The Burger Court Opinion Writing Database

Akron v. Akron Center for Reproductive Health, Inc.

462 U.S. 416 (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

81-746

CHAMBERS OF
THE CHIEF JUSTICE

December 18, 1982

MEMORANDUM TO THE CONFERENCE

Enclosed is Assignment Sheet II. I will send individual note sheets on each case Monday.

On the "abortion cases," I am in essentially the same posture as Lewis on all except the waiting period issue and I will be able to yield on that to produce a consensus.

Danforth controls on parental consent, and although I don't agree, stare decisis requires me to accept it. Matheson governs on parental notice, and if the issue is here, then stare decisis should control.

More later.

Regards,

WEB

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

From: **The Chief Justice**

Circulated: MAY 31 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 81–746 AND 81–1172

CITY OF AKRON, PETITIONER
81–746 *v.*
AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL.

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL., PETITIONERS
81–1172 *v.*
CITY OF AKRON ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June ——, 1983]

CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion.

The Court's holding in *Roe* v. *Wade*, 410 U. S. 113 (1973), not surprisingly brought with it a train of consequences, not all of which were anticipated. The matter of a child of 10 to 17 having an abortion without notice to or consent of parents or other authority presents anomalies. So far as I am aware, a girl of 13, to pick one in the midrange of minority when pregnancy is a physiological possibility, could not have her tonsils or appendix removed without parental consent or a court order of authorization secured by a guardian ad litem. A physician who acted without such consent—barring a case of emergency—might well suffer serious consequences. If binding consent to a tonsillectomy cannot be given by this hypothetical child of 13, I find it difficult to grasp the idea that

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

From: **The Chief Justice**

Circulated: _____

Recirculated: JUN 3 1983

change: 2

2d
~~1st~~ DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 81–746 AND 81–1172

CITY OF AKRON, PETITIONER
81–746 *v.*
AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL.

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL., PETITIONERS
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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 9, 1983

RE: 81-746) - City of Akron v. Akron Center For Reproductive Health, Inc., et al.
81-1172) - Akron Center for Rep. Health, Inc., et al. v. City of Akron, et al.

Dear Lewis:

I have concluded to drop my separate concurrence in these cases and wait for another day.

Regards,

WEB

Justice Powell

Copies to the Conference

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

81-746

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 16, 1982

MEMORANDUM TO THE CONFERENCE

RE: ABORTION CASES

Attached is my record of today's conference votes on the several issues in the three abortion cases.

W.J.B.Jr.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

No. 81-746 City of Akron v. Akron Center for Reproductive Health

March 8, 1983

Dear Harry:

Here is a draft of a letter to Lewis asking him to make the changes we discussed in the footnotes of his opinion. Do you have any comments or suggestions? Anything you have to offer would by gratefully received.

Okay by me as amended

Sincerely,

WJB, Jr.

PS Have just received your proposed letter to Lewis re Memorandum v Akron. I agree, with both

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 8, 1983

No. 81-746 City of Akron v. Akron Center for Reproductive Health

Dear Lewis:

Your opinion in this case is an admirable job, and it shows how much careful thought went into it. My only qualms about it relate to three footnotes, and if you can see your way clear to making some adjustments I shall be happy to join.

At note 10, in the second sentence of text, would you consider qualifying somewhat your statement about minors, so that the second half of the sentence would say something like ". . . this Court has recognized that many minors are less capable than adults . . ."?

At notes 23 and 24, it may not be wise to say that D&E and induction of labor through intrauterine instillation are the only two principal medical techniques for second-trimester abortions. As I understand it, there are a number of hybrid methods, involving, for instance, instillation and artificial evacuation (rather than induced labor). Also, there may well be substances used in instillation procedures other than prostaglandin or hypertonic saline solutions. Shouldn't we take care not to imply that our opinion depends on a view of medical practice that is already outdated? To explain the statements in text, it would suffice merely to say that when Roe was decided the D&E procedure was not used after the 12th week, and instillation procedures were not used until the 16th week.

Finally, I am uncomfortable with note 39. I see no reason to quote so extensively from the briefs in Bellotti I, and except for the complete lack of individualized counseling before the abortion the description does not indicate patent abuses. Although it may well be true that some abortion clinics do not meet the standards of medical ethics, I would like to avoid making a general statement to that effect, unsupported by a specific record. It gives aid and comfort to those who would jus-

tify burdensome regulation on the basis of purportedly widespread ethical violations without investigating whether such violations are in fact occurring. Would you consider deleting this footnote?

Once more, let me express my admiration for the work you have put into this. I hope we can resolve these comparatively minor differences.

Sincerely,

WJB, Jr.

Justice Powell

The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 9, 1983

No. 81-746 City of Akron v. Akron Center

Dear Lewis:

The changes you suggest are fine. Thank you for giving them such prompt consideration. I am happy to join your opinion in this case.

Sincerely,

WJB /pp

WJB, Jr.

Justice Powell

The Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 6, 1983

Re: 81-746) City of Akron v. Akron Center for Reproductive Health, Inc., et al.
)
81-1172) Akron Center for Reproductive Health, Inc., et al. v. City of Akron, et al.

Dear Sandra:

Please add my name to your dissent in this case.

Sincerely,

Byron

Justice O'Connor

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 14, 1983

Re: Nos. 81-746 and 81-1172 - Akron v. Akron Center for Reproductive Health and Akron Center for Reproductive Health v. Akron

Dear Lewis:

Please join me.

Sincerely,

T.M.

T.M.

Justice Powell

cc: The Conference

To Mark & Jim

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 8, 1983

Dear Lewis:

Re: Abortion Cases 81-746, 81-1172

My writing this letter is presumptuous, but I dare to do so because of experience I have had with the Clerk and the Reporter in the past.

I am in hearty agreement with your treating the Akron case as the primary one. Your three opinions all indicate that the order in which they are to be reported is Akron first, Missouri second, and Simopoulos third.

Numerical order, however, seems to be a routine fact of life here in the Court, and, unless specific and positive instructions are given to Mr. Lind and Mr. Stevas, the case with the lowest number always will be first. This is why Simopoulos was argued first (a mistake in my opinion) at the December session. If you indicate and stress your preference to Henry Lind he will, I am sure, follow it. But, if not, Simopoulos will be reported first and your "post" and "ante" references will be changed.

I certainly shall support you in this minor skirmish.

Sincerely,

Harry

Justice Powell

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 8, 1983

Re: No. 81-746) City of Akron v. Akron Center for
for Reproductive Health, Inc.
No. 81-1172) Akron Center for Reproductive
Health, Inc. v. City of Akron

Dear Lewis:

You have written, I feel, a strong and positive opinion for these cases, and I expect to be able to join it.

I have the following somewhat minor suggestions, however, which I offer for your consideration:

1. In footnote 37 on page 27, 8th line, would you consider inserting the words "to the extent it is accurate," or something like that, after the words "type of information"? The Akron ordinance, it seems to me, requires the giving of certain information even though it may be inaccurate. Thus, for example, the woman is to be told that numerous public and private agencies and services are available to assist her. Sometimes such agencies and services are not available in the particular locality.

2. In footnote 28 on page 30, next to the last line, would you consider inserting words such as "for most patients" after the words "relevant information"? For some patients, such as a 40 year old experienced obstetrical nurse, a printed statement might very well equate with adequate counseling.

3. The same kind of problem comes to the surface in the last paragraph of footnote 39 on page 31. I would feel happier if that paragraph could begin with "In most cases such ...."

4. Actually, I would prefer to see footnote 39 omitted in its entirety. We all know that there are rascals in the medical profession as there are in the legal profession.

5. On pages 15 and 16 there is stress on "reasonable." This, admittedly is drawn from Roe. Ordinarily, however, regulations that infringe on a fundamental right must be narrowly drawn. If you could say so, I would be more content. Such an addition would not change the substance of the opinion.

6. I was somewhat concerned initially with your rather emphatic reliance on Bellotti II on page 21 of your opinion. I would have preferred to have you soften this a little since the Bellotti II position has never commanded five votes. I shall leave this, however, to your discretion.

Sincerely,

Harry

Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 10, 1983

Re: No. 81-746, City of Akron v. Akron Center for Reproductive Health, Inc.
No. 81-1172, Akron Center for Reproductive Health, Inc. v. City of Akron

Dear Lewis:

Please join me in your recirculation of March 10.

Sincerely,

Harry

Justice Powell

cc: The Conference

81-1172 Akron file

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 23, 1983

81-185

Dear Lewis:

Herewith, for your information, is a copy of the letter I received from the Catholic Bishop at Fargo. This was hand delivered to me when I was at the University at Grand Forks the weekend before last.

Sincerely,

Harry

Justice Powell

December 17, 1982

Abortion Cases

Dear Chief:

In accordance with your request, I now send out to your residence a memorandum that summarizes the voting in these three cases.

I also enclose a memorandum that deals particularly with the confusing questions in the Akron case of "notice" and "consent".

There were so many issues that recording the votes became somewhat speculative. There may be a few mistakes in my notes.

Because of the multiplicity of issues, and also because we were following your form chart primarily, my explanatory notes are too haphazrd to be of much assistance. Often we would take a vote with no discussion. In my view, the hospitalization issue is the most important one. We have a Court - including Bill Brennan - to affirm Simopoulos. Unlike the Virginia statute, both Akron and Missouri require all second semester abortions in hospitals, without exception for clinics however adequate.

On questions relating to notice of parents and parental consent, I adhered to views expressed by me in Bellotti II and Matheson. These also are important and recurring issues.

If I can be of any assistance, do not hesitate to call on my.

I do hope you are progressing satisfactorily, and will not strain to return here until you have fully recovered.

Sincerely,

The Chief Justice

lfp/ss

December 17, 1982

Abortion Cases

MEMO TO THE CONFERENCE:

I found the consent and notice provisions of the Akron ordinance confusing, and still do to some extent.

With respect to the consent provision - §1870.05(B) - I voted to affirm on the merits. There may still be a standing problem for me.

As to the notice provision, I was uncertain as to whether it is before us at all. I am now satisfied that it is not. See the brief on behalf of the original plaintiffs (respondents and cross petitioners brief) at p. 48, footnote 79.

If the Court reaches the merits, I would affirm on the basis of Matheson. CA6 reversed the District Court's holding of invalidity, relying on Matheson. See appendix, p. 12a, 13a.

L.F.P., Jr.

ss

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

From: Justice Powell

Circulated: ~~FEB~~ MAR 3 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 81-746 AND 81-1172

CITY OF AKRON, PETITIONER
81-746 *v.*
AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL.

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL., PETITIONERS
81-1172 *v.*
CITY OF AKRON ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[March ——, 1983]

JUSTICE POWELL delivered the opinion of the Court.

In this litigation we must decide the constitutionality of several provisions of an ordinance enacted by the city of Akron, Ohio, to regulate the performance of abortions. Today we also review abortion regulations enacted by the State of Missouri, see *Planned Parenthood Ass'n of Kansas City, Mo., Inc.* v. *Ashcroft*, *post*, p. ——, and by the State of Virginia, see *Simopoulos* v. *Virginia*, *post*, p. ——.

These cases come to us a decade after we held in *Roe* v. *Wade*, 410 U. S. 113 (1973), that the right of privacy, grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy. Legislative responses to the Court's decision have required us on several occasions, and again today, to define the limits of a State's authority to

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 9, 1982

81-746 City of Akron v. Akron Center

Dear Harry:

This is a reply to your helpful letter of March 8.

I am glad to make the changes suggested in your paragraphs 1 and 2.

As I have indicated in my letter of this date to Bill Brennan, I am making a substantial revision in fn. 39 on p. 31. I think the change will fully meet the reservations that you and he expressed.

You mention the possibility that, on pages 15 and 16 of my opinion, I may unduly stress the word "reasonable". There is, as you imply, arguably some tension between the fundamental right of the woman and the compelling interest of the state when addressing regulations with respect to the second-trimester period. It seems to me that you resolved this satisfactorily in Roe and Doe by reliance on the reasonableness standard. We adhered to this standard in Danforth. I therefore think that what I have written in this respect is entirely consistent with our precedents. It also is consistent, I think, with fully protecting the woman's abortion right as well as the state's interest in health. If we change the reasonableness standard to a "narrowly drawn" standard, it seems to me this might upset the sound balance established in our prior decisions. Of course, a regulation not only has to be reasonable in the common sense meaning of this term, it also - as I have emphasized - must be reasonably related to the state's interest in the preservation and protection of maternal health.

As to my reliance on Bellotti II, I think it is the most relevant precedent on the parental consent issue and therefore must be cited. I will make clear that it was a plurality opinion, though in view of the other opinions it is controlling at present.

Again, my thanks. I am having a second draft printed that will incorporate the changes discussed in my letters to you and Bill Brennan.

Sincerely,

Lewis

Justice Blackmun

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 9, 1982

81-746 City of Akron v. Akron Center

Dear Bill:

Thank you for your letter.

I will be glad to make the changes in notes 10, 23 and 24 that you suggest. I assume you would have no objection to leaving the last sentence in note 23.

As both you and Harry are uncomfortable with note 39 as it is presently written, I will certainly defer substantially to your views. I had thought from the discussion at Conference that we were of one mind, namely, that abortion mills do exist, and are operated to the great profit of unethical physicians who care little about their patients in the normal sense of the patient/physician relationship. I know from conversations with ethical physicians that this type of "practice" is condemned and viewed as reflecting adversely on the entire profession.

I will, however, omit entirely the quotation from Danforth, and reduce n. 39 to read substantially as follows:

> "This Court's consistent recognition of the critical role of the physician in the abortion procedure has been based on the model of the competent, conscientious and ethical physician. See Doe, 410 U.S., at 196-197. We have no occasion in this case to consider conduct by physicians that may depart from this model. Cf., Danforth, 428 U.S., at 91-92, n. 2 (Stewart, J., concurring)(quoting brief from appellant in Bellotti I. OT 1975, pp. 43-44).

I do appreciate the suggestions from you and Harry. I am writing him a separate letter.

Sincerely,

Lewis

Justice Brennan

lfp/ss
cc: The Conference

9, 17, 27, 30

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

From: **Justice Powell**

Circulated: _____

Recirculated: 10 MAR 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 81–746 AND 81–1172

CITY OF AKRON, PETITIONER
81–746 *v.*
AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL.

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL., PETITIONERS
81–1172 *v.*
CITY OF AKRON ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[March ——, 1983]

JUSTICE POWELL delivered the opinion of the Court.

In this litigation we must decide the constitutionality of several provisions of an ordinance enacted by the city of Akron, Ohio, to regulate the performance of abortions. Today we also review abortion regulations enacted by the State of Missouri, see *Planned Parenthood Ass'n of Kansas City, Mo., Inc.* v. *Ashcroft*, *post*, p. ——, and by the State of Virginia, see *Simopoulos* v. *Virginia*, *post*, p. ——.

These cases come to us a decade after we held in *Roe* v. *Wade*, 410 U. S. 113 (1973), that the right of privacy, grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy. Legislative responses to the Court's decision have required us on several occasions, and again today, to define the limits of a State's authority to

March 14, 1983

Abortion Cases 81-746
81-1172

Dear Harry:

This is to thank you for your note of March 8 suggesting that Messrs. Lind and Stevas be requested to report these cases in the following order: Akron, Missouri and Simopoulos.

I may well have overlooked the desirability of this.

Sincerely,

Justice Blackmun

lfp/ss

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

MAY 7 1983

From: **Justice Powell**

Circulated: _____

pp. 2-7, 18, 22, 28, 30

Recirculated: MAY 9 1983

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 81–746 AND 81–1172

CITY OF AKRON, PETITIONER
81–746 *v.*
AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL.

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL., PETITIONERS
81–1172 *v.*
CITY OF AKRON ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[May ——, 1983]

JUSTICE POWELL delivered the opinion of the Court.

In this litigation we must decide the constitutionality of several provisions of an ordinance enacted by the city of Akron, Ohio, to regulate the performance of abortions. Today we also review abortion regulations enacted by the State of Missouri, see *Planned Parenthood Ass'n of Kansas City, Mo., Inc.* v. *Ashcroft*, *post*, p. ——, and by the State of Virginia, see *Simopoulos* v. *Virginia*, *post*, p. ——.

These cases come to us a decade after we held in *Roe* v. *Wade*, 410 U. S. 113 (1973), that the right of privacy, grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy. Legislative responses to the Court's decision have required us on several occasions, and again today, to define the limits of a State's authority to

May 13, 1983

Abortion Cases

Dear Chief:

The purpose of this letter is to review the situation in these three "headache" cases that you asked me to write.

Akron

I have a bare Court (WJB, TM, HAB, JPS and LFP), and Sandra - for her all-out dissent - has three votes (BRW, WHR and SOC).

As I point out in n. 1, p. 2, of my Akron opinion, Sandra's position simply emasculates Roe and the several cases that have accepted its basic principles. You have not voted, though I consider your joining as essential.

Ashcroft

I have no votes for my opinion. John has indicated by letter that he expects to join all but Part V of my opinion. My understanding is that Harry is writing a long opinion (presumably for WJB and TM). He will join Part II of my opinion that invalidates Missouri's requirement of an acute-care general hospital. There are, as you know, several other issues in Ashcroft, and Harry is dissenting as to parental consent (5-4) (WJB, TM, HAB, JPS), the pathology report (8-1) (HAB) (WJB, TM were tentative), and the second-doctor requirement (6-3) (WJB, TM, HAB).

The O'Connor trio agrees with my result as to all issues except hospitalization.

Simopoulos

This case, in many ways the most important of the three, is at a critical stage and I need your help.

I had hoped that the Justices sharing Sandra's view would at least be with us in Simpoulos. They would

affirm the judgment, but on entirely different reasoning: namely, that a state may impose virtually any limitation it wishes.

The only hope of a Court affirming along the lines of your vote and mine lies essentially with what Harry and Bill Brennan (who are cooperating) are willing to join.

I have had a considerable private exchange with Harry and Bill. Until recently, they were adamant in their unwillingness to affirm. Their position has been that we should vacate and remand to allow the Virginia court to construe and pass upon the validity of the regulations. In view of the curious way - if not negligent way - in which Simopoulos was tried by both parties, the regulations never were expressly addressed by the Supreme Court of Virginia. I remain firm in my view, however, that this is the result of a strategy choice by Simopoulos. As he challenged the entire Virginia regulatory scheme, it is appropriate to reject his challenge and affirm.

Harry has now given me a list of specific changes in my third draft of the opinion that, if I accept, will enable him to join. I deliver to you herewith a proposed fourth draft (not yet circulated) in which I have gone much - but not all of the way - with Harry, but not as far as he would like.

If you can find the time (perhaps today or tomorrow) to take a look at the changes I have made, I will be grateful. If these meet with your approval, I will go back to Harry and see if he will accept them as a compromise between us. Although I have eliminated a good deal of language I would have preferred to keep in the opinion, I think the proposed fourth draft would fairly well settle the validity of regulations like those of Virginia. This is our basic objective.

I will be happy to discuss this with you at any time. We should try to get this off of "dead center" before next week's hectic schedule. Also, HAB is expecting some reply from me.

Sincerely,

The Chief Justice

lfp/ss

JUN 9 1983

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

From: **Justice Powell**

Circulated: _____

Recirculated: JUN 9 1983

pp. 2, 3, 8, 12, 16, 17, 18, 22

4th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 81-746 AND 81-1172

CITY OF AKRON, PETITIONER
81-746 *v.*
AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL.

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL., PETITIONERS
81-1172 *v.*
CITY OF AKRON ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June ——, 1983]

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In this litigation we must decide the constitutionality of several provisions of an ordinance enacted by the city of Akron, Ohio, to regulate the performance of abortions. Today we also review abortion regulations enacted by the State of Missouri, see *Planned Parenthood Ass'n of Kansas City, Mo., Inc.* v. *Ashcroft*, *post*, p. ——, and by the State of Virginia, see *Simopoulos* v. *Virginia*, *post*, p. ——.

These cases come to us a decade after we held in *Roe* v. *Wade*, 410 U. S. 113 (1973), that the right of privacy, grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy. Legislative responses to the Court's decision have required us on several occasions, and again today, to define the limits of a State's authority to

JUN 14 1983

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

From: Justice Powell

Circulated: _____

Recirculated: JUN 14 1983

Stylistic changes

pp. 2, 3

SUPREME COURT OF THE UNITED STATES

Nos. 81-746 AND 81-1172

CITY OF AKRON, PETITIONER

81-746 *v.*

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL.

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL., PETITIONERS

81-1172 *v.*

CITY OF AKRON ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 15, 1983]

JUSTICE POWELL delivered the opinion of the Court.

In this litigation we must decide the constitutionality of several provisions of an ordinance enacted by the city of Akron, Ohio, to regulate the performance of abortions. Today we also review abortion regulations enacted by the State of Missouri, see *Planned Parenthood Ass'n of Kansas City, Mo., Inc.* v. *Ashcroft*, *post*, p. ——, and by the State of Virginia, see *Simopoulos* v. *Virginia*, *post*, p. ——.

These cases come to us a decade after we held in *Roe* v. *Wade*, 410 U. S. 113 (1973), that the right of privacy, grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy. Legislative responses to the Court's decision have required us on several occasions, and again today, to define the limits of a State's authority to

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 14, 1983

MEMORANDUM TO THE CONFERENCE

Re: Cases held for City of Akron v. Akron Reproductive Health Center, Inc., No. 81-746; Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft, No. 81-1255; and Simopoulos v. Virginia, No. 81-185.

No. 81-1782, City of Virginia v. Nyberg

In 1973 the municipal hospital commission of Virginia, Minnesota, enacted a resolution proscribing the use of municipal hospital facilities for all abortions except those necessary to save the life of the mother. Appellees, physicians and staff members at the municipal hospital, brought suit. The DC ordered appellant to make the facilities available for use by physicians who wished to perform abortions. 361 F. Supp. 932 (Minn. 1973). CA8 affirmed, 495 F.2d 1342 (1974), and we dismissed an appeal and denied cert. 419 U.S. 891 (1974).

In 1980 appellant filed a motion for relief of judgment under Rule 60(b), arguing that the prior holding had been undermined by our decisions in Maher v. Roe, 432 U.S. 464 (1977); Poelker v. Doe, 432 U.S. 519 (1977); Harris v. McRae, 448 U.S. 297 (1980); and Williams v. Zbaraz, 448 U.S. 358 (1980). The DC denied relief, and CA8 affirmed.

First, this is not a proper appeal. No statute was invalidated, and a resolution of a hospital commission would not appear to be a "statute" under §1254. I therefore will vote to dismiss the appeal.

On the merits, I think CA8's decision is correct. CA8 distinguished Poelker as holding only that a municipality need not fund or provide abortion services that otherwise are unavailable. Here the city is not being required to fund abortions, hire doctors who perform abortions, or otherwise subsidize abortion services; the injunction only precludes it from preventing physicians from performing paid abortions. I see no conflict requiring our attention. Moreover, this is not a good case to consider this type of

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 14, 1983

MEMORANDUM TO THE CONFERENCE

Re: Cases held for City of Akron v. Akron Reproductive Health Center, Inc., No. 81-746; Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft, No. 81-1255; and Simopoulos v. Virginia, No. 81-185.

No. 82-1188, Kerrey v. Woman's Services

This appeal involves Nebraska's statute regulating abortions. In 1979 the DC invalidated provisions dealing with parental consent for minors, informed consent, a 48-hour waiting period, and a reporting requirement for all abortions "prescribed or performed." CA8 affirmed. We vacated and remanded for reconsideration in light of H.L. v. Matheson, 450 U.S. 398 (1981).

The DC again held these provisions unconstitutional. Appellant apparently then abandoned its argument that the parental consent provision was constitutional, and instead contended that H.L. v. Matheson shows that strict scrutiny should not be applied in judging the remainder of the statute. CA8 again affirmed.

In light of City of Akron, the decision below appears correct on two of the issues. The 48-hour waiting period is plainly invalid. On the reporting requirement, the DC held only that physicians did not have to report abortions that were "prescribed" but not "performed."

The informed consent provision presents a closer question. The patient must be advised, inter alia, "of the reasonably possible medical and mental consequences resulting from an abortion, pregnancy, and childbirth." There is no "parade of horribles" here, nor is there any requirement that the attending physician personally convey the information (although he must sign the consent form). The DC found that "the punch of the statute is from the requirement that the patient be informed of the reasonably possible consequences not only of abortion, but also of pregnancy and childbirth." (App. 51 (emphasis added).) This presents a close question under City of Akron's discussion of what is permissible to ensure "the woman's informed choice between abortion or childbirth."

As this is an appeal, our choices are to affirm, note, or vacate and remand. On balance, I cannot say that I am prepared to affirm on the informed consent issue. I therefore will vote to vacate and remand in light of City of Akron, No. 81-746.

Mr. Ernest has filed the same two motions here as he did in the Minnesota case. I will vote to deny both motions.

L.F.P.

L.F.P. JR.

LFP/vde

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 14, 1983

MEMORANDUM TO THE CONFERENCE

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No. 82-151, International Brotherhood of Teamsters, Local 710 Pension Fund v. Janowski

This case actually was a hold for Hensley v. Eckerhart, No. 81-1244, but was listed as also a hold for Planned Parenthood v. Ashcroft, No. 81-1255 (in which there was an attorney's fee issue).

Petr is a pension fund. In 1976 the Fund was amended in light of ERISA. Resps are two participants in the Fund who brought a class action alleging that certain of the amendments deprived them of vested benefits. The DC disapproved most of the amendments. It then awarded $142,000 in attorney's fees to plaintiffs, an amount based on a multiplier of 2 (i.e., double the base amount of hours times rates).

CA7 affirmed in part and reversed in part. On the issue of attorney's fees, CA7 stated that courts consider several factors in deciding whether to award fees under ERISA: the degree of bad faith, the ability of the parties to pay fees, whether an award will deter other potential violators of the law, the amount of the benefit, and the relative merits of the parties' positions. CA7 noted that "[u]nfortunately, the district court did not justify its decision to award attorney's fees in terms of these specific guidelines." (App. 16a.)

CA7 nonetheless found "sufficient analysis" to permit affirmance, concluding "that this award is justified because the litigation benefited a substantial group of Fund participants and that the award is necessary to enable aggrieved parties to invoke the power of the court when pre-ERISA benefits are in danger." (Id., at 18a.) As to the amount of the award, the court observed: "Because the award was

based on several factors, only one of which was whether Janowski was the prevailing party, nothing in our decision requires recomputation of the amount awarded." (Id.)

Judge Fairchild dissented on the fees issue: "I am also of the opinion that the allowance of attorneys' fees should be reduced. The implied accrual formula ... appears to be the most significant victory of the class members before the district court, and we are reversing that part of the decision." (Id., at 20a.)

Initially, there is an additional issue raised in the petition. Petrs allege that resps failed to allege injury-in-fact and therefore lack standing. Resps reply that the statute expressly provides a right to sue to those who are covered by an unqualified plan. No conflict is alleged, and I believe resps are correct. (I also would note that we already have denied cert in Janowski v. International Brotherhood of Teamsters Local 710 Pension Fund, No. 82-37, in which resps here sought review of the merits of CA7's decision.) There is no reason to review this issue.

As to the attorney's fees issue, if this were a suit under §1988 or another statute providing for fee awards to "prevailing parties," it would be a clear GVR in light of Hensley. A question arises as to whether the Hensley analysis applies in an award of fees under §502(g) of ERISA, which states that "[i]n any action under this subchapter by a participant ... the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." In my view, Hensley is apposite even though ERISA is not a "prevailing party" fee statute.

The DC took its guidance from "prevailing party" cases, and indeed stated:

> "It is the prevailing party, not the wholly successful party, which is entitled to reasonable attorney's fees, in our opinion. ... Unless some claims were made recklessly or in bad faith, we do not believe that the attorney's fees for the prevailing plaintiffs should be based on the number of motions or issues on which they were successful. Otherwise, the fixing of reasonable fees would be reduced to a tabulation of minutiae rather than compensation for the general results achieved." (App. 41a.)

This makes clear that the issue in Hensley is also raised here. In view of Judge Fairchild's dissent pointing out

that the plaintiffs had been reversed on the most important issue, I think the amount of fees should be reassessed in light of Hensley.

I will vote to GVR in light of Hensley.

L.F.P.

L.F.P., JR.

LFP/vde

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 7, 1983

Re: Nos. 81-746 & 81-1172 City of Akron v. Akron Center for Reproductive Health, Inc.

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: No. 81-746) City of Akron v. Akron Center for
) Reproductive Health
No. 81-1172) Akron Center for Reproductive Health
v. City of Akron

Dear Sandra:

Please join me.

Sincerely,

Justice O'Connor

cc: The Conference

81-746

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 14, 1982

Re: Abortion Cases

Dear Chief:

Because there is a danger that I may not get back from Bethesda until a few minutes after 11:00 a.m. on Thursday, I would be grateful if you would not start the conference until I do arrive.

Respectfully,

JPS

The Chief Justice

Copies to the Conference

P.S. Although your note states that the conference is set for 10:00 a.m. on Thursday, I thought we had agreed upon 11:00 a.m.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 2, 1983

Re: 81-746 & 81-1172 - City of Akron
v. Akron Center for Repro. Health

Dear Lewis:

This morning I read through your draft opinion. I believe I will be able to join it without any significant modifications. I was particularly interested in Part IV because you and I took different approaches in Bellotti II, but I think the way you have written that section I will have no difficulty in joining your opinion although I may add a comment or two in a separate writing. I also have a slight problem with the last sentence in footnote 10 on page 9. Perhaps you could either delete the sentence and merely cite the plurality opinion in Bellotti II or else we could develop a minor language change such as "a Majority of the Court has also concluded ...." This, however, is really just a flyspeck.

Another flyspeck on another subject: On page 30, you refer to "the medical decision to perform the adoption." Perhaps it would be better to say something like the "medical aspects of the decision" or perhaps the "medical consequences" of the decision.

On the whole, I think the opinion is excellent. I may, of course, have other suggestions after I read what you propose in the other cases, but I expect to have no difficulty in joining this circulation. Thanks for sharing it with me.

Respectfully,

Justice Powell

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 4, 1983

Re: 81-746 & 81-1172 - City of Akron
v. Akron Center for Repro. Health

Dear Lewis:

Please join me.

Respectfully,

John

Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 9, 1983

Re: 81-746 & 81-1172 - City of Akron
v. Akron Center for Repro. Health

Dear Lewis:

Your new footnote responding to the dissent is effective. You need not change a word to keep me happy, but I have two thoughts to suggest for your consideration:

> First, in the third sentence of the second paragraph, would it not be more accurate to say that the dissent's reasoning "would accomplish precisely that result."
>
> Second, in the next to the last sentence in the footnote, I wonder if you might consider a revision along these lines: "In sum, it appears that the dissent would uphold virtually any abortion-inhibiting regulation because every such regulation is rationally related to the State's interest in preserving potential human life. This analysis is wholly incompatible ...."

As I say, these are just suggestions.

Respectfully,

JPS

Justice Powell

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 7, 1983

No. 81-746 City of Akron v. Akron Center for Reproductive Health, Inc.
No. 81-1172 Akron Center for Reproductive Health v. City of Akron

Dear Lewis,

As you already know, I have a different view in this matter. In due course, I will circulate something.

Sincerely,

Sandra

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

Nos. 81-746 AND 81-1172

CITY OF AKRON, PETITIONER
81-746 *v.*
AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL.

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL., PETITIONERS
81-1172 *v.*
CITY OF AKRON ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[May ——, 1983]

JUSTICE O'CONNOR, dissenting.

In *Roe* v. *Wade*, 410 U. S. 113 (1973), the Court held that the "right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.*, at 153. The parties in these cases have not asked the Court to reexamine the validity of that holding and the court below did not address it.

Even assuming that there is a fundamental right to terminate pregnancy in some situations, I find no justification in constitutional theory for applying an analytical framework that varies according to the "stages" of pregnancy, where those stages, and their concomitant standards of review, differ according to the level of medical technology available

pp. 3, 8, 9, 12, 14-15, 21

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

From: **Justice O'Connor**

Circulated: _____

Recirculated: MAY 10 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 81–746 AND 81–1172

CITY OF AKRON, PETITIONER
81–746 *v.*
AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL.

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL., PETITIONERS
81–1172 *v.*
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[May ——, 1983]

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Even assuming that there is a fundamental right to terminate pregnancy in some situations, I find no justification in constitutional theory for applying an analytical framework that varies according to the "stages" of pregnancy, where those stages, and their concomitant standards of review, differ according to the level of medical technology available

Stylistic Changes Throughout
pp. 1, 2, 3, 4, 5, 16, 17, 23, 24

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

From: Justice O'Connor

Circulated: _____

3d Draft

Recirculated: JUN 13 1983

SUPREME COURT OF THE UNITED STATES

Nos. 81–746 AND 81–1172

CITY OF AKRON, PETITIONER
81–746 *v.*
AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL.

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL., PETITIONERS
81–1172 *v.*
CITY OF AKRON ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 15, 1983]

JUSTICE O'CONNOR, with whom JUSTICE WHITE and JUSTICE REHNQUIST join, dissenting.

In *Roe* v. *Wade*, 410 U. S. 113 (1973), the Court held that the "right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.*, at 153. The parties in these cases have not asked the Court to re-examine the validity of that holding and the court below did not address it. Accordingly, the Court does not re-examine its previous holding. Nonetheless, it is apparent from the Court's opinion that neither sound constitutional theory nor our need to decide cases based on the application of neutral principles can accommodate an analytical framework that varies according to the "stages" of pregnancy, where those

81-0746

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

Received 6/17/83

Dear Lewis,

Thank you for your kind note. I was very pleased to see the "Posts" editorials today which focused reasonably on the opinions in these touchy cases. I was very glad you wrote for the majority. It kept the rhetoric dispassionate throughout and I think will

not stir up any
more public outcry
than is already
extant anyway.

Sandra