IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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| RICHARD RAGSDALE, et al., | ) | |
| Plaintiffs-Appellants, | ) | |
| v. | ) | No. 85-3242 |
| BERNARD J. TURNOCK, | ) | |
| Defendants-Appellants. | ) | |

Appeal From The United States District Court
For The Northern District Of Illinois
Judge John A. Nordberg Presiding
No. 85 C 6011

# MOTION OF AMICUS CURIAE FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF OF AMICUS CURIAE AMERICANS UNITED FOR LIFE LEGAL DEFENSE FUND

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July 28, 1986

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF OF AMICUS CURIAE, AMERICANS UNITED FOR LIFE LEGAL DEFENSE FUND

Now Comes Amicus Curiae Americans United for Life Legal Defense Fund (AUL) and moves this Court for leave to file a supplemental brief which addresses the issue outlined for the parties to brief in the Court's order of July 8, 1986, and, in support thereof, states as follows:

1. Counsel for Amicus have previously been granted leave to file, and have filed, a brief amicus curiae.

2. This Court has ordered the parties to submit supplemental briefs addressing the applicability to this appeal of the Supreme Court's recent decision in Thornburgh v. American College of Obstetricians and Gynecologists, 106 S.Ct. 2169 (1986).

3. By its order, the Court implies that it believes

that this appeal concerns abortion, and that the principles of Roe v. Wade, 410 U.S. 113 (1973) and its progeny, most recently addressed in Thornburgh, might have some bearing on this appeal.

4. Attorneys for the Appellants have maintained in the district court and on appeal that this case is not an abortion case in that it involves general health regulations applicable to all ambulatory surgical treatment centers in the state. Accordingly, they have argued that the standard of review applicable to abortion regulations is not to be applied in this case.

5. Because of this belief, it appears that the State intends only to address the application of Thornburgh in cursory fashion in its brief.

6. Your amicus believes that the issues in this appeal do in fact concern abortion and the constitutional principles articulated in Roe v. Wade and Thornburgh. Accordingly, your amicus has prepared a detailed brief concerning the application of Thornburgh to the questions presented in this case.

7. Because of Amicus' particular expertise in this area of constitutional law, previously outlined in its motion for leave to file its brief amicus curiae, and its acute familiarity with the issues in Thornburgh, Amicus's views on the applicability of Thornburgh to this appeal could greatly assist this Court in determining the extent to which Thornburgh affects the issues on appeal.

WHEREFORE, Amicus Curiae, Americans United for Life, moves this Court for leave to file its supplemental brief addressing the applicability of Thornburgh to the issues in this appeal.

Respectfully submitted,

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SUPPLEMENTAL BRIEF OF AMICUS CURIAE,
AMERICANS UNITED FOR LIFE LEGAL DEFENSE FUND

## ARGUMENT

### I. INTRODUCTION

Five provisions of the Pennsylvania abortion law were before the Supreme Court in Thornburgh v. American College of Obstetricians and Gynecologists, 106 S.Ct. 2169 (1986). Briefly, those provisions raised questions regarding the state's ability to require: 1) that parental consent be obtained for minors, 2) that a second physician be present during post-viable abortions, 3) that post-viable abortions be performed by the method least likely to cause fetal death, 4) that informed consent be obtained prior to an abortion, and 5) that reports of abortions be made and filed with the state department of health.

The Thornburgh decision is relevant to this appeal only with respect to its treatment of the last two questions--

informed consent and reporting. None of the other three issues in Thornburgh are similar to issues in this case.

Thornburgh reaffirms a number of general principles set forth in prior Supreme Court decisions and relied upon by the State of Illinois and your amicus in evaluating the constitutionality of the provisions challenged here. Thus, Thornburgh supports the arguments set forth in their prior briefs.

There are fundamental differences between the Pennsylvania informed consent and reporting provisions and those contained in the Illinois Ambulatory Surgical Treatment Centers Act (ASTCA). The reasons for striking the Pennsylvania provisions in Thornburgh do not apply to these provisions. Thus, Thornburgh does not require that any of the challenged provisions in this case be struck. Moreover, since these provisions are constitutional under prior Supreme Court decisions that were reaffirmed by Thornburgh, they remain constitutional.

## II. THORNBURGH REAFFIRMED THE CONSTITUTIONAL PRINCIPLES AND STANDARD OF REVIEW OF STATE STATUTES PREVIOUSLY ARTICULATED IN AKRON, ASHCROFT, AND SIMOPOULOS.

Initially, it must be noted that the Court in Thornburgh specifically reaffirmed the principles laid down in City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983). "Less than three years ago, this Court, in Akron, Ashcroft, and Simopoulos, reviewed challenges to state and municipal legislation regulating the

performance of abortions...Again today, we reaffirm the general principles laid down in Roe and in Akron. Thornburgh, 106 S.Ct. at 2178. Therefore, the standard of review set forth in Akron, and applied in Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983), and Simopoulos v. Virginia, 462 U.S. 506 (1983), is the proper standard of review to be applied to these regulations. See, Appellants' brief at 26-36; AUL brief at 10-14. The standard of review urged upon the district court and this court by plaintiffs is contrary to that set forth in Akron and reaffirmed in Thornburgh. Therefore it must be rejected.

## III. THE INFORMED CONSENT AND COUNSELING PROVISIONS OF THE ASTCA ARE CONSTITUTIONAL UNDER THORNBURGH.

Sections 205.520(c) and 205.730(b) of the ASTCA involve informed consent and counseling, respectively. Nothing in Thornburgh, however, would undermine the constitutionality of these provisions.

### A. The Informed Consent Requirement of § 205.520(c) is Constitutional.

Section 205.520(c) states:

> A written statement indicating informed consent and a signed authorization by the patient for the performance of the specific surgical procedure shall be procured and made part of the patient's clinical record.

This section merely provides that a written statement, which confirms that informed consent has been given, must be signed by the patient and secured before any surgical procedure is performed.

In Planned Parenthood v. Danforth, 428 U.S. 52 (1976), the Supreme Court specifically upheld a general requirement, like § 205.520(c), which required that "the woman, prior to submitting to the abortion, certif[y] in writing her consent to the abortion and that her consent is informed and freely given and is not the result of coercion." Id. at 66-67, 85.

The Court in Thornburgh explicitly reaffirmed this holding in Danforth stating:

> A requirement that the woman give what is truly a voluntary and informed consent, as a general proposition, is, of course, proper and is surely not unconstitutional.

106 S.Ct. at 2178. Thus, § 205.520(c) is clearly constitutional under both Danforth and Thornburgh.

B. The Counseling Requirements of § 205.730(b) Are Constitutional.

Section 205.730(b) governs abortion counseling. Subsection one requires that individual counseling be given to patients prior to an abortion. Subsection two sets forth general guidelines for counselor qualifications and training. Subsection three lists general categories of information that counselors should discuss with patients.

1. Section 205.730(b)(1).

Subsection one does not require that any specific information be given to the patient. It states:

> Counseling shall be provided following disclosure to the patient of the diagnosis of pregnancy, and prior to the performance of any surgical procedure. It shall be

done individually and in a room designated for such use which shall not be the procedure room.

This general statement requires that counseling shall be provided individually and in a separate room after the patient has been informed that she is pregnant and before the procedure is performed.* This section does not require that any specific information be given to the woman.

The specific question of whether individual counseling may be required was not before the Court in Thornburgh. However, in Akron, the Court noted: "It is not disputed that individual consent should be available for those persons who desire or need it." Akron, 462 U.S. at 448 n.38.

Nothing in the regulation specifies the amount of time to be spent in individual counseling nor the type of information that must be given during individual counseling. The individual counseling may be quite brief where the woman's need for it is not great and longer where it is needed. It is clear that the regulation also contemplates

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* The Department's Note to §730(b) states:

> "In the opinion of the Ambulatory Surgical Treatment Center Licensing Board, the patient should make a decision concerning the procedure in an atmosphere free from coercion. Consequently, the Board believes this is best accomplished in a room separate and apart from the procedure room. The Board believes that it is difficult to reach a truly voluntary decision while the patient is undressed and on the procedure table."

While the question of whether a separate room may be required for counseling has never been addressed by the Supreme Court, it is reasonable to assume, as did the Board, that a truly voluntary decision is not likely to be made when the patient is already undressed and on the procedure table.

the use of group counseling since it is specifically permitted under subsection three. Thus, the bulk of the counseling may be conducted in groups. The requirement of individual counseling simply assures that there will be an opportunity for those in need of individual counseling to obtain it. This is consistent with Akron and, since Thornburgh reaffirmed Akron, is constitutional.

2. Section 205.730(b)(2).

Section 205.730(b)(2) requires that counselors be:

> [Q]ualified to:
> (i) discuss alternatives for dealing with an unwanted pregnancy;
> (ii) describe the procedures used in the facility;
> (iii) explain the risks and possible complications of each procedure;
> (iv) provide contraceptive information.

This section does not require that any specific information be given to patients. It simply requires that counselors be qualified to discuss these areas and that the clinic be able to document that its counselors have been given orientation training.

The question of counselor qualifications was not before the Court in Thornburgh. The Supreme Court in Akron, however, stated that regulations governing the competency of counselors are not only permissible but "important." Akron, 462 U.S. at 449 and n. 40, 41. "[T]he state may establish reasonable minimum qualifications for those people who perform the primary counseling function." Id. at 449.

Since Thornburgh reaffirmed Akron, it must be presumed that this subsection is also constitutional.

3. Section 205.730(b)(3).

This section states:

> Counseling shall include a discussion of alternatives, description of the procedure to be performed, explanation of risks and possible complications. Contraceptive information may be provided postoperatively. Group counseling may be provided in addition to individual counseling. The patient's clinical record shall include documentation of the counseling received.

While this subsection does require that counselors discuss alternatives to abortion, describe the abortion procedure to be performed, and explain the risks and possible complications of abortion, it does no more. Unlike the Akron ordinance and the Pennsylvania statute in Thornburgh, which listed specific information within these general categories that was required to be given to the woman, § 205.730(b)(3) does not require any specific information to be given.

In Thornburgh, the challenged informed consent statute "prescribed in detail the method for securing 'informed consent." 106 S.Ct. at 2178. In addition, "[s]even explicit kinds of information must be delivered to the woman at least 24 hours before her consent is given, and five of these must be presented by the physician." Id. Those five included:

(a) the name of the physician who will perform the abortion.

(b) the "fact that there may be detrimental physical and psychological effects which are not accurately foreseeable,

(c) the "particular medical risks associated with the particular procedure to be employed,"

(d) the probable gestational age of the fetus,

(e) the "medical risks associated with carrying her child to term."

106 S.Ct. at 2178. The other two areas were:

(f) the "fact that medical assistance benefits may be available. . ." and

(g) the "fact that the father is liable to assist" in the child's support.

106 S.Ct. at 2178-79.

A comparison of the Pennsylvania statute with the ASTCA, under the principles articulated in Akron and reaffirmed in Thornburgh, establishes that § 205.730(b)(3) is constitutional.

First, in contrast to the Pennsylvania statute, the ASTCA does not require that any counseling be given by the doctor. Moreover, the ASTCA does not require that the counseling be done 24 hours before her consent is given, as did the Pennsylvania statute, but simply after the patient is told that she is pregnant and before the procedure.

Second, in contrast to the Pennsylvania statute, the ASTCA does not at all include items (a), (d), (e), (f), and (g) outlined above.

Finally, items (b) and (c) of the Pennsylvania law, outlined above, are more detailed and specific than the

general description of areas contained in ASTCA § 205.730(b)(3). Whereas the Pennsylvania statute required information of "the fact that there may be detrimental physical and psychological effects which are not accurately foreseeable," section (b)(3) simply requires an "explanation of risks and possible complications." Moreover, whereas the Pennsylvania statute required information about "particular medical risks associated with the particular abortion procedure to be employed," the ASTCA requires only a "description of the procedure to be performed."

In Akron, the Court stated that a provision that "merely describes in general terms the information to be disclosed" would be constitutional because it "properly leaves the precise nature and amount of this disclosure to the physician's discretion and 'medical judgment.'" 462 U.S. at 447. The Akron provision that described in general terms the categories of information that must be given, however, also required that the information be given by the physician. It did not allow qualified counselors to provide that information. Therefore, the Court held it unconstitutional. Id.

In contrast to § 1870.06(C) of the Akron ordinance, this section specifically allows counselors rather than doctors to give the required information. It describes in general terms the information which must be disclosed and does not in any way attempt to structure the content of the

counselor's discussion of these topics. Thus, § 205.730(b)(3) is constitutional under Akron and Thornburgh.

V. THE RECORD KEEPING AND REPORTING PROVISIONS OF THE ASTCA REMAIN CONSTITUTIONAL IN SPITE OF THORNBURGH.

Four sections of the ASTCA concern record keeping and reporting. Two of these section, 205.520(c) and 205.610, deal only with the making and keeping of patient records. They do not require that any of the information recorded be reported to any state department or agency. Thornburgh does not address the constitutionality of any provision that merely required that patient information be taken and recorded in the patient's medical chart. Therefore, it does not affect these two provsions.*

Two other sections, 205.620 and 205.760 do require that reports be submitted to the Department of Health and are therefore subject to the holding of Thornburgh. However, neither of these sections runs afoul of the holding of Thornburgh.

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* Medical records are routinely made and kept by all treating physicians and have never been challenged as unconstitutional. See, A.C.O.G. Standards at 63, 67 ("All ambulatory facilities should maintain an accurate and efficient record system...This record should contain sufficient information not only to justify the preoperative diagnosis and the operative procedure, but also to document the postoperative course.") Moreover, the items listed in the A.C.O.G. Standards are virtually identical to those listed in § 205.610. Id. at 67.

In Danforth, the Supreme Court stated:

> Recordkeeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible.

428 U.S. at 80-81. This holding was specifically reaffirmed in Thornburgh. 106 S.Ct at 2181. The reports in the Pennsylvania statute were struck down because they went "well beyond the health-related interests that served to justify the Missouri reports under consideration in Danforth." Id. The ASTCA provisions are similar to the Danforth provisions, in that they do not require detailed information to be reported and do not allow for public access to the reports that are filed with the department of health. Thus, they are constitutional under both Danforth and Thornburgh.

A. Section 205.620 is Constitutional.

Section 205.620 concerns statistical data. It requires that each ASTC annually submit to the Department the following:

(a) the number and type of procedures performed

(b) the number and type of complications reported

(c) the nymber of patients requiring transfer to a licensed hospital for treatment of complications

(d) the number of patients returning for follow-up contact,

(e) the number of deaths.

This section does not require that the actual patient record be sent to the Department. Nor does it require that any information on specific patients be forwarded. It merely requires that ASTCs submit statistical data annually to the Department regarding general, objective information that is clearly related to the protection of maternal health (types and numbers of procedures, complications, deaths). Since section 205.620 requires nothing more than was required by the Missouri statute in Danforth, it is clearly constitutional under Danforth and Thornburgh.

B. Section 205.760 is Constitutional.

Section 205.760 concerns reports of abortion procedures. This section, however, is itself simply a procedural requirement. It merely requires that a report for each abortion procedure be made on forms provided by the Department. This section is virtually identical to the procedural requirements in the reporting statute upheld in Danforth, 428 U.S. at 79-81, 87, and reaffirmed in Thornburgh. 106 S.Ct. at 2181. It therefore is plainly constitutional.

This should end the inquiry regarding the constitutionality of § 205.760. However, the State defendants argued in their opening brief that this section was not being enforced because § 10 of the Illinois Abortion Law of 1975 was permanently enjoined in Charles v. Carey,

579 F.Supp. 464 (N.D.Ill. 1983), aff'd, 749 F.2d 452 (7th Cir. 1984), appeal dismissed, Diamond v. Charles, 106 S.Ct. 1697 (1986). Brief of Defendant-Appellants at 15. Section 10 of the Illinois Abortion Law was amended in 1984 in response to the district court's decision in Charles. The constitutionality of amended section 10 is presently before the District Court in Keith v. Daley, 84 C 5602. Consequently, it may be argued that this court should evaluate the constitutionality of that provision in order to determine whether § 205.760 could be enforced.

Your amicus respectfully submits, however, that the constitutionality of amended section 10 of the Illinois Abortion Law should properly be left to the District Court for its determination of constitutionality after the development of a full record. The constitutionality of reporting requirements in the first trimester hinge on their relation to the preservation of maternal health. Thus, in order to evaluate section 10, the record must be developed regarding the usefulness of the information required to be reported in preserving maternal health. That record has not yet been developed. Accordingly, this court should refrain from reviewing section 10 of the Illinois Abortion Law at this time.

## VI. CONCLUSION

For the foregoing reasons, nothing contained in the Supreme Court's recent decision in Thornburgh v. American College of Obstetricians and Gynecologists alters the conclusion that the provisions of the ASTCA are constitutional under the principles previously articulated in Akron, Ashcroft, and Simopoulos.

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