeing on Akron and Simopoulos (by far the two most important issues), each of which reaffirms Roe, I think we will have gone a long way to lay to rest the controversy of the last decade as to the faithfulness of this Court to your historic decision. Guidance also will be given legislatures and courts.

Sincerely,

Justice Blackmun

lfp/ss

Not circulated
L.F.P.

In HAB papers. draft attached
to letter of 5/17
To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: _____

MAY 7 1983

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-185

CHRIS SIMOPOULOS, APPELLANT *v.* VIRGINIA

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

[May —, 1983]

JUSTICE POWELL delivered the opinion of the Court.

We have considered today mandatory hospitalization requirements for second-trimester abortions in *City of Akron v. Akron Center for Reproductive Health, Inc.*, ante, p. —, and *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft*, ante, p. —. The principal issue here is whether Virginia's mandatory hospitalization requirement is constitutional.

I

Appellant is a practicing obstetrician-gynecologist certified by the American Board of Obstetrics and Gynecology. In November, 1979, he practiced at his office in Woodbridge, Virginia, at four local hospitals, and at his clinic in Falls Church. The Falls Church clinic has an operating room and facilities for resuscitation and emergency treatment of cardiac/respiratory arrest. Replacement and stabilization fluids are on hand. Appellant customarily performs first-trimester abortions at his clinic. During the time relevant to this case, the clinic was not licensed, nor had appellant sought any license for it.

P.M. was a 17-year old high-school student when she went to appellant's clinic on November 8, 1979. She was unmarried, and told appellant that she was approximately 22 weeks pregnant. She requested an abortion but did not want her parents to know. Examination by appellant confirmed that

May 20, 1983

81-185 Simopoulos v. Virginia

Dear Harry:

I am pleased by your letter of the 18th because, at long last, we should be able to get a Court together that will adequately protect all of the relevant interests, and also afford guidance that is now lacking.

You are generous to express your willingness to join my fourth draft in its present form. Your strong preference, however, would be to omit footnotes 9-17 that include a more detailed statement of the regulations than the general summary in the text. Although I really do not share your concern, I understand it. Also, I think it is important for both of us to be strongly supportive of a fourth draft. After all, we need three more votes.

Accordingly, if we can obtain the concurrence of Bill Brennan and Thurgood in the opinion, I will remove the eight footnotes.

It will be necessary, of course, for me to persuade the Chief. I think this can be done to assure a Court, though I have not spoken to him.

Would you be willing to talk to Bill Brennan, either alone or with me as you think best?

When John called me on the 18th to say that he will join your Ashcroft dissent, we discussed the status of Simopoulos. He recognizes the importance of trying to have a solid six Court majority, and has agreed to await my fourth draft. In the discussion with John, I summarized very briefly the exchanges you and I have had.

Sincerely,

Justice Blackmun

lfp/ss

Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

Pages: 1, 5, 7-13

MAY 23 1983

MAY 21 1983

From: Justice Powell

Circulated: MAY 23 1983

Recirculated: _____

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-185

CHRIS SIMOPOULOS, APPELLANT v. VIRGINIA

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

[May —, 1983]

JUSTICE POWELL delivered the opinion of the Court.

We have considered today mandatory hospitalization requirements for second-trimester abortions in *City of Akron v. Akron Center for Reproductive Health, Inc.*, ante, p. —, and *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft*, ante, p. —. The principal issue here is whether Virginia's mandatory hospitalization requirement is constitutional.

I

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P.M. was a 17-year old high-school student when she went to appellant's clinic on November 8, 1979. She was unmarried, and told appellant that she was approximately 22 weeks pregnant. She requested an abortion but did not want her parents to know. Examination by appellant confirmed that

JUN 9 1983

Change: 3

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall ✓
 Justice Blackmun
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: Justice Powell

Circulated: _____

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5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-185

CHRIS SIMOPOULOS, APPELLANT *v.* VIRGINIA

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

[June —, 1983]

JUSTICE POWELL delivered the opinion of the Court.

We have considered today mandatory hospitalization requirements for second-trimester abortions in *City of Akron v. Akron Center for Reproductive Health, Inc.*, *ante*, p. —, and *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft*, *ante*, p. —. The principal issue here is whether Virginia's mandatory hospitalization requirement is constitutional.

I

Appellant is a practicing obstetrician-gynecologist certified by the American Board of Obstetrics and Gynecology. In November, 1979, he practiced at his office in Woodbridge, Virginia, at four local hospitals, and at his clinic in Falls Church, Virginia. The Falls Church clinic has an operating room and facilities for resuscitation and emergency treatment of cardiac/respiratory arrest. Replacement and stabilization fluids are on hand. Appellant customarily performs first-trimester abortions at his clinic. During the time relevant to this case, the clinic was not licensed, nor had appellant sought any license for it.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

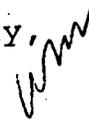
March 7, 1983

Re: No. 81-185 Simopoulos v. Virginia

Dear Lewis:

I will await Sandra's writing.

Sincerely,



Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 5, 1983

Re: 81-185 Simopoulos v. Virginia

Dear Sandra:

Please join me.

Sincerely,



Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 7, 1983

Re: 81-185 - Simopoulos v. Virginia

Dear Lewis:

It seems doubtful to me that in 1979 either the Virginia Legislature or the medical profession understood that the statutory requirement that a second trimester abortion must be performed in a hospital could be satisfied by making use of an out-patient surgical clinic. I shall therefore wait for further writing in this case.

Respectfully,



Justice Powell

Copies to the Conference

Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice O'Connor

From: **Justice Stevens**

Circulated: JUN 1 '83

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-185

CHRIS SIMOPOULOS, APPELLANT *v.* VIRGINIA

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

[June —, 1983]

JUSTICE STEVENS, dissenting.

Prior to this Court's decision in *Roe v. Wade*, 410 U. S. 113 (1973), it was a felony to perform any abortion in Virginia except in a hospital accredited by the Joint Committee on Accreditation of Hospitals and licensed by the Department of Health, and with the approval of the hospital's Abortion Review Board (a committee of three physicians).^{*} In 1975, the Virginia Code was amended to authorize additional abortions, including any second trimester abortion performed by a physician "in a hospital licensed by the State Department of Health or under the control of the State Board of Mental Health and Mental Retardation." Va. Code § 18.2-73 (1982).

The amended statute might be interpreted in either of two ways. It might be read to prohibit all second trimester abortions except those performed in a full-service, acute-care hospital facility. Or it might be read to permit any abortion performed in a facility licensed as a "hospital" in accord with any regulations subsequently adopted by the Department of Health. The Court today chooses the latter interpretation. See *ante*, at 5-6.

^{*}An in-hospital abortion was also unlawful unless (a) it was necessary to protect the life or health of the mother, (b) the pregnancy was the product of rape or incest, or (c) there was a substantial medical likelihood that the child would be born with an irremediable and incapacitating mental or physical defect. 1970 Va. Acts, ch. 508.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 7, 1983

No. 81-185 Simopoulos v. Virginia

Dear Lewis,

I will concur in the judgment in this case
and will circulate something in due course.

Sincerely,



Justice Powell

Copies to the Conference

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens

From: **Justice O'Connor**

Circulated: MAY 5 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-185

CHRIS SIMOPOULOS, APPELLANT v. VIRGINIA

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

[May —, 1983]

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

I agree with the Court's treatment of the appellant's arguments based on *United States v. Vuitch*, 402 U. S. 62 (1971) and *Patterson v. New York*, 432 U. S. 197 (1977). Accordingly, I join parts I and II of the Court's opinion.

I concur in the judgment of the Court insofar as it affirms the conviction. For reasons stated in my dissent in No. 81-746, *Akron v. Akron Center for Reproductive Health* and in No. 81-1172, *Akron Center for Reproductive Health v. Akron*, I do not agree that the constitutional validity of the Virginia mandatory hospitalization requirement is contingent in any way on the trimester in which it is imposed. Rather, I believe that the requirement in this case is not an undue burden on the decision to undergo an abortion.

Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens

From: Justice O'Connor

Circulated: _____

Recirculated: _____ JUN 13

2d DRAFT
 SUPREME COURT OF THE UNITED STATES

No. 81-185

CHRIS SIMOPOULOS, APPELLANT *v.* VIRGINIA

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

[June 15, 1983]

JUSTICE O'CONNOR, with whom JUSTICE WHITE and JUSTICE REHNQUIST join, concurring in part and concurring in the judgment.

I agree with the Court's treatment of the appellant's arguments based on *United States v. Vuitch*, 402 U. S. 62 (1971) and *Patterson v. New York*, 432 U. S. 197 (1977). Accordingly, I join parts I and II of the Court's opinion.

I concur in the judgment of the Court insofar as it affirms the conviction. For reasons stated in my dissent in No. 81-746, *Akron v. Akron Center for Reproductive Health* and in No. 81-1172, *Akron Center for Reproductive Health v. Akron*, I do not agree that the constitutional validity of the Virginia mandatory hospitalization requirement is contingent in any way on the trimester in which it is imposed. Rather, I believe that the requirement in this case is not an undue burden on the decision to undergo an abortion.