



10-1982

Planned Parenthood Assn. v. Ashcroft

Lewis F. Powell Jr

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Grant
direct
with
Akron
lower

Deny

(though I'd not
object to
a hold for
81-7468/854
(City of Akron
on abortion
only))

CA 8 correctly
sustained validity
of Mo. statute that
substantially ~~more~~
comports with my
opinion in H. L. v. Matheson (Utah
case)

4/15/82 jw
Resps argue the
CA 8 decision is
correct and is consistent
with Belotti II.

If the Court grants on City of Akron, No 81-746,
I would hold this case. Otherwise deny jw

PRELIMINARY MEMORANDUM

February 26, 1982 Conference
List 1, Sheet 3

No. 81-1255

PLANNED PARENTHOOD AS-
SOCIATION OF KANSAS
CITY, et al.

Cert to CA 8 (Lay, Henley, Harris
[DJ])

v.
ASHCROFT (Mo Att'y
Gen'l), et al.

Federal/Civil

Timely

Deny
consent
issue not
clearly
presented
4/29

SUMMARY: Petr challenges the Missouri statute requiring the
consent of a parent or approval of the juvenile court before an
unemancipated minor may obtain an abortion.

FACTS AND HOLDING BELOW: Petrs are two corporations operat-
ing abortion clinics in Kansas City and St. Louis and two physi-
cians who regularly perform abortions in the clinics and else-

I would deny. You may wish to CF R and considering with Nos.
81-746, -854 & -1172. jw

[FEB 26, 1982]

Caldwell says DENY -
the consent issue is
not clearly presented
by the record.
I agree.
Deny.
RF

where. They brought this suit as a facial challenge to several Missouri statutes enacted together as part of a comprehensive scheme to regulate, and allegedly discourage, abortions. After a trial on the merits, the District Court (Hunter, W.D. Mo.) held that several of the provisions were unconstitutional but that others were valid.¹ One of the provisions held unconstitutional was that requiring parental or judicial consent before a minor may obtain an abortion.

✓ CA8 reversed in part and affirmed in part.² On the issue of

¹The DC decided petrs' challenge to the following provisions:

- 1) A requirement that abortions be performed only by physicians. Mo. Rev. Stat. §188.020. Found constitutional.
- 2) A requirement that abortions performed after the twelfth week of pregnancy be performed in a hospital. Mo. Rev. Stat. §188.025. Found unconstitutional.
- 3) A requirement of parental or judicial consent before minors may obtain an abortion. Mo. Rev. Stat. §188.028. Found unconstitutional.
- 4) Regulation of abortion of fetuses found to be viable. Mo. Rev. Stat. §188.030. Found unconstitutional.
- 5) Imposition of a detailed informed consent warning procedure. Mo. Rev. Stat. §188.039. The court found unconstitutional the requirement of a 48 hours waiting period between the informed consent warning and the abortion, the requirement that the informed consent warning also be given to parents of minors seeking abortions, and several of the substantive requirements of the warning.
- 6) A requirement of a pathology report on the aborted fetus. Mo. Rev. Stat. §188.047. Found constitutional.
- 7) Recordkeeping and reporting reequirements. Mo. Rev. Stat. §188.052. Found constitutional.
- 8) Regulation of counseling provided at "abortion facilities." Mo. Rev. Stat. §188.063. Found unconstitutional.

Footnote(s) 2 will appear on following pages.

consent for minors' abortions, the court in large part reversed the DC decision. Mo. Rev. Stat. §188.028(1) provides:

"No person shall knowingly perform an abortion upon a pregnant women under eighteen years unless:

(1) The attending physician has secured the informed written consent of the minor and one parent or guardian; or

(2) The minor is emancipated and the attending physician had received the written informed consent of the minor; or

(3) The minor has been granted the right to self-consent to the abortion by court order pursuant to subsection 2 of this section . . . ; or

(4) The minor has been granted consent to the abortion by court order, and . . . the minor is having the abortion willingly in compliance with subsection 3 of this section.

Subsection 2 sets out the procedure to be followed in obtaining judicial consent for the abortion. The minor must petition the juvenile court either for "majority rights for the purpose of consenting to the abortion," in which case the minor can give consent herself, or for a judicial determination that the abortion is in the best interests of the minor. Subsection 3 provides that a minor cannot be forced to undergo an abortion

²The court of appeals reversed the DC holding of unconstitutionality in regard to two provisions: §188.030 (regulation of abortion of viable fetuses), and §188.028 (parental or judicial consent) (reversed in part). It also reversed the DC's holding that §188.047, requiring pathology reports, was valid. The court remanded for consideration the DC holding that §188.025, requiring hospitalization after the twelfth week, was unconstitutional, and its holding that §188.052, requiring certain reports, was valid. On remand, the district court conducted additional factfinding and once again found the hospitalization requirement invalid and the reporting requirement valid. The court of appeals affirmed those findings.

against her consent unless a court orders the abortion as necessary to preserve the woman's life.

The court of appeals noted that a blanket requirement of parental consent was declared unconstitutional in Planned Parenthood v. Danforth, 428 U.S. 52 (1976). This Court later determined that a statute requiring the consent of a parent or of a court was unconstitutional because it allowed the court to block the abortion even after it had determined that the minor was sufficiently mature to make her own decision. ✓ Bellotti v. Baird, 433 U.S. 622 (1979) [✓ Bellotti II]. The DC held §188.028 invalid because it believed the law would allow the juvenile court to deny permission for an abortion upon "good cause" even if the minor were sufficiently mature. The court of appeals construed the Missouri statute differently, however. It held that the law would allow the juvenile court to deny permission only if it found that the minor was not sufficiently mature to make her own choice. Under that interpretation, the law is valid.

The CA went on to discuss other parts of §188.028. First, it held that the requirement of notice to the minor's parents in all cases was unconstitutional insofar as it required notice to the parents even if the juvenile court determines that the minor is mature or that it is in her best interest to have an abortion. The court found that this question was left open in ✓ H.L. v. Matheson, 450 U.S. 398 (1981), but believed that the answer was dictated by the concurring opinion of Justice Powell, joined by Justice Stewart.³ The court also held that the law was not

U.S. v. Carl

Footnote(s) 3 will appear on following pages.

overinclusive or underinclusive, that the use of the term "eman-
cipated" did not render the statute void for vagueness, and that
the statute protects the minor's anonymity and allows for a suf-
ficiently prompt judicial determination.

CONTENTIONS: Petrs contend that the CA8 decision is direct-
ly contrary to Danforth and Bellotti II. The statute here held
valid contains the same two provisions found fatal to the Massa-
chusetts law in Bellotti II: it allows a court to deny permis-
sion to a mature minor and it requires parental notification in
every case. Similar provisions were held invalid by CA7 in Wynn
v. Carey, 582 F.2d 1375 (CA7 1978), and by several other courts.
CA8 avoids this result by rendering a "tortured construction of
§188.028" to make it consistent with the Bellotti II require-
ments.

DISCUSSION: Petrs contentions are somewhat unusual. First
of all, petrs ignore the CA8 holding striking down the Missouri
requirement that the juvenile court notify the minor's parents in
every case. Next, they argue that the CA8 construction of the
statute to make it conform to the requirements of Danforth and
Bellotti II is incorrect. Contrary to the CA8 interpretation of

³CA8 noted that three Justices would have held the parental
notification statute involved in Matheson unconstitutional on its
face and that Justice Powell, joined by Justice Stewart, clearly
indicated that they would hold invalid a law which required pa-
rental notification even if the minor was found to be mature or
the court determined that notification was not in her best inter-
ests. 450 U.S., at 420.

In this case, CA8 held that the notification requirement was sev-
erable and its invalidity did not require the invalidation of the
remainder of §188.028.

the statute, petrs maintain that the law does not require the juvenile court to allow a mature minor to give consent herself and is in that respect invalid. Thus their argument is not with statute as interpreted by CA8, but with the harsher interpretation they give to the law themselves. Unless a state court decides that the CA8 interpretation is wrong, it is hard to see what petrs have to complain about.

Ordinarily, I would recommend denial, but the underlying issue in this case--the validity of the parental or court consent provisions--is before the Court in three other petitions involving the Akron, Ohio, abortion ordinance. Akron v. Akron Center for Reproductive Health, Nos. 81-746, 81-854 and 81-1172. In Akron, CA6 held that a similar, although not identical, consent requirement was invalid. That court made several additional holdings which conflict with parts of the CA8 decision in this case not challenged by petr. (The last CA8 opinion in this case was filed on November 30, 1981, so there may still be a petition from the state raising some of the issues presented in Akron.) The Court has called for a response in 81-1172, the cross-petrn of the Akron Center for Reproductive Health. I recommend calling for a response in this case and considering it along with the Akron petitions.

I recommend CFR.

There is no response.

February 18, 1982

Holzhauser

Opns in petn

Dispute with ~~the~~
Akron Center v. City of Akron
80-746, 854 & 1172 (see p 5)

Grant
to both
New case
& Akron

in which a substantial similar
abortion regulation (second
trimester abortion must be performed
in a hospital) was held valid.

This case is in direct conflict
as CA8 invalidated Mo. statute.

Grant on
all 3
issues
4/29

PRELIMINARY MEMORANDUM

April 16, 1982 Conference
List 3, Sheet 1

No. 81-1623

ASHCROFT, Atty Gen'l of
Mo., et al.

Cert to CA8 (Lay, Henley, Harris
[DJ])

v.

PLANNED PARENTHOOD
ASS'N OF KANSAS CITY

Federal/Civil

Timely

NOTE: This is a cross-petition to Planned Parenthood
Association of Kansas City v. Ashcroft, No. 81-1255. Please make
reference to the Preliminary Memorandum in that case.

SUMMARY: Petrs challenge of the invalidation of Missouri's
statutory requirements that (1) every abortion performed
subsequent to the first 12 weeks of pregnancy be performed in a
hospital; (2) a second physician attend the performance of an

Grant on the 3 abortion questions. The attorney's
Fees issue has already been granted in 81-1244 Hensley v.
Eckert
DL

[RE APRIL 16, 1982]

There are 3 "abortion" issues.
Caldwell suggests a Grant
limited to the hospitalization
requirement for the second
trimester.

I would Grant all 3 abortion
issues. The others help to
illuminate the context in which
the "main" issue arises. RF

abortion of a "viable fetus"; and (3) a tissue sample be taken of every abortion and submitted to a qualified pathologist for a pathology report. Petrs also contend that the DC erred in calculating its award of attorney's fees.

FACTS: In June 1979, Missouri enacted a comprehensive statute dealing with abortion. Resps--two corporations operating abortion clinics and two physicians who regularly perform abortions in the clinics and elsewhere--filed suit in the W.D. Mo., challenging as unconstitutional 9 sections of the new law. However, only the following 3 sections are involved in this cross-petition.

Section 188.025 provides that "[e]very abortion performed subsequent to the first 12 weeks of pregnancy shall be performed in a hospital." Section 188.030.3 provides that an abortion of a "viable unborn child"--a fetus at that stage of development when its life "may be continued indefinitely outside the womb by natural or artificial life support systems"--"shall be performed only when there is in attendance a physician other than the physician performing or inducing the abortion who shall take control of and provide immediate medical care for a child born as a result of the abortion."¹ This section also requires the physician performing the abortion to take all reasonable steps to preserve the life and health of the unborn child, provided that he can do so without posing an increased risk to the life and

¹Other subsections of § 188.030 prohibit any abortion of a "viable unborn child" unless necessary to preserve the life or health of the mother, and also require the performing physician to use the technique most likely to preserve the life of the unborn child unless that technique will endanger the mother.

health of the mother. Criminal penalties are imposed for violations of the section. Finally, § 188.047 requires that a "representative sample of tissue removed at the time of abortion" be sent to a certified pathologist, who must prepare a "tissue report" to be filed with the state and the facility in which the abortion was performed.

The DC (J. Hunter) found the first two of these provisions unconstitutional, but upheld § 188.047 (requiring the pathology report). Of the 5 other provisions challenged by resps at trial (they had abandoned their challenge to one provision prior to trial), the DC upheld two, struck down two in their entirety, and invalidated portions of the fifth. Nevertheless, the DC awarded resps \$19,279 in attorney's fees, which was apparently based on the full amount of time resps' attorneys had spent on the case.

HOLDING BELOW AND CONTENTIONS: The CA8 affirmed in part and reversed in part, holding unconstitutional all 3 provisions at issue here.

1. Second Trimester Hospitalization Requirement: The DC had found the requirement that abortions be performed in a hospital after the first trimester of pregnancy to be unconstitutional for two reasons. First, the requirement did not reasonably relate to protection of maternal health because the "dilation and evacuation" method of abortion (D&E) could be performed safely outside a hospital up until the 18th week of pregnancy; and, since only one Mo. hospital allows use of the D&E method in the second trimester, the effect of the hospitalization requirement was to render the D&E method virtually unavailable. Second, since no Mo. hospital will admit a woman under 18 without parental consent, the requirement permitted parents to veto a

minor's decision to have an abortion, contrary to Planned Parenthood v. Danforth, 428 U.S. 52 (1976). The CA rejected this second rationale, saying that "the fact that private entities (i.e., the hospitals) impose additional requirements without the State's sanction or insistence cannot affect the statute's constitutionality." The CA said that the proper inquiry was whether the requirement (1) creates a substantial interference with and imposes a direct burden on the woman's decision to have an abortion; and (2) if so, is reasonably related to protection of the woman's health. Because it found the record inadequate to decide these questions, it remanded to the DC.

On remand, the DC found that (1) the D&E procedure was the safest post-12 week abortion technique currently available, even when performed outside of a hospital; (2) only one Mo. hospital performs second trimester D&E procedures; (3) the D&E procedure in a hospital is significantly more expensive than the same procedure performed in an outpatient facility; and (4) the second trimester hospitalization requirement results in fewer second trimester abortions being performed than if hospitalization was not required. On the basis of these findings the CA held that the requirement unconstitutionally burdened a woman's decision to seek an abortion because it was not reasonably related to maternal health.

Petrs contend that this decision conflicts with Roe v. Wade, 410 U.S. 113, 163 (1973), which indicates that the state's interest in protecting the health of the mother after the first trimester of pregnancy justifies state regulation "as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other

place of less-than-hospital status." (The CA found that Roe was not dispositive because it was decided before the D&E procedure became widely-used and accepted.) Moreover, in Akron Center for Reproductive Health v. City of Akron, 651 F.2d 1198 (CA6 1981), petitions for cert pending, Nos. 80-746, 80-854, & 80-1172 (all "straight-lined" with the instant case on the April 16 Conference List), the court held on virtually identical evidence that a similar hospitalization requirements was constitutional. The Akron decision relied heavily on Gary-Northwest Indiana Women's Services v. Bowen, 496 F. Supp. 894 (N.D. Ind. 1980), aff'd summarily, 451 U.S. 934 (1981) (with 3 Justices stating they would NPJ), which addressed in particular the impracticality of retreating from Roe's "bright-line test" to rules under which the constitutionality of second trimester regulation fluctuate with every change in statistics concerning the availability of abortions and the safety of new abortion techniques. The CA8 should have considered itself bound by this Court's summary affirmance in Gary-Northwest.

2. Pathology Reports. The DC upheld the requirement of pathology reports on the ground that it was rationally related to the state's interest in regulating standards of medical care. However, the CA held the requirement unconstitutional because it increased the cost of abortion by \$10-\$40 (thereby burdening the decision to abort); Mo. does not require submission of tissue to a pathologist following other medical procedures; and there was no showing that there were unique medical complications associated with abortion that necessitated a pathology report in every case. While in individual cases a report may be useful (to indicate possible fetal disorders, among other things), there is

no reason why physicians should not be able to use their own professional judgment about whether such a report is required, as they would do in connection with every other surgical procedure.

Petrs contend that the requirement is rationally related to the state's interest in preserving maternal health, and point out that the decision below conflicts with Wynn v. Scott, 449 F. Supp. 1302, 1322 (N.D. Ill. 1978), appeal dismissed, 439 U.S. 8 (1978), aff'd, 599 F.2d 193 (CA7 1979).

3. Requirement That a Second Physician Attend the Abortion of a Viable Fetus. The DC struck down this requirement as overbroad, because it requires a second doctor even when the fetus has no reasonable chance of survival, such as when D&E is the only safe procedure for the woman. The CA agreed, finding that the requirement significantly increased the costs of abortion, thereby decreasing its availability, and was not justified in cases where a D&E procedure was used.

Petrs contend that the decision flies in the face of an "overwhelming factual record" indicating that D&E should never be the procedure of choice at a sufficiently late date in the pregnancy that the fetus would be viable. The decision also conflicts with Roe, supra, at 163-164, which says that the state's compelling interest in potential life justifies a proscription against abortion after "viability," except when necessary to preserve the mother's life or health. Obviously this interest is sufficiently compelling to justify requiring the presence of a second physician to preserve and care for the potential human life.

4. Attorney's Fees. The CA held that resps were entitled to the full award of attorney's fees even though they prevailed on

only some issues. Petrs contend that this approach conflicts with decisions in other circuits, which hold that the award should reflect the extent to which the party prevailed. E.g., Nadeau v. Helgemoe, 581 F.2d 275, 279 (CA1 1978); Hughes v. Repko, 578 F.2d 483 (CA3 1978); Morton v. Charles Cty. Bd. of Educ., 373 F. Supp. 394, 411 (D.Md. 1974), aff'd, 520 F.2d 871 (CA4 1974); Batiste v. Furnco Construction Corp., 503 F.2d 447, 451 (CA7 1974); Schaeffer v. San Diego Yellow Cabs, 462 F.2d 1002, 1008 (CA9 1972).

Resps (petrs in No. 81-1255) have filed a "waiver of the right to respond," in which they actually state their position on the cross-petition. They point out that the issues presented in the cross-petition are similar to those pending before the Court in Akron v. Akron Center for Reproductive Health v. City of Akron, etc., Nos. 80-746, 80-854, & 80-1172, and maintain that the record is more complete in this case than in Acron. Thus, if the Court is inclined to grant plenary review in Acron it should also grant the cross-petition.

DISCUSSION: All of the issues relating to the constitutionality of the abortion statute are substantial, and there is a conflict on two of the issues. Moreover, as petrs point out, there seems to be tension between the CA8 decision and the language of Roe v. Wade; and arguably the CA's conclusion that the hospitalization requirement is unconstitutional was foreclosed by the summary affirmance in Gary-Northwest, supra.²

Footnote(s) 2 will appear on following pages.

In all, I recommend that the Court grant the petition, possibly in conjunction with Akron, No. 81-1172, which likewise concerns the constitutionality of a second trimester hospitalization requirement. Since there is a CA conflict concerning the calculation of attorney's fees, I recommend that the Court review this issue along with the other questions.

There is a "waiver of the right to respond" with a statement of resps' position, and also an amicus brief from the City of St. Louis urging a grant.

April 8, 1982

Rosenblum

Opns in petr

²The petr in Akron, supra, No. 81-1172, makes a decent argument that the factual situation in Gary-Northwest was sufficiently different from that in Akron and this case that the summary affirmance is not binding. See the Preliminary Memorandum in 81-1172.

Court
Argued, 19...
Submitted, 19...

Voted on....., 19..
Assigned, 19..
Announced, 19..

No. 81-1255

PLANNED PARENTHOOD OF KANSAS CITY

vs.

ASHCROFT, A.G.

This is a petition for cert.

Grant

Reluct
in C

[illegible]

Abortion Case (5/13/82)

81-185 Simopoulos v. Va - Grant
Both issues: parental consent
& second trimester hospitalization)

81-746 Akron v Akron Center - Deny
Possible mootness ~~issue~~
(Consent issue)

81-854, Sequin v. Akron Center - Deny
(Curved lined with 81-746)

81-1172, Akron Center v Akron - Grant?
Also curve lined with 81-746
But is not moot as it also
presents "hospitalization issue)"

81-1255 Planned Parenthood & Deny
v. Ashcroft
(Consent issue poorly presented)

81-1623 Ashcroft v. Planned Parenthood Grant
Hospitalization
issue - but with some
variations.

Both
may
be
moot.
The pregnant
daughters
are
now
over 15

Abortion Case (5/13/82)

2 at
are

81-185 Simopoulos v. Va. - Grant
Both issues: parental consent
& second trimester hospitalization)

Both
may
be
most.
The pregnant
daughters
are
now
over 15

81-746 Akron v Akron Center - Deny
Possible mootness ~~issue~~
(Consent issue)

81-854, Sequin v. Akron Center - Deny
(Curved lined with 81-746)

81-1172, Akron Center v Akron - Grant?
Also curved lined with 81-746
But is not moot as it also
presents "hospitalization issue)"

81-1255 Planned Parenthood v. Ashcroft - Deny
Consent issue poorly presented)

81-1623 Ashcroft v. Planned Parenthood - Grant

Hospitalization
issue - but with some
variations.

Court

Voted on....., 19...

Argued, 19...

Assigned, 19...

No. 81-1623

Submitted, 19...

Announced, 19...

vs.

PLANNED PARENTHOOD

This is a petition for cert.

There has
never met
~~but~~ in other cases.

Grant

[illegible]

Court

Argued, 19...

Assigned, 19...

Submitted, 19...

Announced, 19...

vs.

Grant

same
vote
as on 5/13

[illegible]

Voted on....., 19...

Argued, 19...

Assigned, 19...

No. 81-1255

Submitted, 19...

Announced, 19...

PLANNED PARENTHOOD OF K.C.

vs.

ASHCROFT, ATTY. GEN. OF MO

Grant

~~A~~ Consolidate
ms.

cover

[illegible]

MEMO TO FILE

(Mo. - Ashworth Case)

81-1255 and 81-1623 Planned Parenthood v. Ashcroft (Mo)

Planned Parenthood, a clinic (Reproduction Health Services), and a couple of doctors, sought injunctive and declaratory relief against the Missouri abortion statute as revised following Danforth. It is not easy to identify the "winner", although ^{the} ~~this~~ state prevailed on what appear to be most of the major issues. This memo, dictated only to aid my memory will review - summarily - the opinion of CA8 by Chief Judge Lay. In doing so, I follow by subject matter CA8's disposition of the issues.*

I. Second Trimester^u Hospitalization Requirement.

Section 188.025 requires that second and third trimester abortions be performed in a hospital. The DC had invalidated this requirement. It had noted that the D&E

*At the beginning, CA8 summarizes its disposition of the District Court's opinion, affirming in part and reversing in part. A-56-57.

Counsel for Cliner - as I understood him - said only D & E procedure is now used in Mo. (He relies on Danforth decision as to "saline" procedure).

method was available in Missouri in only one hospital.

Moreover, the DC noted that no hospital would admit a woman under 18 without parental consent, and therefore parents were given the power to veto minor women's decisions with respect to second and third trimester abortions.

2. Only one hospital permitted D+E and no hospital

Parental Consent for Hospitalization

CA8 noted that, unlike the statute in Danforth, the new statute does not require parental consent (is this true even for immature minors?). In rejecting the DC's position, CA8 noted that the unavailability of hospitals was not state action, but was the action of "private entities". Moreover, CA8 thought that the DC's position would "force reevaluation of every health-based second trimester regulation", and that the state interest was both concern for the mother's health and viability of the fetus.

Because of inadequate findings by the District Court, CA8 remanded on the hospitalization requirement. It noted that "the central issue is the relative safety of nonhospitalized D&E and hospitalized methods". In concluding this portion of its opinion, CA8 said:

CA8 re-manded on

Should ascertain on remand

"In sum, we find that the district court failed to properly analyze the hospitalization requirement. On remand, it should first determine if the regulation creates substantial interference with and imposes a direct burden on the woman's decision to have an abortion. If it does, the district court should evaluate whether the hospitalization requirement is justified by a compelling state interest; i.e., whether it is reasonably related to the woman's health. Missouri bears the burden of justifying the restriction." A-66

II. Parental or Court Consent for Minors.

This section makes it a crime to perform an abortion on a minor (under age 18) unless (i) the physician has obtained written consent of the minor and one parent or guardian; or (ii) the minor is emancipated and the physician has informed consent; or (iii) the minor has been granted the right to self-consent to the abortion by a court order, obtained by procedure prescribed in the statute; or (iv) the minor has been granted consent by court order. See brief of respondents cross petitioners, p. 5.

CA8 began its discussion of this issue by quoting the paragraph from my Bellotti II opinion that outlined requirements with respect to consent.

The DC had invalidated this provision because it was viewed as allowing a state court unbridled discretion. Also the statute had not dealt with emancipation properly. CA8 construed §188.028 differently. It ruled that a court could not deny the minor's petition unless it found that "the minor was not emancipated and was not mature enough to make her own decision and that an abortion was not in her best interests". These are my Bellotti II requirements. CA8 buttressed its holding in this respect by reliance on H.L. v. Matheson. See A68-69.

In discussing Matheson CA8 noted that it had gone off on a "standing" issue. But here the plaintiff was not a young woman seeking abortion. Rather, they were corporations and physicians seeking to provide abortion

*Presented guest
left open in
H.L.v. Matheson
CA8 accepted
that view
that no
notice is
required
by statute
minors*

services, and that these plaintiffs had shown that some of their respective patients included mature minors.

Interestingly, the plaintiffs in this case (the primary petitioners who lost on major points below) argue that CA8 had no authority to interpret the statute as it did, contending that the plain language was otherwise.

CA8 then noted that this case presented "the case left open in Matheson: whether it is constitutionally permissible to require mature or 'best interest' minors to notify their parents prior to a court hearing in which they seek judicial consent". A70 Again relying on my Bellotti II opinion, CA8 states that it "advances persuasive reasons for concluding that parental notice is unduly burdensome in cases involving mature or 'best interest' minors." 443 U.S., at 642-648.

Planned Parenthood challenged several other provisions of §188.028. These do not appear substantial to me - at least at present. The usual vagueness argument is made. It also is said that the procedure does not assure anonymity. Despite these arguments, CA8 concluded that "the judicial consent provision" is constitutional. But CA8 agreed with Planned Parenthood that "the notice provisions found in subsection 188.028.2(2) are impermissible and must be set aside."

CA8 approved the jud. consent provision.

In sum, the judicial consent, construed, was sustained, but - in accord with Bellotti II, the requirement of parental notification was invalidated.

III. Restrictions on Abortion After Viability (A73)

CA8 first reversed the DCs holding that all of these restrictions were void for vagueness. I do not think we granted cert on the vagueness issue.

Second Doctor Requirement

CA8 held unduly burdensome. 9 agree

CA8 affirmed the DC's decision that this unduly burdened the woman's right. The state agreed that there was a financial burden, but argued that under Harris and Maher that this was a private rather than public matter. I agree with CA8 that these cases were misconstrued by Missouri. Thus, there certainly was a state imposed burden that could be justified only by a showing of compelling state interest.

The interest relied upon by the state was the importance of making sure, where a second trimester abortion is performed, that the fetus will ~~not survive~~ *is not capable of surviving*. CA8 affirmed the DC in concluding that the state failed to show that a second doctor's opinion was necessary.

CA8 discussed the D&E procedure, and the conflict of Dr. Crist's testimony with that of all other doctors.*

*My recollection is that Dr. Crist was a party in the Akron *no* case. He testified that he used D&E successfully on women pregnant as much as 28 weeks. His testimony was contradicted by every other physician, the prevailing view being that a fetus could not survive D&E abortion. I'd like to find some way to check up on Dr. Crist. My guess is that he is a professional witness.

IV. Informed Consent

Requirement went beyond Danforth, & was invalidated^{6.}

Danforth held that a state may require "informed consent" even in the first trimester. Danforth, 428 U.S., at 64-67. But Danforth limited this as follows:

"The giving of information ^{and} to the patient as to just what would be done, as to its consequences [may be required]. To ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable straightjacket in the practice of his profession." At 67.

Section 188.039.2(3) goes well beyond Danforth.

It requires that the woman be informed of the "probable anatomical and psychological characteristics of the unborn child", and subsection (4) provides that she must be informed of "the immediate and long range physical dangers of abortion and psychological trauma".

The DC held this unduly burdensome, and CA8 affirmed.

In so doing, CA8 said that the DC properly concluded that "the abortion decision is one to be made by a woman and her physician", and that the state's interest is adequately served when the woman's decision is made with "full knowledge of its nature and consequences". Danforth, 428 U.S., at 67.

^u
A Physician Must Advise *to enable "informed consent"*

not before
Section 188.039.1 requires that the "attending physician" inform the woman of the information specified in the statute. Both the DC and CA8 sustained this requirement, despite the argument of Planned Parenthood that

nonphysicians are capable of informing the patient, and that requiring the physician to do it creates scheduling problems and increased costs. My tentative view is that a qualified person other than a physician could give this information.

I think a state could require the licensing of such persons, such as practical nurses are licensed.*

*But this well
could be left
to states.*

V. Pathological Reports

Section 188.047 requires that sample of the tissue removed must be submitted to a certified pathologist, who must file a report with the state division of health.

CA8 invalidated this provision, holding that the decision whether to obtain pathological reports should be left to the physician. CA8 noted that Missouri "does not require submission of tissue to a pathologist following other medical procedures". A94

*In the subsection discussing advice by the physician (p. A91), CA8 refers to the 48 hours waiting period prescribed. It appears to sustain this as valid, although the discussion at this point in the opinion is very brief.

In invalidating this requirement, CA8 reiterated that "Missouri law requires that all abortions be performed by physicians". A96*

* * *

CA8's opinion is long and rambling, and not altogether clear. I hope we can find some way to prevent courts from having to make the multiplicity of judgments such as those addressed by the DC and CA8 in this case.

L.F.P., Jr.

ss

*CA8's opinion is so long I may have missed it, but I find no full discussion of the requirement that only physicians may perform first trimester abortions. My guess is that the Court will hold specially trained persons other than physicians may be competent to perform first trimester abortions.

lfp/ss 11/23/82

MEMORANDUM

TO: Jim DATE: Nov. 22, 1982
FROM: Lewis F. Powell, Jr.

Abortion Cases

I have now read the briefs you were good enough to select for me, including also the brief by the American College of Obstetricians and Gynecologists. As I am sure you have found, the number of issues in these cases is a bit overwhelming. I have not tried to sort out which ones we granted, or whether we took them across the board.

A primary objective of the Court at this time, as I see it, is to enunciate principles or standards that would afford clearer guidance to state legislatures and limit the flow of litigation into the Courts. The professors' brief with respect to the major issues, suggests rather positive standards, and emphasizes the undesirability of "balancing". These have appeal, but they also probably permit abortions for adult women during the first trimester quite literally "at will". In view of the fees charged (see the Virginia case), there always will be licensed physicians who will make enormous profits out of what have been described as "abortion mills". I am not at all sure the professors' brief fairly states some of our holdings. Perhaps the SG goes too far the other way.

I now summarize, Jim, tentative views on several of the major issues in these cases:

Informed Consent Requirement

Danforth recognized that this is not an undue burden per se. The Akron provision is unduly burdensome because it imposes extensive requirements as to exactly what a physician must advise the woman as a predicate to her "informed" consent.

As to the consent requirement with respect to minors who are neither mature nor emancipated, I joined Matheson in holding that parental consent of at least one parent is a valid requirement except where the minor is mature or emancipated or an independent decision-maker finds that a non-consented abortion is in the best interests of the minor. In Akron, apparently Ohio law would require the juvenile court to notify the parents. Under my opinions in Bellotti II and Matheson, this would be invalid.

24 Hours Delay (Akron) / 48 Hours (Missouri)

Although I do not recall (without checking) a court decision on this issue, I doubt that an arbitrary delay - even with an emergency provision - would meet our standards. This normally can be left to the physician, provided there is some assurance that the physician will adequately inform the woman. With respect to immature minors, there should be time to assure informed consent. We have never considered the extent of a doctor's responsibility in determining whether a minor is mature. I suppose a state validly could require with respect to minors

of tender age (under 15) that an independent decision maker determine maturity and best interest issues. Such a requirement inevitably would produce some delay.

Second Trimester Abortions

My recollection is that Roe drew no bright line, referring only to approximate stages in the development of a fetus. In Akron, respondents argue that "early second trimester abortions are safely performed [even in] outpatient clinics, and CA6 apparently would invalidate any "arbitrary line between trimesters".

The American College seems to agree, relying on the argument that "medical knowledge [since Doe] has progressed dramatically", particularly in the use of D&E procedures. Yet, the evidence in the Missouri case persuaded CA8 (and possibly the DC also) that D&E procedure invariably destroys the fetus. Thus, in view of the compelling state interest once viability exists a state lawfully could insist that the decision as to viability be made by a physician.

As the College brief relies on "current medical knowledge", it would appear that it agrees a qualified physician is the only person likely to possess such knowledge, and therefore the viability decision cannot be delegated to a less qualified person.

Free Standing Clinics

A major issue, in view of the extensive use of clinics and the apparent unavailability of hospitals willing to do abortions, is what sort of facilities - if any - would be lawful.

I am favorably inclined toward the views in the amicus brief of the College. See pages 23, 24. I particularly like footnote 65 on p. 24 that describes the College's standards for "free standing surgical facilities" as requiring them to "maintain the same surgical, anesthetic, personal (maybe this is personnel) standards as recommended for hospitals." Clearly, I would think, clinics should be regulated and approved by state law, and periodically inspected.

It is not clear whether the College would require this type of clinic for first trimester abortions. The record - or perhaps one of the briefs - has the full text of the College's standard as to abortions. Take a look, and identify (or xerox) anything helpful.

* * *

Jim, I have dictated the foregoing summary of tentative views. When we go into Conference on three cases, involving three different sets of regulations, it will be helpful to have a somewhat similar summary from you, identifying the issue and the case. Where we differ, we can reconcile these prior to Conference.

L.F.P., Jr.

job 11/29/82

Akron

Mo

To: Mr. Justice Powell

From: Jim

Re: Abortion Cases

ask Mo. and Akron apparently ^{*accredited*} require JCAH-licensed "hospitals." No one has indicated in the briefs what standards the JCAH imposes, and the JCAH's requirements are unavailable to me. You may want to ask the clinics in the Mo. and Akron cases whether they ever tried to comply with the law and whether their clinics were denied certification.

I have heard from someone that once saw the JCAH regulations that they impose very minimal requirements. If that is the case, the Court should know exactly what "burden" they impose before they strike them down as unconstitutional.

*licensed "hospitals" only ?
defined to include
out-patient clinics of any kind?
Did these 3 clinics seek
to be licensed*

81-1255 PLANNED PARENTHOOD v. ASHCROFT
81-1623 ASHCROFT v. PLANNED PARENTHOOD

Argued 11/30/82

Furman (Planned Parenthood)

Suggests we "obtain" on the notice requirement - as Mo. S.Ct has not construed it. CA8's construction as to court approval is not authoritative

Hospital issue (

* See findings of DC - in Appx

2nd Tri. may be performed lawfully only in hospitals.

All 2nd Tri. ^{abortion} at issue here are ~~is~~ limited to D. & E. procedures.

Ashcroft (AG of Mo)

Furman {
(1) ~~Hospitalization~~
(2) 2nd Doctor requirement where father may be ~~not~~ viable
(3) 3rd Notice & Consent
(4)

Mo. statute has not been ~~is~~ interpreted.

State Reg. is impossible if we retreat from bright line of Roe.

Consent provisions are in accord with Bellotti

Ashcraft (cont).

If we ~~depart~~ from the ~~3~~
Three trimester, "bright line" rules
of Roe, legislatures and courts
will have no guide lines, &
will be left to relying on
the testimony of physicians
& medical societies that may vary
from year to year.

(WHR said this statute has
been enjoined & ~~has not been~~
did not go into effect until —

A good
argument { No. legislature has concluded
that health of woman is best
preserved in 2nd Trimester abortion
& ~~that a state's~~ ~~interest~~ in hospitals
& their compelling interest standard
was met.

Physicians differ widely - e.g.
as to the period during which 2nd T.
may be performed safely - e.g. 14-18 weeks

Doctors can determine ~~date of~~ ~~not~~
~~not~~ accurately where conception occurred

Ashcroft (cont)

(21 states require)

1. Hospitalization: ^{licensed hospitals} Requirement for 2nd Tri-semester
(The 17 yr. old was 5 1/2 mo preg)

& Regs

State
law

& Regs.

very

see

separate
notes

Code₁ defined "hospitals" to include "outpatient
abortion clinics"

Regs. ~~for~~ require a physician, and
various safeguards - e.g. one registered
nurse, emergency services.

Regs also require patient to be
kept in clinic, under observation, for 60 min
to guard against post operative problems.

Cirke

(Note: Simopoulos allowed
patient to leave in 5 min)

Compelling State interest in woman's
health - as stated in Roe - is met.

Only Q is whether, in light of current
medical knowledge, the interest becomes
compelling at end of 12 weeks rather
than, say, about 13-15 weeks. (Am College
14 weeks
- p 37)

Should adhere to a "bright line" rule
approving hospitalization requirement
for 2nd trimester - leaving some ~~latitude~~
latitude as to termination of end of 1st Tri.

2. Necessity. Va statute imposes no criminal
liability where abortion is medically "necessary"
to save life of mother. Va neglected to allege
or prove that this abortion was "unnecessary"

3. Evidence ^{was} insufficient to prove
the abortion killed the fetus.

1. Out-patient hospitals - 1st Tr - 12 weeks
2. Out-patient Surgical Hospitals - 2nd Tr

Va Regs (Licensed)

p 15

Part II "Outpatient Surgical Hospitals" 2nd Trimester

p 16

41.2 - Must have written policy/procedures
including:
Written informed consent

p 16

42.1 - Staff

Surgical procedures - licensed
physician

Req. nurse on duty - all times

p 18

43.5 - Emergency Service equipment

Monitoring

Suction apparatus

Oxygen.

Control of hemorrhage

p 20

43.9. Post-operative recovery

Patients must "be observed
for minimum of 60 min.

p 29

Part III - "Outpatient Hospitals"
Abortions Only (1st tri)

Any other licensed
clinics?

Doctors off? p 31

Must be performed prior
to end of 1st tri. (12 weeks)

{ see
require-
ments

1. Burden on Necessity Issue (an affirmative defense)

§ 18.2-24.1 - Aborts. lawful at any time
if "necessary to save woman's life."

Petr says ~~the~~ burden of charging &
proving no necessity is on State.

Va S/CT distinguished U.S. v Vuich
where "necessity" was in the "enacting clause
of the statute". Here, as construed by
Va S/CT, § 18.2-24-1 is a "substantive defense"
entirely separate from the "enacting"
provisions of the crime.

no
need
to show
necessity

2. Hospital Requirement (2nd Tri OK in "hospital")

Roe: State interest "compelling" - 410 U.S.
162-3

"Hospital" broadly defined (§ 32-1-123)
to include "clinics".

Regs. ~~law~~ "Outpatient Surg. Hospital,"
2nd Tri Aborts (Va Bar - 29)

Petr. Not licensed, but by time of
trial Petr had sought license.

No hospitalization requirement for 1st Tri
Part III of Va Regs provide for out-patient "hospital"
for 1st Tri. No Code prov. on 1st Tri.

for
challenge

81-1255 - Planned Parenthood v. Ashcroft

81-1623 - Ashcroft v. P/Parenthood

Pre-
cf.
notes
12/2

On ^{Clinical} Min. Petition: (only one issue)

① Parental Consent - Aff'ir CA8

As construed to require an independent decision maker, OK under Bellotti & Matheson.

On Cross-Ref. by State:

Bolton:
Gen. required
1st Tri. abts.
only in
JCAH
accredited
hospitals.
Bolton
invalidated
but left open
2nd & 3rd Tri.

① Hospitalization { DC invalidated.
CA8 Rev & Remanded for further findings. *
All abortions after 1st Tri. must
be in "hospitals" (i.e. for all 2nd & 3rd Tri.)

No definition of limiting
word "hospitals". (like Bolton & Alkon)
"Clinics" are not defined as hospitals.

2. Second physician { voided by DC & CA8
Required whenever fetus is viable
(not explicitly ~~refer~~ to trimester
Seems burdensome - ^{state} interest may be
~~substantial but probably not~~ compelling.

3. Pathology Report { voided by CA8

* Findings as to "woman's health" & use of W & E
in early 2nd Tri.

ARTICLE 1.

Hospital and Nursing Home Licensure and Inspection.

§ 32.1-123. **Definitions.** — As used in this article unless a different meaning or construction is clearly required by the context or otherwise:

1. *"Hospital"* means any facility in which the primary function is the provision of diagnosis, of treatment, and of medical and nursing services, surgical or nonsurgical, for two or more nonrelated individuals, including hospitals known by varying nomenclature or designation such as sanatoriums, sanitariums and general, acute, short-term, long-term, outpatient and maternity hospitals;

2. *"Nursing home"* means any facility or any identifiable component of any facility in which the primary function is the provision, on a continuing basis, of nursing services and health-related services for the treatment and inpatient care of two or more nonrelated individuals, including facilities known by varying nomenclature or designation such as convalescent homes, skilled care facilities, intermediate care facilities, extended care facilities and infirmaries.

3. *"Nonrelated"* means not related by blood or marriage, ascending or descending or first degree full or half collateral. (Code 1950, § 32-298; 1964, c. 54; 1973, c. 477; 1979, c. 711.)

§ 32.1-124. **Exemptions.** — The provisions of §§ 32.1-123 through 32.1-136 shall not be applicable to: (1) a dispensary or first-aid facility maintained by any commercial or industrial plant, educational institution or convent; (2) an institution licensed by the State Mental Health and Mental Retardation Board; (3) an institution or portion thereof licensed by the State Board of Welfare; (4) a hospital or nursing home owned or operated by an agency of the Commonwealth or of the United States government; and (5) an office of one or more physicians or surgeons unless such office is used principally for performing surgery. (Code 1950, § 32-298; 1964, c. 54; 1973, c. 477; 1979, c. 711.)

§ 32.1-125. **Establishment or operation of hospitals and nursing homes prohibited without license; licenses not transferable.** — A. No person shall own, establish, conduct, maintain, manage or operate in this Commonwealth any hospital or nursing home unless such hospital or nursing home is licensed as provided in this article.

B. No license issued hereunder shall be assignable or transferable. (Code 1950, § 32-299; 1979, c. 711.)

§ 32.1-125.1. **Inspection of hospitals by State agencies generally.** — As used in this section:

A. *"Hospital"* means a hospital as defined in § 32.1-123 or 37.1-1 of the Code.

B. *"Inspection"* means all surveys, inspections, investigations and other procedures necessary for a state agency or a division or unit thereof to perform in order to carry out various obligations imposed on such agency by applicable State and federal laws and regulations.

State agencies shall make or cause to be made only such inspections of hospitals as are necessary to carry out the various obligations imposed on each agency by applicable State and federal laws and regulations. Any on-site inspection by a State agency or a division or unit thereof that substantially complies with the inspection requirements of any other State agency or any other division or unit of the inspecting agency charged with making similar inspections shall be accepted as an equivalent inspection in lieu of an on-site inspection by said agency or by a division or unit of the inspecting agency. A

App - 4-4

Conference 15/16

81-1255 Planned Parenthood (Mo.)

Issue 1 - Abstinence

All 8 of us affirmed

Issue 2 - Parental Consent

W.J.B. - ~~Reverse~~ Reverse

Requires time consuming & expense to obtain approval by independent decision maker. Too burdensome

B.R.W. - Affirm

T.M. - Rev

HAB - Rev

L.F.P. - Aff on Bellotti II & Matheson

~~J.B.~~ P.S. - Rev. adheres to his position in Bellotti II.

W.H.R. - Aff.

S.O.C. - Aff.

Conference 12/16/82

81-1623

Ashecroft v. Planned Parenthood

CJ absent

Issue No 1 - Hospitalization required

WJB - Aff in.

Bill read a statement.

Mo. statute out-of-touch with
current medical science.

Hospitals often not available
+ expensive

B.R.W. - ~~Bill~~ Rev

T.M. - Aff in

H.A.B. - Aff in

L.F.P. - Aff in -

W.H.R. - Rev.

State of medical arts is
different now. But viability of fetus
exists earlier.

Can't adjust law to each
change in med. science

J.P.S. Aff in - agrees with LFP

S.O.C. - Rev.

Conference 12/16

81-1623 Ashecroft v. Planned Parenthood

Issue No 2 - Pathologist Report

Read
statement

WJB - Rev. - tentative

Unnecessary for every abortion.

- even tho. & not burdensome

CAS applied E/P analysis

BOW - Rev.

T.M. - Rev. - tentative

HAB - ~~affirm~~ Affirm.

State has not proved need

to leave to doctor

LFP - Rev - very tentative.

I could go either way -

but if WJB thinks we should
Reverse, I'll ^{probably} go along.

~~HAB~~ WHR - Rev.

JPS - Affirm on E/P grounds

SOC - Rev.

Two cases continued

Rev. 5 Aff'm 3
~~#~~

Issue 3 - Second Physical requirement

Read
statement

W.J.B. - Vacate on standards. Aff'm ^{otherwise}
Not clear any TT had standing

— No party before court

Once fetus is viable, state
interest is strong. But would
prefer ~~to~~ not to reach merits

B.R.W. - Reverse

T.M. - Aff'm

H.A.B. - ~~Rev~~ Aff'm

No one lodging the issue.

There is a prenatal statute.

Flatly contrary to Bolton

L.F.P. - Rev - ~~Rev~~ tentative.

Applies only to viable
fetus. State interest is probably
compelling.

W.H.R. - Rev

J.P.S. - Rev

S.O.C. - Rev

~~Bolton~~
Attorney Fee & costs - Hold
for Hensley

lfp/ss 12/17/82

81-1255 Planned Parenthood v. Ashcroft (Missouri)
Conference 12/16/82

CJ absent due to illness.

This memorandum summarizes the votes on the issues before us.

Issue No. 1 - Abstention.

Affirm: 8-0.

Issue No. 2 - Parental Notification and Consent

Divided vote - 4-4.

Voting to reverse: WJB, TM, HAB and JPS

Voting to affirm: BRW, LFP, WHR, SO'C

Note: CA8 construed the Missouri statute to require an independent decision-maker, expressly relying on my opinion in Bellotti II.

* * *

81-1623 Ashcroft v. Planned Parenthood

Issue No. 1 - Hospitalization in JCAH Hospitals

Affirmed 5-3

A vote to affirm in this case sustains CA8 holding of invalidity.

Voting to affirm: WJB, TM, HAB, LFP and JPS.

Voting to reverse: BRW, WHR and SO'C

Issue No. 2 - Pathologist's Report

CA8 held this requirement invalid.

Reversed: 6-2 (several tentative).

Voting to reverse: WJB (tentative), BRW, TM (tentative), LFP (tentative), WHR, and SO'C.

Voting to affirm: i.e., invalidate the requirement. HAB and JPS

Note: I would not be surprised to see WJB and TM change their votes on this issue. I also was tentative.

Issue No. 3 - Second Physician's Opinion - Invalidated by CA8

Reversed 5-3.

Voting to reverse (to sustain the requirement) BRW, LFP, WHR, JPS and SO'C.

Voting to affirm: WJB, TM and HAB.

Note: HAB feels strongly about this issue. He thinks that sustaining the second physician requirement is "flatly contrary to Bolton". But Bolton involved only first trimesters. Here the requirement exists only when the fetus is viable and the state's interest is at its strongest.

* * *

Issue No. 4 - Attorney's Fee

All vote to Hold for my opinion in Hensley.

lfp/ss 02/01/83

MEMORANDUM

TO: Jim and Mark DATE: Feb. 1, 1983
FROM: Lewis F. Powell, Jr.

81-1255 and 81-1623 Ashcroft

I have reviewed Ashcroft, and return my edited copy to Jim herewith.

As you predicted, this is somewhat easier to deal with than Akron. Yet, apart from the hospitalization issue, none of our positions is entirely easy to defend.

Only with respect to the "second physician" issue have I suggested consideration of a significant changes in your draft. I started out to do a rider, and went on to put on paper my thoughts as to the best arguments supporting validity. Feel free to edit or rewrite or blend in with your draft.

I have some trouble with the first few pages of the draft, Jim, as we are dealing with four issues and although there is repetition in restating these, there may be room for some clarification. Read these over with this concern in mind.

If you should be able to put this in a second draft that satisfies both of you before I leave after lunch on Thursday, I will take it with me for our long weekend.

L.F.P., Jr.

ss

lfp/ss 02/02/83

MEMORANDUM

TO: Jim

DATE: Feb. 2, 1983

FROM: Lewis F. Powell, Jr.

12575

Ashcroft

Unless we have used it in the section dealing with the "second physician", I would like to add the following from Roe, at p. 163:

"With respect to the state's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb."

It may well be that we already have this in the draft.

L.F.P., Jr.

ss

lfp/ss 02/28/83

MEMORANDUM

TO: Jim DATE: Feb. 28, 1983
FROM: Lewis F. Powell, Jr.

81-1255 Ashcroft

Thank you for giving me the opportunity to review the first printed draft on Sunday.

I have done some editing of language, and raised a minor question or two in the margin.

Attached hereto is a stylistic revision for page 12. The rather long sentence beginning: "We think this minor burden . . .," is a bit awkward.

Take a look at page 15. The sentences in the text do not seem to flow as smoothly as most of the opinion. Perhaps the third sentence (before exercising . . .) should precede the second sentence ("The Court . . ."). I don't feel strongly about this.

In one of my opinions, either Matheson or possibly Bellotti II, I indicated that a minor should have access to an "independent decision-maker" who need not be a judge. What would you and Mark think of adding a note saying, in effect, that since Missouri has provided for a judicial decision-maker, we need not consider whether a qualified and independent non-judicial decision-maker would be appropriate, citing what was said in one of my opinions?

On Saturday when you and Mark raised the denial of equal protection issue, I mentioned my recollection that Roe

described the abortion procedures (decision?) as "unique". Would it not be desirable to include a reference to this in Akron? I think the emphasis on the "stressful" nature of the decision, with both amotional and physical consequences, contributes to the uniqueness. Moreover, in view of the long history of state regulation, exclusively of abortions, and the strong views held by various religions, it would be irrational indeed to conclude that abortions could not be classified differently from other surgical procedures. They have been viewed as unique since the founding of the republic - and before.

L.F.P., Jr.

Post 3/31/83 Infant Born 18 Weeks Prematurely At 17 Ounces Survives After 7 Weeks

By Jay Mathews
Washington Post Staff Writer

LOS ANGELES, March 30—A 1 pound, 1 ounce infant born 18 weeks prematurely has survived for almost two months in San Diego. She may be the smallest baby known to have survived such a premature birth.

The doctor caring for Ernestine Hudgins, who now weighs 1 pound, 14 ounces, said she has a 95 percent chance of survival.

"She is very special," said Dr. Morton L. Cohen, medical director of the neonatal unit at San Diego's Children's Hospital. "Her lungs should not have been developed at all, and her brain should not have been developed to the point where it could tell her to breathe."

The unprecedented survival of the child, born to San Diego housekeepers Gloria Patterson, 27, and Ernest Hudgins, 24, is expected to fuel controversy between pro-abortion and anti-abortion groups.

Ernestine was born after only 22 weeks of gestation. This is six weeks earlier than the 28-week point of "viability" suggested by the U.S. Supreme Court as the stage when the government might begin to regulate abortions.

"Viability is only dependent on the extent of the sophistication of the medical equipment available to keep these kids alive, and this goes to prove it," said Dan Donehey, spokesman for the National Right to Life Committee.

According to a spokesman for the American College of Obstetricians and Gynecologists, "There is no unambiguous documentation that an infant born weighing less than 601 grams at a gestational age of 24 weeks or less has ever survived." Ernestine, however, weighed 484 grams at birth, and both her mother and Cohen said today they were certain of the gestational age of 22 weeks.

Cohen cautioned against using Ernestine's case to justify massive efforts to save other children born prematurely. A baby born 17 weeks prematurely and also weighing pound, 1 ounce survived in San Diego in 1978, Cohen said, but remains severely retarded.

Cohen said Ernestine at birth in most ways fit the profile of an infant her age, showing, for instance, no calcification in her bones since that process begins at about 25 weeks.

However, her lungs were unusually well-developed. He said she has developed chronic lung damage characteristic of premature babies, but the damage is considered minor. She is being kept on a respirator and is being fed high-calorie formula through a tube in her stomach.

Cohen said she would remain in intensive care for at least two more months, but so far gave every sign of developing into a normal child.

Patterson, Ernestine's mother, said in an interview that she was in pain the day before her baby's Feb.

8 birth and went to Sharp Hospital. The doctor there told her to expect a miscarriage, but she insisted on staying at the hospital. The child was born at 8:30 the next night.

The baby was transferred to Children's Hospital the next day, and doctors told her the chances of survival were not good.

"But she's still here," Patterson said, "and I am real happy."

Baby, Delivered After Mother Was Legally Dead, Is Healthy

SAN FRANCISCO, March 30 (UPI)—A healthy 3-pound boy was born two months after his mother was legally dead, doctors at the University of California hospital said today.

The baby was nine weeks premature and suffered from a minor respiratory problem, but was otherwise healthy with "excellent" chances of survival, a doctor said.

After the cesarean delivery, the mother was removed from life-support systems and immediately stopped breathing.

A hospital spokesman said the mother was in her mid-20s and "very healthy" until a brain seizure Jan. 24. When her brain ceased to function, the woman was declared legally dead. Her husband and parents elected to keep her on life support until the baby's birth.

At the time of the mother's seizure, the fetus weighed 1 pound.



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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 4, 1983

Re: No. 81-1255) Planned Parenthood of Kansas City v. Ashcroft
No. 81-1623) Ashcroft v. Planned Parenthood of Kansas City

Dear Lewis:

In due course, I shall be writing a partial dissent in these cases. This may take a while. *I'm sure it will.*

Sincerely,

Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

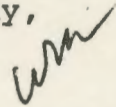
May 5, 1983

Re: No. 81-1255) Planned Parenthood v. Ashcroft
No. 81-1623) Ashcroft v. Planned Parenthood

Dear Sandra:

Please join me.

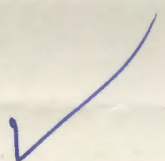
Sincerely,



Justice O'Connor

cc: The Conference

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



CHAMBERS OF
JUSTICE BYRON R. WHITE

May 6, 1983

Re: 81-1255) Planned Parenthood Association of Kansas
) City, et al. v. John Ashcroft, et al.
81-1623) John Ashcroft, et al. v. Planned Parenthood
) Association of Kansas City, et al.

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 JOHN PAUL STEVENS



March 7, 1983

Re: 81-1255 and 81-1623 - Planned
Parenthood Assn. v. Ashcroft

Dear Lewis:

Although I expect to join Parts I thru IV of your opinion, I do not agree with the analysis in Part V and therefore shall await further writing.

Respectfully,

Justice Powell

Copies to the Conference



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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 7, 1983

✓

No. 81-1255 Planned Parenthood Association of
Kansas City v. Ashcroft
No. 81-1623 Ashcroft v. Planned Parenthood
Association of Kansas City

Dear Lewis,

In due course, I will circulate something
concurring in part and dissenting in part.

Sincerely,

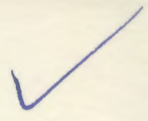
Sandra

Justice Powell

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST



March 7, 1983

Re: Nos. 81-1255 & 81-1623 Planned Parenthood
Association of Kansas City v. Ashcroft

Dear Lewis:

I will await Sandra's writing in this case.

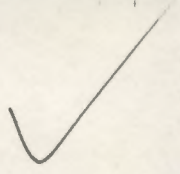
Sincerely,

Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL



May 25, 1983

Re: Nos. 81-1255 and 81-1623 - Planned Parenthood
Association of Kansas City, Missouri v.
Ashcroft and Ashcroft v. Planned Parenthood
Association of Kansas City, Missouri

Dear Harry:

Please join me in your opinion.

Sincerely,

T.M.

Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

✓

June 1, 1983

Re: 81-1255 - Planned Parenthood v. Ashcroft
81-1623 - Ashcroft v. Planned Parenthood

Dear Harry:

Please join me in your opinion.

Respectfully,

John

Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE



June 1, 1983

Re: No. 81-1255, Planned Parenthood of Kansas City, Mo. v.
Ashcroft, AG of Mo.

81-1623, Ashcroft, AG of Mo. v. Planned Parenthood
of Kansas City, Mo.

Dear Lewis:

I join.

Regards,

Justice Powell

Copies to the Conference

lfp/ss 06/03/83

MEMORANDUM

TO: Jim DATE: June 3, 1983
FROM: Lewis F. Powell, Jr.

Ashcroft

After a rereading of the opinions below on the "second physician" issue (that I had not reread since preargument), and again reading HAB's dissent, I do not believe proposed Rider A - as you and I have draft^{ed} it - is quite fair. As a means of focusing my own thinking (and so you can check it), I dictate this memo.

The DC invalidated the second physician requirement as overbroad, devoting only a paragraph to it (A 26). Its findings included: "D&E may be the procedure of choice, even after viability, in cases in which there are positive contraindications to the use of saline or prostaglandins installation"; "no chance of fetus survival" when D&E is used; and, the concluding sentence: "the attendance of a second physician during an abortion procedure which holds no possibility of fetal survival does not further [the state's] interest."

The finding relied on by HAB is that D&E "may be the procedure of choice even after viability", but

apparently only in cases in which the woman's health requires this because it might be endangered by the "use of saline or prostaglandins installation". We would agree, if the woman's life is endangered by methods other than D&E. Thus, the question seems to be whether there is substantial evidence that during the third trimester D&E may be required in the interest of the mother's health?

A footnote cites, without quoting, the testimony of "Doctors Robert Crist for plaintiffs and Richard Schmidt for defendants". It seems to me that HAB's opinion correctly states the DC's holding (p. 6), concluding that "in some cases . . . maternal health considerations will preclude the use of procedures that might result in a live birth . . . [the second doctor in such circumstances] "is superfluous".

CA 8 quoted Dr. Crist as testifying that "D&E may be the best medical procedure at 28 weeks" because there were "contraindications" to the use of other methods. (A 80) CA8 does state that "Missouri points to testimony by other physicians that do not or would not use D&E at this stage, and therefore the evidence indicates that "the question is one in which medical opinions may differ".

If I am reading the foregoing correctly, it seems to me that our rider A needs substantial revision. Sadly, I don't think we can hang HAB directly with Dr. Crist's testimony, as he does not mention him at all. He simply latches on to the findings of the two courts below, and relies on the "two court" rule.

You are far more familiar with all of this, Jim, than I am. Unless I am mistaken or have overlooked something important, it seems to me we must refocus our response on this aspect of the two physician issue. CA8 concedes that medical opinions differ. At best, this is the ultimate finding of fact below. This entitles us to do two things: (i) show, as you have devastatingly (subject to a comment below) that on the plaintiff's side the only "differing view" is that of Dr. Crist, whereas the other view is that few if any physicians ever use a D&E during third trimester; and (ii) given this contradictory evidence, with the great weight of it contrary to Dr. Crist's views, the state's interest in protecting a viable fetus justifies the second physician requirement even though there may be the rare case where a doctor may think honestly that D&E is required for the mother's health.

Legislation need not accomodate every conceivable contingency.

My one qualification about Dr. Crist's testimony is the possible ambiguity in his long answer to the question in the middle of the page (A 130). I believe, however, that your reading of this testimony (at least that reprinted in the appendix) is correct. The final question and answer on p. 131 was as follows:

Q. And do you believe that as a general principle . . . where there is an abortion there should never be a live fetus?

A. That is correct."

We should discuss this.

L.F.P., Jr.

ss

June 6, 1983

82-1255 Ashcroft

Dear Henry:

I would appreciate your advice as to how to frame the position of the Court and the Justices in the above case.

In terms of the judgment, I have a Court on every issue. On the hospitalization issue, the dissenters are Justices White, Rehnquist and O'Connor. On the remaining three issues in Ashcroft, only the Chief has joined me. I have a judgment concurred in by White, Rehnquist and O'Connor.

It seems a bit awkward for me to be saying, in those three sections that "the Court holds" or that "we" make some decision. I understand that HAB, in his dissent in Ashcroft refers to my opinion as "Justice Powell's opinion".

I am now making some changes in this case, but all of the opinions may be ready by our Conference next Thursday.

Sincerely,

Mr. Henry Lind

lfp/ss

P.P. 1, 2

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

From: Justice O'Connor

Circulated: _____

Recirculated: JUN 13 1983

2d DRAFT
SUPREME COURT OF THE UNITED STATES

Nos. 81-1255 AND 81-1623

PLANNED PARENTHOOD ASSOCIATION OF
KANSAS CITY, MISSOURI, INC.,
ET AL., PETITIONERS

81-1255

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF
MISSOURI, ET AL.

JOHN ASHCROFT, ATTORNEY GENERAL OF
MISSOURI, ET AL., PETITIONERS

81-1623

v.

PLANNED PARENTHOOD ASSOCIATION OF
KANSAS CITY, MISSOURI, INC.,
ET AL., PETITIONERS

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

[June 15, 1983]

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

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 believe that the second-trimester hospitalization requirement imposed by § 188.025 does not impose an undue burden on the limited right to undergo an abortion. Assuming *arguendo* that the requirement was an undue burden, it would nevertheless "reasonably relate[] to the preservation and protec-

*Nothing requiring any change on
your part.
JOS*

tion of maternal health.” *Roe v. Wade*, 410 U. S. 113 , 163 (1973). I therefore dissent from the Court’s judgment that the requirement is unconstitutional.

I agree that second-physician requirement contained in § 188.030.3 is constitutional because the State possesses a compelling interest in protecting and preserving fetal life, but I believe that this state interest is extant throughout pregnancy. I therefore concur in the judgment of the Court.

I agree that pathology-report requirement imposed by § 188.047 is constitutional because it imposes no undue burden on the limited right to undergo an abortion. Because I do not believe that the validity of this requirement is contingent in any way on the trimester of pregnancy in which it is imposed, I concur in the judgment of the Court.

Assuming *arguendo* that the State cannot impose a parental veto on the decision of a minor to undergo an abortion, I agree that the parental consent provision contained in § 188.028.2 is constitutional. However, I believe that the provision is valid because it imposes no undue burden on any right that a minor may have to undergo an abortion. I concur in the judgment of the Court on this issue.

I also concur in the Court’s decision to vacate and remand on the issue of attorney’s fees in light of *Hensley v. Eckerhart*, — U. S. — (1983).

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

issue. The case was decided in the early 1970's, and arises now as a motion for relief from judgment.

My vote is to dismiss and deny.

There are two motions by a lawyer named Alan Ernest, one to file an amicus brief on behalf of the Legal Defense Fund for Unborn Children, the other to represent children unborn and born alive. I will vote to deny these motions. The proposed amicus brief is wholly unhelpful and scurrilous.

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

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. 82-151, 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

The second of these cases comes to us on certiora-
ri/ to the Court of Appeals for the Eighth Circuit. It in-
volves four provisions of a Missouri statute that comprehen-
sively regulates the performance of abortions.

The first of these is a hospital requirement sub-
stantially similar to that in Akron. For the reasons stated
in that case, we affirm the judgment of the Court of Appeals
that the Missouri requirement is invalid.

A second provision requires minors to secure pa-
rental or judicial consent before obtaining an abortion.
The Court of Appeals sustained the validity of this require-
ment. We agree and affirm its judgment.

A third provision requires a partholgy report for
each abortion performed. The Court of Appeals invalidated
this requirement. We ~~disagree~~ ^{take a different view,} and reverse the judgment.

Finally, a fourth provision requires the presence
of a second physician/during abortions performed after the
fetus has become viable. The role of the second physician
is to preserve the life of the fetus - where this may be
possible.

*The Ct. of Appeals
invalidated this
requirement.*

The Court of Appeals ~~nevertheless~~ invalidated this provision. *requirement.*

→ *A* As was made clear in Roe, after viability of the fetus, the state has a compelling interest in preserving its life. We think the Court of Appeals erred in invalidating the second-physician requirement, and we reverse its judgment.

* * *

The views of the Justices, however, have diverged considerably *on* ~~in~~ the issues in this case.

Parts III, IV, and V of my opinion were joined only by the Chief Justice.

Justice Blackmun has filed an opinion concurring with respect to the hospital requirement, but dissenting on the other three issues. His opinion is joined by Justices Brennan, Marshall, and Stevens.

Justice O'Connor has filed an opinion dissenting from the judgment on the hospitalization issue, but concurring in the judgment on the other three issues. She is joined by Justices White and Rehnquist.

Justice Powell

Page proof of syllabus as approved.

- Lineup included.
- Lineup still to be added. Please send lineup to me when available.

JUN 13 1983 -10 05 AM

Mr Lind
OK
LJP

Another copy of page proof of syllabus as approved to show—

NOTE
being do
The syll
pared by
United

- Lineup, which has now been added.
- Additional changes in syllabus.

will be released, as is the opinion is issued. Court but has been pre-ice of the reader. See 337.

SUPRE

8 I

HENRY C. LIND
Reporter of Decisions.

UNITED STATES

PLANNED PARENTHOOD ASSOCIATION OF KANSAS
CITY, MISSOURI, INC., ET AL. v. ASHCROFT, ATTOR-
NEY GENERAL OF MISSOURI, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

No. 81-1255. Argued November 30, 1982—Decided June 15, 1983 *

Missouri statutes require abortions after 12 weeks of pregnancy to be performed in a hospital (§ 188.025); require a pathology report for each abortion performed (§ 188.047); require the presence of a second physician during abortions performed after viability (§ 188.030.3); and require minors to secure parental consent or consent from the juvenile court for an abortion (§ 188.028). In an action challenging the constitutionality of these provisions, the District Court invalidated all provisions except § 188.047. The Court of Appeals reversed as to §§ 188.028 and 188.047 but affirmed as to §§ 188.030.3 and 188.025.

Held: Section 188.025 is unconstitutional, but §§ 188.047, 188.030.3, and 188.028 are constitutional.

655 F. 2d 848, affirmed in part, reversed in part, vacated in part, and remanded; 664 F. 2d 687, affirmed.

JUSTICE POWELL delivered the opinion of the Court with respect to Parts I, II, and VI, concluding that the second-trimester hospitalization requirement of § 188.025 “unreasonably infringes upon a woman’s constitutional right to obtain an abortion.” *City of Akron v. Akron Center of Reproductive Health, Inc.*, ante, at —. Pp. 4-5.

JUSTICE POWELL, joined by THE CHIEF JUSTICE, concluded in Parts III, IV, and V that:

*Together with No. 81-1623, *Ashcroft, Attorney General of Missouri, et al. v. Planned Parenthood Association of Kansas City, Missouri, Inc., et al.*, also on certiorari to the same court.

Syllabus

1. The second-physician requirement of § 188.030.3 is constitutional as reasonably furthering the State's compelling interest in protecting the lives of viable fetuses. Pp. 5-9.

2. The pathology-report requirement of § 188.047 is constitutional. On its face and in effect, such requirement is reasonably related to generally accepted medical standards and furthers important health-related state concerns. In light of the substantial benefits that a pathologist's examination can have, the small additional cost of such an examination does not significantly burden a pregnant woman's abortion decision. Pp. 9-14.

3. Section 188.028 is constitutional. A State's interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial. And as interpreted by the Court of Appeals to mean that the juvenile court cannot deny a minor's application for consent to an abortion "for good cause" unless the court first finds that the minor was not mature enough to make her own decision, § 188.028 provides a judicial alternative that is consistent with established legal standards. See *City of Akron v. Akron Center for Reproductive Health, Inc.*, ante, at —. Pp. 14-17.

JUSTICE O'CONNOR, joined by JUSTICE WHITE and JUSTICE REHNQUIST, concluded that:

1. The second-physician requirement of § 188.030.3 is constitutional because the State has a compelling interest, extant throughout pregnancy, in protecting and preserving fetal life. P. 2.

2. The pathology-report requirement of § 188.047 is constitutional because it imposes no undue burden on the limited right to undergo an abortion, and its validity is not contingent on the trimester of pregnancy in which it is imposed. P. 2.

3. Assuming, *arguendo*, that the State cannot impose a parental veto on a minor's decision to undergo an abortion, the parental consent provision of § 188.028.2 is constitutional because it imposes no undue burden on any right that a minor may have to undergo an abortion. P. 2.

POWELL, J., announced the Court's judgment and delivered the opinion of the Court with respect to Parts I, II, and VI, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined, and an opinion with respect to Parts III, IV, and V, in which BURGER, C. J., joined. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined. O'CONNOR, J., filed an opinion concurring in part in the judgment and dissenting in part, in which WHITE and REHNQUIST, JJ., joined.

81-1255# Planned Parenthood Assn. of Kansas City, MO. v.

Ashcroft (Jim)

LFP for the Court

1st draft 3/4/83

2nd draft 6/7/83

3rd draft 6/10/83

Joined by CJ

Copy to Mr. Lind 6/2/83

HAB concurring in part and dissenting in part

1st draft 5/17/83

2nd draft 5/19/83

3rd draft 5/23/83

4th draft 6/10/83

Joined by WJB, TM, JPS

SOC concurring in part and dissenting in part

1st draft 5/5/83

2nd draft 6/13/83

Joined by BRW, WHR

It could well be that they need for the
safeguard of a pathological examination

4.

But this is a recent change of policy by the ACOG and was not uncontroversial. See 4 Record 799-800. While the change was in part a judgment made after a cost-benefit analysis, it was also meant to encourage routine identification of fetal parts before the woman leaves the abortion facility: "Current clinical tenets recommend that the uterine contents be submitted for a pathologist's review; however, this approach does not place enough emphasis on the necessity for proper examination of the tissue at the time of the abortion procedure itself." Rubin, Fatal Ectopic Pregnancy After Attempted Legally Induced Abortion 4 (April 2, 1979) (presented at annual EIS conference, U.S. Department of Health, Education, and Welfare, Public Health Service, Center for Disease Control).

We cite Rubin below. One is enough.

Times 25-26 (Special Reprint 1978).

In suggesting that we make from a "comfortable perspective" the judgment that a State constitutionally can require the additional cost of pathology examination, the dissent suggests that we disregard the interests of the "woman on welfare or the unemployed teenager." Post, at 4. But these women may not be able to afford many options other than the cheapest clinic least available. And "[t]he risk of ectopic pregnancy has been associated with increasing age, higher-order gravidity, black races, and low socio-economic groups." Rubin, Fatal Ectopic Pregnancy After Attempted Legally Induced Abortion (April 2, 1979) (paper presented at annual EIS conference, U.S. Department of Health, Education, and Welfare, Public Health Service, Center for Disease Control). An abortion followed by a pathology report may be the one valuable opportunity a poor woman has to discover serious health problems, and she and the State both certainly have a strong and immediate interest in assuring that the abortion is performed properly. Without abortion procedures that conform to generally accepted medical standards, legalized abortion may not offer the poor many of the benefits that the Roe right was meant to foster.

Those most likely to seek the least expensive clinic

See note.

The dissent suggests that \$188.047 is infirm because it does not require microscopic examination, but that misses the point of the regulation, which is that someone other than the performing clinic will give an independent medical judgment of the tissue. See n. 3, supra; 4 Record 750 (Dr. Pierre Keitges, a pathologist) ("I would simply look at it grossly.... The

Footnote continued on next page.

should make

on

(A)
As the standards of medical practice may not measure in such clinics may not be the highest, a state may conclude reasonably that ~~that~~ a pathological examination of tissue is particularly important. See n. —.

But there is substantial support for the microscopic requirement.

5.

CH A *BK?* As the testimony in the District Court ^{indicates,} makes clear, medical opinion remains far from unanimous on this question. See 3 Record 623, 4 Record 749-750, 798-800, 845-847. App. 799-800, 804-805. In this case, for example, Dr. Bernard Nathanson, a widely experienced abortion practitioner, testified that he requires a pathologist examination after each of the 60,000 abortions performed under his direction at the New York Center for Reproductive and Sexual Health. He considers it "absolutely necessary to obtain a pathologist's report on each and every specimen of tissue removed for abortion or for that matter from any other surgical procedure which involved the

difference is I wouldn't just be saying that, I would be putting down an official diagnosis and putting my name on it, which would make me professionally liable for the accuracy of that interpretation."). Moreover, it is reasonable for the State to assume that an independent pathologist is much more likely to perform a microscopic examination than the performing doctor. See H. Cove, Surgical Pathology of the Endometrium 28 (1981) ("To the pathologist, abortions of any sort are evaluated grossly and microscopically for the primary purpose of establishing a diagnosis of intrauterine pregnancy.") (emphasis added). In any case, in changing its policy, the ACOG found that the policies of clinics varied as to the need for microscopic examinations:

No consensus exists regarding routine microscopic examination of aspirated tissue in every case. The committee surveyed a representative sampling of institutions around the country. Information was received from experienced clinicians in 29 institutions in all regions of the country concerning their policies on the examination of presumed products of conception. Nearly two-fifths (38 percent) of the respondents made microscopic examination of the tissue discretionary, while slightly more than half (55 percent) stated that a microscopic examination was performed in all cases.

ACOG, Report of Committee on Gynecologic Practice, Item #6.2.1 (June 27-28, 1980). Thus, the dissent appears to be critical of the State for not taking away all discretion of the clinic in sending tissue to a pathologist when it takes away some.

removal of tissue from the human body." App. 143-144. See also App. 146-147 (testimony of Dr. Keitges); 5 Record 798-799 (testimony of Dr. Schmidt).

OK In weighing the balance between protection of a woman's health and the comparatively small additional cost of a pathologist's examination, we cannot say that the Constitution requires that a State subordinate its interest in health to minimize ^{the} ~~the~~ cost of abortions. ^{to this extent the} ~~the~~ ¹⁴ Even in the early weeks of pregnancy, "[c]ertain regulations that have no significant impact on the woman's exercise of her right to decide to have an abortion may be permissible where justified by important state health objectives." City of Akron, ante, at 11. See Danforth, 428 U.S., at 80-81. In light of the substantial benefits that a pathologist's examination can have, we think the ~~small additional~~ cost of a tissue examination does not significantly burden a pregnant woman's abortion decision. The estimated cost of compliance for plaintiff Reproductive Health Services was \$19.40 per abortion performed. 483 F. Supp., at 700,

¹⁴⁵ By disregarding the considered judgment of the Missouri legislature, the dissenting opinion seems to suggest that because some voices in the medical profession do not agree with the State's judgment that a pathologist's examination is necessary in all cases, the State's requirement is unconstitutional. Post, at 2-3. But this Court has never suggested that a State's abortion regulations must conform in every detail to the recommendations of the ACOG or the National Abortion Federation. The medical profession is not the only guardian of the citizens' health. A State is obligated to protect its citizens against unethical practices, and for courts making difficult constitutional decisions in this area, a legislature's factfindings and reports can be a persuasive and helpful supplement to the medical community's views with respect to the need for and reasonableness of abortion regulations.

n. 48. In Danforth, this Court unanimously upheld Missouri's recordkeeping requirement as "useful to the State's interest in protecting the health of its female citizens, and [as] a resource that is relevant to decisions involving medical experience and judgment," 428 U.S., at 81.¹⁵ We view the requirement for a pathology report as comparable and as a relatively insignificant burden. Accordingly, we reverse the judgment of the Court of Appeals on this point.

No

I doubt this
is really helpful

RIDER A

JUSTICE BLACKMUN's dissenting opinion would hold invalid the statute on the mere possibility that Missouri courts might not find any exception for emergency situations. Post, at 8-9. But as JUSTICE MARSHALL stated in Exxon Corp. v. Eagerton, ___ U.S. ___ (1983), "[w]e will not strain to reach a constitutional question by speculating that the [state] courts might in the future interpret" a statute in a questionable manner. Id., at ___ (citing Ashwander v. TVA, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring)).

RIDER A (new pgs 7 m p 6)

7. JUSTICE BLACKMUN's dissenting opinion would hold \$188.030.3 unconstitutionally overbroad because a fetus cannot survive a D&E abortion after viability. Post, at 6-7. It assumes that D&E is the "method of choice for some women who need post-viability abortions." Id., at 6. The sole record support for this assumption appears to be the testimony of Dr. Robert Crist, a physician called by plaintiffs. See 2 Record 427, 438. This method ~~certainly~~ may be the choice for those who select Dr. Crist as their physician. He indicated that, "as a general principle," "[t]here should not be a live fetus," id., at 435, and "that the abortion patient has a right not only to be rid of the growth, called a fetus in her body, but also has a right to a dead fetus," id., at 431--even though ^{he thought} one could survive a D&E abortion, id., at 433. None of the other witnesses at trial, those called both by the plaintiffs and defendants, indicated any use of D&E late in a pregnancy after viability. See 1 Record 21 (limiting use of D&E to under 18 weeks); 2 Record 381, 410-413 (Dr. Robert Kretzschmar) (D&E up to 17 weeks; would never perform D&E after 26 weeks); 4 Record 787 (almost "inconceivable" to use D&E after viability); 7 Record 52 (D&E safest up to 18 weeks); id., at 110 (doctor not performing D&E past 20 weeks); id., at 111 (risks of doing outpatient D&E equivalent to childbirth at 24 weeks); 8 Record 33, 78-81 (Dr. Willard Cates) (16 weeks latest D&E performed). There ^{probably are} ~~may well be~~ few physicians with Dr. Crist's expressed total disinterest in preserving fetal life,

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and who perform third-trimester abortions with no regard to the State's compelling interest in preserving fetal life when this is possible without endangering the health of the mother. Yet, the dissent's overbreadth argument, based primarily on Dr. Crist's views, is without other support in the record.

As all third-trimester abortions are subject to the requirements of §188.030.2, D&E should not be used when the fetus is viable; when other methods are more likely to preserve its life; and when alternative procedures do not pose a greater risk to the woman's life or health. The dissent points to nothing in the record, ~~however, to indicate that~~ *that indicates* D&E will ever be the method that poses the least risk to the woman in situations where there are compelling medical reasons for performing an abortion after viability. It appears therefore that the premise of the dissent's factual assumption that D&E is the method of choice in the third trimester has no basis in the record. Nor does the dissent identify medical literature that supports this assumption. Cf. American College of Obstetricians and Gynecologists (ACOG) Technical Bulletin No. 56, Methods of Midtrimester Abortion 4 (1979) (mortality rate for D&E less than or similar to that of instillation abortions up to 20 weeks); App. 79-80. The dissenters thus point to no support for their assumption that "maternal health considerations will preclude the use of procedures that might result in a live birth" after viability. Post, at 6.

OK as edited.

RIDER B

In regulating hospital services within the State, Missouri requires that "[a]ll tissue surgically removed with the exception of such tissue as tonsils, adenoids, hernial sacs and prepuces, shall be examined by a pathologist, either on the premises or by arrangement outside of the hospital." 13 Mo. Admin. Code 50-20.030(3)(A)7 (1977). With respect to abortions, whether performed in hospitals or in some other facility, §188.047 requires the pathologist to "file a copy of the tissue report with the State Division of Health...." See n. 2, supra. The pathologist also is required to "provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced." Thus, Missouri appears to require that tissue following abortions, as well as almost all other surgeries performed in hospitals, must be submitted to a pathologist, not merely to a pathological examination by the performing doctor. The narrow question before us is whether the State also may require the tissue removed following an abortion performed in clinics as well as in hospitals to be submitted to a pathologist. We believe that it can.

On its face and in effect, §188.047 is reasonably related to generally accepted medical standards and "further[s] important health-related State concerns." City of Akron, ante, at 12. As the Court of Appeals recognized, pathology examinations are clearly "useful and even necessary in some cases," because "abnormalities in the tissue may warn of serious, possibly fatal disorders." 655

F.2d, at 870.¹⁰ As rule, it is good medical practice to submit all tissue to the examination of a pathologist.¹¹ This is particularly important following abortion, because questions remain as to the long-range complications of abortions and their effect on subsequent pregnancies. See App. 72-73 (testimony of Dr. Willard Cates, Jr.); Levin, et al., Association of Induced Abortion with Subsequent Pregnancy Loss, 243 J. A.M.A. 2495, 2499 (1980). Recorded pathology

¹⁰ A pathological examination is designed to assist in the detection of fatal ectopic pregnancies, hydatridiform moles or other precancerous growths, and a variety of other problems that can be discovered only through a pathological examination. The general medical utility of pathological examinations is clear. See, e. g., American College of Obstetricians and Gynecologists (ACOG), Standards for Obstetric-Gynecologic Services 52 (5th ed. 1982); National Abortion Federation (NAF), National Abortion Federation Standards 6 (1981) (compliance with standards obligatory for NAF member facilities to remain in good standing); Brief of the American Public Health Association as Amicus Curiae in Nos. 81-185, 81-746, 81-1172, at 29, n. 6 (supporting the NAF standards for non-hospital abortion facilities as constituting "minimum standards").

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reports, in concert with abortion complication reports, provide a statistical basis for studying those complications. Cf. Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 81 (1976).

Plaintiffs argue that the physician performing the abortion is as qualified as a pathologist to make the examination. This argument ^{disregards} ignores the fact that Missouri requires a pathologist--not the performing physician--to examine tissue after almost every type of surgery. Although this requirement is in a provision relating to surgical procedures in hospitals, many of the same procedures included within the Missouri statute customarily are performed also in outpatient clinics. No reason has been suggested why the prudence required in a hospital should not be equally appropriate in such a clinic. Indeed, there may be good reason to impose stricter standards ^{in this respect} on clinics performing abortions than on hospitals.¹² As

¹² The professional views that the plaintiffs find to support their position do not disclose whether consideration was given to the fact that there has been a measure of serious abuse in some abortion clinics. It is clear that a State reasonably could conclude that a pathology requirement is more necessary in outpatient clinics than in general hospitals, ^{substantial} particularly with ^{considerable} respect to abortions. There is abundant evidence that abortion has been a surgical procedure associated with a high incidence of questionable practices. See Bellotti v. Baird, 443 U.S. 622, 641, n. 21 (1979) (Bellotti II) (minors may resort to "incompetent or unethical" abortion clinics); Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 91, n. 2 (1976) (Stewart, J., concurring). The Sun-Times of Chicago, in a series of special reports, disclosed widespread questionable practices in abortion clinics, including the failure to obtain proper pathology reports. ^{in Chicago} See "The Abortion Profiteers," Chicago Sun-Times 25-26 (Special Reprint 1978).

In suggesting that we make from a "comfortable perspective" the judgment that a State constitutionally can require the additional cost of a pathology examination, the dissent suggests that we disregard the interests of the "woman on welfare or the unemployed teenager." Post, at 4. But these women may be those most likely to seek the least expensive clinic available. And

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the testimony in the District Court indicates, medical opinion is not unanimous on this question. See 3 Record 623; 4 Record 749-750, 798-800, 845-847; n. ¹¹2, supra. But there is substantial support for Missouri's requirement. In this case, for example, Dr. Bernard Nathanson, a widely experienced abortion practitioner, testified that he requires a pathologist examination after each of the 60,000 abortions performed under his direction at the New York Center for Reproductive and Sexual Health. He considers it "absolutely necessary to obtain a pathologist's report on each and every specimen of tissue removed for abortion or for that matter from any other surgical procedure which involved the removal of tissue from the human body." App. 143-144. See also App. 146-147 (testimony of Dr. Keitges); 5 Record 798-799 (testimony of Dr. Schmidt). ¹³

In weighing the balance between protection of a woman's health

"[t]he risk of ectopic pregnancy has been associated with increasing age, higher-order gravidity, black races, and low socio-economic groups." Rubin, Fatal Ectopic Pregnancy After Attempted Legally Induced Abortion (April 2, 1979) (paper presented at annual EIS conference, U.S. Department of Health, Education, and Welfare, Public Health Service, Center for Disease Control). As the standards of medical practice in such clinics may not be the highest, a State may conclude reasonably that a pathologist's examination of tissue is particularly important.

¹³ The dissent suggests that §188.047 is infirm because it does not require microscopic examination, post, at 4, but that misses the point of the regulation, which is that someone other than the performing clinic should make an independent medical judgment on the tissue. See n. ¹²7, supra; 4 Record 750 (Dr. Pierre Keitges, a pathologist). It is reasonable for the State to assume that an independent pathologist is ~~much~~ more likely to perform a microscopic examination than the performing doctor. See H. Cove, Surgical Pathology of the Endometrium 28 (1981) ("To the pathologist, abortions of any sort are evaluated grossly and microscopically for the primary purpose of establishing a diagnosis of intrauterine pregnancy.") (emphasis added).

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and the comparatively small additional cost of a pathologist's examination, we cannot say that the Constitution requires that a State subordinate its interest in health to minimize to this extent the cost of abortions. ^{§ 14} Even in the early weeks of pregnancy, "[c]ertain regulations that have no significant impact on the woman's exercise of her right to decide to have an abortion may be permissible where justified by important state health objectives." City of Akron, ante, at 11. See Danforth, 428 U.S., at 80-81. In light of the substantial benefits that a pathologist's examination can have, we think the cost of a tissue examination does not significantly burden a pregnant woman's abortion decision. The estimated cost of compliance for plaintiff Reproductive Health Services was \$19.40 per abortion performed. 483 F. Supp., at 700, n. 48. In Danforth, this Court unanimously upheld Missouri's recordkeeping requirement as "useful to the State's interest in protecting the health of its female citizens, and [as] a resource that is relevant to decisions involving medical experience and

¹⁴⁸ By disregarding the considered judgment of the Missouri legislature, the dissenting opinion seems to suggest that because some voices in the medical profession do not agree with the State's judgment that a pathologist's examination is necessary in all cases, the State's requirement is unconstitutional. Post, at 2-3. But this Court has never suggested that a State's abortion regulations must conform in every detail to the recommendations of the ACOG or the National Abortion Federation. The medical profession is not the only guardian of the citizens' health. A State is obligated to protect its citizens against unethical practices, and for courts making difficult constitutional decisions in this area, a legislature's factfindings and reports can be a persuasive and helpful supplement to the medical community's views with respect to the need for and reasonableness of abortion regulations.

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Jim - we disregarded the dissent in the hospital case

judgment," 428 U.S., at 81.¹⁵ We view the requirement for a pathology report as comparable and as a relatively insignificant burden. Accordingly, we reverse the judgment of the Court of Appeals on this point. *issue.*

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ASHALT SALLY-POW

There is agreement that no fetus can survive a D&E. Thus, as the Court of Appeals noted, the choice of this procedure after viability is subject to the requirements of §188.030.2. See id., at 865, and n. 28. The courts below, in conclusory language, found that D&E is the "method of choice for some women who need post-viability abortions". Post, at 6. No scholarly writing supporting this view is cited by those courts or by the dissent. Reliance apparently is placed solely on the testimony of Dr. Robert Crist, a physician from Kansas. His testimony, *in his candor.* if nothing else, is remarkable. He is a member of the National Abortion Federation, "an organization of abortion providers and people interested in the pro-choice

movement". Record, 415-416. He supported the use of D&E on 28-week pregnancies, well into the third trimester. In some circumstances, he considered it a better procedure than other methods. See 2 Record 427-428. His disinterest in protecting fetal life is evidenced by his agreement "that the abortion patient has a right not only to be rid of the growth, called a fetus in her body, but also has a right to a dead fetus". Id., at 431. He also agreed that he "[n]ever ha[s] any intention of trying to protect the fetus, if it can be saved", id., and finally that "as a general principle" "[t]here should not be a live fetus", Id., at 435. Moreover, contrary to every other view, he thought a fetus could survive a D&E abortion, id., at 433-434. None of the other physicians who testified at the trial, those called both by the

plaintiffs and defendants, considered that any use of D&E
after viability was indicated.

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RIDER A

7. The courts below found, and JUSTICE BLACKMUN's dissenting opinion agrees, post, at 6-7, that there is no possible justification for a second-physician requirement whenever D&E is used because no viable fetus can survive a D&E procedure. 483 F. Supp., at 694; 655 F.2d, at 865. Accordingly, for them, §188.030.3 is overbroad.

Rider AA

~~As the Court of Appeals noted, however,~~ ^{*this procedure*} the choice of D&E after viability is subject to the requirements of §188.030.2. See id., at 865, and n. 28. ^{*It proscribes the use of D+E*} Thus, ~~D&E is not to be used~~ when the fetus is viable; when other methods are more likely to preserve its life; and when alternative procedures do not pose a greater risk to the woman's life or health. Cf. id., at 865 (^{*several*} ~~some~~ physicians testified they would not use D&E in third trimester); American College of Obstetricians and Gynecologists (ACOG) Technical Bulletin No. 56, Methods of Midtrimester Abortion 4 (1979) (mortality rate for D&E less than or similar to that of instillation abortions up to 20 weeks); App. 79-80.

The sole record support for the ~~lower courts'~~ ^{*below*} findings that D&E is the "method of choice for some women who need post-viability abortions," post, at 6, appears to be the testimony of Dr. Robert Crist, a physician called by plaintiffs and a member of the National Abortion Federation, "an organization of abortion providers and people interested in the pro-choice movement," Record 415-416. Dr. Crist ~~considered it good medical practice to~~ ^{*supported the*} use D&E on a 28-week pregnancy and in some circumstances considered it a better procedure than other methods. See 2 Record 427-428. But he also was of the

philosophy "that the abortion patient has a right not only to be rid of the growth, called a fetus in her body, but also has a right to a dead fetus," id., at 431, that he "[n]ever ha[s] any intention of trying to protect the fetus, if it can be saved," id., and that, "as a general principle," "[t]here should not be a live fetus," id., at 435--even though he thought a fetus could survive a D&E abortion, id., at 433-434. None of the other witnesses at trial, those called both by the plaintiffs and defendants, indicated any use of D&E after viability. See 1 Record 21 (limiting use of D&E to under 18 weeks); 2 Record 381, 410-413 (Dr. Robert Kretzschmar) (D&E up to 17 weeks; would never perform D&E after 26 weeks); 4 Record 787 (almost "inconceivable" to use D&E after viability); 7 Record 52 (D&E safest up to 18 weeks); id., at 110 (doctor not performing D&E past 20 weeks); id., at 111 (risks of doing outpatient D&E equivalent to childbirth at 24 weeks); 8 Record 33, 78-81 (Dr. Willard Cates) (16 weeks latest D&E performed).

Rebuttal no 2

As all third-trimester abortions are subject to the requirements of both §188.030.1 and §188.030.2, D&E should not be used in Missouri when the fetus is viable; when other methods are more likely to preserve its life; when alternative procedures do not pose a greater risk to the woman's life or health; and when the abortion is not necessary to preserve the life or health of the woman. Thus, to ^{establish} show that §188.030.3 is overbroad, it is not enough to show that D&E ~~is sometimes~~ the method of choice, and that no fetus will survive a D&E abortion. Because Dr. Crist apparently performed all his abortions in Kansas, 2 Record 334, 368, 428, ~~a state having no~~ which does not have a statute similar to §188.030.1 and §188.030.2, and because he did not make clear that the D&E abortions he had per-

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formed on viable fetuses were under emergency situations, there is no record evidence that D&E will ever be the method that poses the least risk to the woman in those rare situations where there are compelling medical reasons for performing an abortion after viability. Moreover, even if there are such instances, it is not at all clear that they would justify invalidating §188.030.3. The District Court also relied on the testimony of Dr. Schmidt, but his testimony is enlightening on the relevance of ~~any~~ ^{the} finding that a D&E abortion ^{after viability} absolutely will be necessary in some circumstances:

Q. Is there any reason that you can give us for the attendance of a second physician for an abortion on a viable fetus by method of D&E.

A. No.

Q. There is no possibility of survival, is there?

A. No. Mr. Susman, can I add to that just a moment?

Q. Certainly.

A. To get that in focus, to me this is not a practical point. I simply do not believe that the question of viability comes up when D&E is an elected method of abortion. Because, again, we are talking about well along in second trimester, not early trimester. ~~(emphasis added)~~

Q. Doctor, there has been prior testimony of D&E being performed at those stages when contraindication exists for the other alternatives.

A. Well, okay. There very well may be, but I personally cannot conceive that as a significant practical point. It may be important legally, but from a medical standpoint, that doesn't bother me. ~~(emphasis added)~~

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4 Record 836-837. Given the ^{compelling} contradictory evidence, the State's interest in protecting a viable fetus justifies the second-physician requirement even though there may be the rare case where a doctor may think honestly that D&E is required for the mother's health. Legislation need not accommodate every conceivable contingency.

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RIDER B

In regulating hospital services within the State, Missouri requires that "[a]ll tissue surgically removed with the exception of such tissue as tonsils, adenoids, hernial sacs and prepuces, shall be examined by a pathologist, either on the premises or by arrangement outside of the hospital." 13 Mo. Admin. Code 50-20.030(3)(A)7 (1977). With respect to abortions, whether performed in hospitals or in some other facility, §188.047 requires the pathologist to "file a copy of the tissue report with the State Division of Health...." See n. 2, supra. The pathologist also is required to "provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced." Thus, Missouri appears to require that tissue following abortions, as well as ^{from} almost all other surgeries performed in hospitals, must be submitted to a pathologist, not merely to a pathological examination by the performing doctor. The narrow question before us is whether the State ^{lawfully} also may require the tissue removed following an abortion performed in clinics as well as in hospitals to be submitted to a pathologist. We believe that it can. stet

On its face and in effect, §188.047 is reasonably related to generally accepted medical standards and "further[s] important health-related State concerns." City of Akron, ante, at 12. As the Court of Appeals recognized, pathology examinations are clearly "useful and even necessary in some cases," because "abnormalities in the tissue may warn of serious, possibly fatal disorders." 655

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*not all abortion clinics, particularly ~~un~~
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Court indicates, medical opinion is not unanimous on this question. See 3 Record 623; 4 Record 749-750, 798-800, 845-847; n. 2, supra. But there is substantial support for Missouri's requirement. In this case, for example, Dr. Bernard Nathanson, a widely experienced abortion practitioner, testified that he requires a pathologist examination after each of the 60,000 abortions performed under his direction at the New York Center for Reproductive and Sexual Health. He considers it "absolutely necessary to obtain a pathologist's report on each and every specimen of tissue removed for abortion or for that matter from any other surgical procedure which involved the removal of tissue from the human body." App. 143-144. See also App. 146-147 (testimony of Dr. Keitges); 5 Record 798-799 (testimony of Dr. Schmidt).¹³

In weighing the balance between protection of a woman's health and the comparatively small additional cost of a pathologist's examination, we cannot say that the Constitution requires that a

unemployed teenager." Post, at 4. But these women may be those most likely to seek the least expensive clinic available. As the standards of medical practice in such clinics may not be the highest, a State may conclude reasonably that a pathologist's examination of tissue is particularly important.

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State subordinate its interest in health to minimize to this extent the cost of abortions. Even in the early weeks of pregnancy, "[c]ertain regulations that have no significant impact on the woman's exercise of her right to decide to have an abortion may be permissible where justified by important state health objectives." City of Akron, ante, at 11. See Danforth, 428 U.S., at 80-81. In light of the substantial benefits that a pathologist's examination can have, we think the cost of a tissue examination does not significantly burden a pregnant woman's abortion decision. The estimated cost of compliance for plaintiff Reproductive Health Services was \$19.40 per abortion performed. 483 F. Supp., at 700, n. 48. In Danforth, this Court unanimously upheld Missouri's recordkeeping requirement as "useful to the State's interest in protecting the health of its female citizens, and [as] a resource that is relevant to decisions involving medical experience and judgment," 428 U.S., at 81.¹⁴ We view the requirement for a pathology report as comparable and as a relatively insignificant burden. Accordingly, we reverse the judgment of the Court of Appeals on this issue.

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Full

February 1, 1983

ASH1 GINA-POW

Rider A page 9

(Draft only)

In Roe the Court recognized as compelling the interest of a state in the life of a viable fetus: "...the state in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." Roe at 165. Several of Missouri's statutes undertake this regulation. Post - viability abortions are proscribed except when necessary to preserve the life or the health of the mother. Mo. Rev. Stat. §188.030.1. The state also forbids the use of procedures fatal to the viable fetus unless alternative procedures pose a greater risk to the health of the mother. See Id., §188.030.2. The statute at issue here is §188.030.3 that requires the attendance of a second physician at the abortion of a viable fetus. The Court of Appeals invalidated this requirement, agreeing with the District Court.

The plaintiffs (respondents here on this issue) urge affirmance, advancing a number of arguments. They say

that this second-physician requirement is an aberration of the traditional doctor-patient relationship, and is impractical, unnecessary, burdensome and costly. No other Missouri statute requires two physicians in attendance for any other medical or surgical procedure, including child birth or delivery of a premature infant. These are not insubstantial arguments, and we view the issue as a close one.

Our cases repeatedly have held, however, that the state's interest in the potential life of a fetus is compelling. It therefore has substantial discretion in the type of regulations it may adopt with respect to abortions that are permissible after viability. See Beale v. Dole, 432 U.S. 438, 445-446 (1977); Roe v. Wade, 410 U.S. 113, 165 (1973). The fetus is uniquely vulnerable at this stage, and as recognized in Roe the abortion decision no longer is solely one to be made between the mother and her physician. Roe 410 U.S. at 166.

Section 188.030.3 provides that the second physician "shall take control of and provide immediate medical care for a child born as a result of the abortion". Moreover, the statute requires that the physician "be in attendance" during the abortion and "take all reasonable steps in

keeping with good medical practice ... to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman". Section 188.030.3. See n. 4 supra. It is clear from these provisions that Missouri has made a judgment that there are some physicians primarily interested in performing abortions when desired by the woman, and that there may be tension between this interest and the state interest in protecting the potential life of an unborn child. *

* It is a matter of common knowledge that over the past decade numerous physicians have specialized in abortion practice, and clinics solely devoted to this practice have been opened in cities across our country. As evidenced by the description of the type of clinic before the Court in Bellotti I (citation), some of these clinics fairly may be described as "abortion mills" in which a woman's demand often is honored with little or no counseling. Moreover, many such clinics lack facilities adequate to deal with the problems and risks attended upon abortions when there may be close questions as to viability. (Jim: If you and Mark think this is a proper and useful not, we should add a cross-reference to the footnote in Simopoulos on the Boston-type clinic).

All of the expert testimony at trial, both by witnesses called by the plaintiffs and the defendants (with one exception)**, agreed that the use of the dilation and evacuation procedure (D & E) after viability is usually fatal to the fetus. The presence of a second physician could be a safeguard against the improper use of this procedure.

** The one exception was the testimony of Dr. Robert Crist. Although his testimony is not entirely unambiguous, it can be read as approving the use of the D & E procedure at times close to if not after viability. He also expressed the belief that honoring the wishes of the woman may be more important than protecting the potential life of a unborn child. (Jim: The AG of Missouri suggests this - see p. 41. We should, of course, check exactly what Dr. Crist said and my guess is this will require some revision of what I have just dictated, if not its omission).

Perhaps the most persuasive argument relied on by the plaintiffs is that the presence of a second physician is not required for any other medical or surgical procedure, including childbirth or delivery of a premature infant. The answer given by the state to this argument, in effect, is that abortion are unique. In other situations the patient's primary interest is in preserving his or her own health. Exception to this, of course, are childbirth and where an infant must be delivered prematurely. Yet, in these situations, the mother and physician are essentially of one mind. Having carried the fetus to the time of delivery, the mother ardently desires that it be born safely and healthy. She also naturally hopes to survive herself in good health. Thus, there rarely if ever is a conflict of interests between the principal actors. The situation is different with respect to the woman who on her own initiative seeks an abortion. This is a surgical procedure she may desire for no health reason and solely to avoid childbirth. To be sure, if told that the fetus is or may be viable, this may determine many mothers who otherwise would like to have an abortion. But it does not deter all mothers and the state's assumption that some physicians will accord primacy to the wishes of the woman

cannot be viewed as unreasonable. After all, the states interest is compelling and this necessarily supports the right of a state to impose some burdens on the woman's choice following viability of the fetus. We therefore believe the second physician requirement "has both logical and biological justifications," id. at 163, and bears a reasonable relationship to the state interest. We reverse the Court of Appeals on this issue.

7. The courts below found, and JUSTICE BLACKMUN's dissenting opinion agrees, post, at 6-7, that there is no possible justification for a second-physician requirement whenever D&E is used because no viable fetus can survive a D&E procedure. 483 F. Supp., at 694; 655 F.2d, at 865. Accordingly, for them, §188.030.3 is overbroad. There is agreement that a fetus generally cannot survive a D&E abortion. But as the Court of Appeals noted, the choice of this procedure after viability is subject to the requirements of §188.030.2. See id., at 865, and n. 28. Nevertheless, the courts below, in conclusory language, found that D&E is the "method of choice for some women who need post-viability abortions." Post, at 6. No scholarly writing supporting this view is cited by those courts or by the dissent. Reliance apparently is placed solely on the testimony of Dr. Robert Crist, a physician from Kansas. His testimony, if nothing else, is remarkable in its candor. He is a member of the National Abortion Federation, "an organization of abortion providers and people interested in the pro-choice movement." 2 Record 415-416. He supported the use of D&E on 28-week pregnancies, well into the third trimester. In some circumstances, he considered it a better procedure than other methods. See 2 Record 427-428. His disinterest in protecting fetal life is evidenced by his agreement "that the abortion patient has a right not only to be rid of the growth, called a fetus in her body, but also has a right to a dead fetus." Id., at 431. He also agreed that he "[n]ever ha[s] any intention of trying to protect the fetus, if it can be saved," id., and finally

that "as a general principle" "[t]here should not be a live fetus," id., at 435. Moreover, contrary to every other view, he thought a fetus could survive a D&E abortion. Id., at 433-434. None of the other physicians who testified at the trial, those called both by the plaintiffs and defendants, considered that any use of D&E after viability was indicated. See 1 Record 21 (limiting use of D&E to under 18 weeks); 2 Record 381, 410-413 (Dr. Robert Kretzschmar) (D&E up to 17 weeks; would never perform D&E after 26 weeks); 4 Record 787 (almost "inconceivable" to use D&E after viability); 7 Record 52 (D&E safest up to 18 weeks); id., at 110 (doctor not performing D&E past 20 weeks); id., at 111 (risks of doing outpatient D&E equivalent to childbirth at 24 weeks); 8 Record 33, 78-81 (Dr. Willard Cates) (16 weeks latest D&E performed). Apparently Dr. Crist practiced only in Kansas, 2 Record 334, 368, 428, a state having no statutes comparable to §188.030.1 and §188.030.2. It is not clear whether he was operating under or familiar with the limitations imposed by Missouri law. Nor did he explain the circumstances when there were "contraindications" against the use of any of the procedures that could preserve viability, or whether his conclusory opinion was limited to emergency situations. Indeed, there is no record evidence that D&E ever will be the method that poses the least risk to the woman in those rare situations where there are compelling medical reasons for performing an abortion after viability. If there were such instances, they hardly would justify invalidating §188.030.3.

In addition to citing Dr. Crist in a footnote, the District Court cited--with no elaboration--Dr. Schmidt. His testimony, reflecting no agreement with Dr. Crist, is enlightening.

Q. Is there any reason that you can give us for the attendance of a second physician for an abortion on a viable fetus by method of D&E.

A. No.

Q. There is no possibility of survival, is there?

A. No. Mr. Susman, can I add to that just a moment?

Q. Certainly.

A. To get that in focus, to me this is not a practical point. I simply do not believe that the question of viability comes up when D&E is an elected method of abortion. Because, again, we are talking about well along in second trimester, not early trimester.

Q. Doctor, there has been prior testimony of D&E being performed at those stages when contraindication exists for the other alternatives.

A. Well, okay. There very well may be, but I personally cannot conceive that as a significant practical point. It may be important legally, but from a medical standpoint, that doesn't bother me.

4 Record 836-837 (emphasis added). Given that Dr. Crist's ^{discordant} ~~schismatic~~ testimony is wholly unsupported, the State's compelling interest in protecting a viable fetus justifies the second-physician requirement even though there may be the rare case when a physician may think honestly that D&E is required for the mother's health. Legislation need not accommodate every conceivable contingency.

R 3a

OTL

RIDER C

The dissenters apparently believe that the issue here is an open one, and adhere to the views that they expressed in Bellotti II. Post, at 10-11. But those views have never been adopted by a majority of this Court, while a majority have expressed quite differing views. See H.L. v. Matheson, 450 U.S. 398 (1981); Bellotti II, 443 U.S. 622 (plurality opinion).

R4g, R4f

RIDER B

In regulating hospital services within the State, Missouri requires that "[a]ll tissue surgically removed with the exception of such tissue as tonsils, adenoids, hernial sacs and prepuces, shall be examined by a pathologist, either on the premises or by arrangement outside of the hospital." 13 Mo. Admin. Code 50-20.030(3)(A)7 (1977). With respect to abortions, whether performed in hospitals or in some other facility, §188.047 requires the pathologist to "file a copy of the tissue report with the State Division of Health...." See n. 2, supra. The pathologist also is required to "provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced." Thus, Missouri appears to require that tissue following abortions, as well as from almost all other surgery performed in hospitals, must be submitted to a pathologist, not merely to a pathological examination by the performing doctor. The narrow question before us is whether the State lawfully also may require the tissue removed following an abortion performed in clinics as well as in hospitals to be submitted to a pathologist. We believe that it can.

On its face and in effect, §188.047 is reasonably related to generally accepted medical standards and "further[s] important health-related State concerns." City of Akron, ante, at 12. As the Court of Appeals recognized, pathology examinations are clearly "useful and even necessary in some cases," because "abnormalities in the tissue may warn of serious, possibly fatal disorders." 655

¹⁰
F.2d, at 870.² As a rule, it is good medical practice to submit all tissue to the examination of a pathologist.²¹¹ This is particularly important following abortion, because questions remain as to the long-range complications and their effect on subsequent pregnancies. See App. 72-73 (testimony of Dr. Willard Cates, Jr.); Levin, et al., Association of Induced Abortion with Subsequent Pregnancy Loss, 243 J. A.M.A. 2495, 2499 (1980). Recorded pathology reports, in concert

¹⁰
²A pathological examination is designed to assist in the detection of fatal ectopic pregnancies, hydatridiform moles or other precancerous growths, and a variety of other problems that can be discovered only through a pathological examination. The general medical utility of pathological examinations is clear. See, e. g., American College of Obstetricians and Gynecologists (ACOG), Standards for Obstetric-Gynecologic Services 52 (5th ed. 1982); National Abortion Federation (NAF), National Abortion Federation Standards 6 (1981) (compliance with standards obligatory for NAF member facilities to remain in good standing); Brief of the American Public Health Association as Amicus Curiae in Nos. 81-185, 81-746, 81-1172, at 29, n. 6 (supporting the NAF standards for non-hospital abortion facilities as constituting "minimum standards").

¹¹²ACOG's standards at the time of the District Court's trial recommended that a "tissue or operative review committee" should examine "all tissue removed at obstetric-gynecologic operations." ACOG, Standards for Obstetric-Gynecologic Services 13 (4th ed. 1974). The current ACOG standards also state as a general rule that, for all surgical services performed on an ambulatory basis, "[t]issue removed should be submitted to a pathologist for an examination." ACOG, supra, at 52 (5th ed. 1982). The dissent, however, relies on the recent modification of these standards as they apply to abortions. ACOG now provides an "exception to the practice" of mandatory examination by a pathologist and makes such examination for abortion tissue permissive. Ibid. Not surprisingly, this change in policy was controversial within the College. See 4 Record 799-800. ACOG found that "[n]o consensus exists regarding routine microscopic examination of aspirated tissue in every case," though it recognized--on the basis of inquiries made in 29 institutions--that in a majority of them a microscopic examination is performed in all cases. ACOG, Report of Committee on Gynecologic Practice, Item #6.2.1 (June 27-28, 1980).

with abortion complication reports, provide a statistical basis for studying those complications. Cf. Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 81 (1976).

Plaintiffs argue that the physician performing the abortion is as qualified as a pathologist to make the examination. This argument disregards the fact that Missouri requires a pathologist--not the performing physician--to examine tissue after almost every type of surgery. Although this requirement is in a provision relating to surgical procedures in hospitals, many of the same procedures included within the Missouri statute customarily are performed also in outpatient clinics. No reason has been suggested why the prudence required in a hospital should not be equally appropriate in such a clinic. Indeed, there may be good reason to impose stricter standards in this respect on clinics performing abortions than on hospitals.¹² As the testimony in the District

¹² The professional views that the plaintiffs find to support their position do not disclose whether consideration was given to the fact that not all abortion clinics, particularly inadequately regulated clinics, conform to ethical or generally accepted medical standards. See Bellotti v. Baird, 443 U.S. 622, 641, n. 21 (1979) (Bellotti II) (minors may resort to "incompetent or unethical" abortion clinics); Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 91, n. 2 (1976) (Stewart, J., concurring). The Sun-Times of Chicago, in a series of special reports, disclosed widespread questionable practices in abortion clinics in Chicago, including the failure to obtain proper pathology reports. See "The Abortion Profiteers," Chicago Sun-Times 25-26 (Special Reprint 1978). It is clear, therefore, that a State reasonably could conclude that a pathology requirement is necessary in abortion clinics as well as in general hospitals.

In suggesting that we make from a "comfortable perspective" the judgment that a State constitutionally can require the additional cost of a pathology examination, the dissent suggests that we disregard the interests of the "woman on welfare or the unemployed teenager." Post, at 4. But these women may be those

Footnote continued on next page.

Court indicates, medical opinion is not unanimous on this question. See 3 Record 623; 4 Record 749-750, 798-800, 845-847; n. 2, supra. But there is substantial support for Missouri's requirement. In this case, for example, Dr. Bernard Nathanson, a widely experienced abortion practitioner, testified that he requires a pathologist examination after each of the 60,000 abortions performed under his direction at the New York Center for Reproductive and Sexual Health. He considers it "absolutely necessary to obtain a pathologist's report on each and every specimen of tissue removed for abortion or for that matter from any other surgical procedure which involved the removal of tissue from the human body." App. 143-144. See also App. 146-147 (testimony of Dr. Keitges); 5 Record 798-799 (testimony of Dr. Schmidt).¹³

In weighing the balance between protection of a woman's health and the comparatively small additional cost of a pathologist's examination, we cannot say that the Constitution requires that a

most likely to seek the least expensive clinic available. As the standards of medical practice in such clinics may not be the highest, a State may conclude reasonably that a pathologist's examination of tissue is particularly important.

¹³ The dissent appears to suggest that §188.047 is constitutionally infirm because it does not require microscopic examination, post, at 4, but that misses the point of the regulation. The need is for someone other than the performing clinic to make an independent medical judgment on the tissue. See n. 12, supra; 4 Record 750 (Dr. Pierre Keitges, a pathologist). It is reasonable for the State to assume that an independent pathologist is more likely to perform a microscopic examination than the performing doctor. See H. Cove, *Surgical Pathology of the Endometrium* 28 (1981) ("To the pathologist, abortions of any sort are evaluated grossly and microscopically for the primary purpose of establishing a diagnosis of intrauterine pregnancy.") (emphasis added).

State subordinate its interest in health to minimize to this extent the cost of abortions. Even in the early weeks of pregnancy, "[c]ertain regulations that have no significant impact on the woman's exercise of her right to decide to have an abortion may be permissible where justified by important state health objectives." City of Akron, ante, at 11. See Danforth, 428 U.S., at 80-81. In light of the substantial benefits that a pathologist's examination can have, we think the cost of a tissue examination does not significantly burden a pregnant woman's abortion decision. The estimated cost of compliance for plaintiff Reproductive Health Services was \$19.40 per abortion performed. 483 F. Supp., at 700, n. 48. In Danforth, this Court unanimously upheld Missouri's recordkeeping requirement as "useful to the State's interest in protecting the health of its female citizens, and [as] a resource that is relevant to decisions involving medical experience and judgment," 428 U.S., at 81.¹⁴ We view the requirement for a pathology report as comparable and as a relatively insignificant burden. Accordingly, we reverse the judgment of the Court of Appeals on this issue.

27P
lfp/ss 05/30/83

File
Ashcroft Footnote B

ASHFNB SALLY-POW

The dissenting opinion relies on medical opinion that does not agree with the state's judgment that examination by a pathologist is necessary following almost all surgical procedures. Medical opinion, however, is far from being unanimous on this question. Moreover, the professional views expressed do not disclose whether consideration was given to the fact that there has been a measure of serious abuse in some abortion clinics. See n. ___, supra. In this case, Dr. Bernard Nathanson, a widely experienced abortion practitioner, testified that he requires a pathologist examination after each of the 60,000 abortions performed under his direction at the New York Center for Reproductive and Sexual Health. He

considers it "absolutely necessary to obtain a pathologist's report on each and every specimen of tissue removed for abortion or for that matter from any other surgical procedure which involved the removal of tissue from the human body". App. 143-144. See also App. 146-147 (testimony of Dr. Keitges); 5 Record 798-799 (testimony of Schmidt). In weighing the balance between protection of a woman's health and the comparatively small additional cost of a pathologist's examination, we cannot say that the Constitution requires that a state subordinate its interest in health to minimize the cost of abortions. The evidence in this case indicates charges for first-trimester abortions range from _____ to _____, whereas the additional cost for the health protective tissue examination ranges from _____ to _____.

LFP
lfp/ss 05/30/83

Ashcroft - Footnote A

ASHFNA SALLY-POW

The dissenting opinion by Justice Blackmun would hold that the Missouri requirement for a pathology examination is a burden on the woman's right of constitutional proportions. It argues that the physician performing the abortion is as qualified as a pathologist to make the examination. The dissent, in advancing this argument, ignores the fact that Missouri requires a pathologist - not the performing physician - to examine tissue after almost every type of surgery. Although the this requirement is in a provision relating to surgical procedures in hospitals, many of the same procedures included within the Missouri statute customarily are performed also in outpatient clinics. No reason has been

suggested why the prudence required in a hospital should not be equally appropriate in such a clinic.

Inddd, a state reasonably could conclude that this health precaution is more necessary in outpatient clinics than in general hospitals - particularly with respect to abortions. There is abundant evidence that abortion has been a surgical procedure associated with a high incidence of questionable practices. See Bellotti II, 443 U.S., at 641, n. 21 (minors may resort to "incompetent or unethical" abortion clinics); Danforth, 428 U.S., at 91, n. 2 (Stewart, J., concurring). The Sun-Times of Chicago, in a series of special reports, disclosed widespread questionable practices, in abortion clinics, including the failure to obtain proper pathology reports. See "The Abortion Profiteers", Chicago Sun-Times

(Special Reprint 1978). The additional cost of a pathology examination, modest compared to other medical charges (see, e.g., Simopoulos v. Commonwealth, ____ at ____), is justified by the state's interest in protecting the health of the mother.

lfp/ss 05/30/83

Ashcroft - Footnote A

ASHFNA SALLY-POW

The dissenting opinion by Justice Blackmun would hold that the Missouri requirement for a pathology examination is a burden on the woman's right of constitutional proportions. It argues that the physician performing the abortion is as qualified as a pathologist to make the examination. The dissent, in advancing this argument, ignores the fact that Missouri requires a pathologist - not the performing physician - to examine tissue after almost every type of surgery. Although the this requirement is in a provision relating to surgical procedures in hospitals, many of the same procedures included within the Missouri statute customarily are performed also in outpatient clinics. No reason has been

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(Special Reprint 1978). The additional cost of a pathology examination, modest compared to other medical charges (see, e.g., Simopoulos v. Commonwealth, ____ at ____), is justified by the state's interest in protecting the health of the mother.

lfp/ss 05/28/83

Rider A, p. 8 (Ashcroft)

ASH8 SALLY-POW

(In regulating hospital services),
Missouri requires that "[a]ll tissue surgically removed, with the exception of such tissue as tonsils, adenoids, hernial sacs and prepuces, shall be examined by a pathologist, either on the premises or by arrangement outside of the hospital". 13 Mo. Admin. Code 502.030(3)(A)7 (1977). With respect to abortions, ^{whether performed in hospitals or some other facility, regardless of the facility} §188.047 requires the pathologist to "file a copy of the tissue report with the State Division of Health, ..." See, n. 2, supra. The pathologist also is required to "provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced".

The question is whether the foregoing pathology

(abortion) requirements (for abortions) unconstitutionally burden ^(s) a woman's abortion

decision. We hold that ^{it} ~~they~~ do ^(so) not. ~~It is not clear~~ ^{Although}

~~whether~~ the filing of a pathology report is ^(not) required in

^(hospital) all ^(it is for abortions.) procedures, Assuming, however, that its filing is

required only for abortions, this routine act would hardly

assume unconstitutional proportions. Even in the early

weeks of pregnancy "[c]ertain requirements that have no

significant impact on the woman's exercise of her right to

decide to have an abortion may be permissible where

justified by important state health objectives. [^] City of

Akron, ante, at 11. See Planned Parenthood of Central Mo.

v. Danforth, 428 U.S. 52, 80-81 (1976). We think it clear

that the additional requirement that the pathologist's

report be filed can have "no significant impact" on the

woman's right. Or, putting it differently, the abortion

decision is not unconstitutionally burdened.

lfp/ss 06/02/83 Rider A, p. (Ashcroft)

ASHA SALLY-POW

Note to Jim:

Although I would deemphasize and remove from the text the change of opinion by ACOG, we should recognize - preferably in a note - that the dissent relies on the recent modification of its standards, providing that a pathological examination is a permissive rather than a mandatory safeguard. The ACOG found that no "consensus exists regarding routine microscopic examination of aspirated tissue in every case", though it recognized - on the basis of inquiries made in 29 institutions that in a majority of them a microscopic examination^s performed in all cases. (citation)

File

lfp/ss 06/04/83

Ashcroft Alternative Language Rider A

ASHALT SALLY-POW

There is agreement that no fetus can survive a D&E. Thus, as the Court of Appeals noted, the choice of this procedure after viability is subject to the requirements of §188.030.2. See id., at 865, and n. 28. The courts below, in conclusory language, found that D&E is the "method of choice for some women who need post-viability abortions". Post, at 6. No scholarly writing supporting this view is cited by those courts or by the dissent.

Reliance apparently is placed solely on the testimony of Dr. Robert Crist, a physician from Kansas. His testimony, if nothing else, is remarkable. He is a member of the National Abortion Federation, "an organization of abortion providers and people interested in the pro-choice

movement". Record, 415-416. He supported the use of D&E on 28-week pregnancies, well into the third trimester. In some circumstances, he considered it a better procedure than other methods. See 2 Record 427-428. His disinterest in protecting fetal life is evidenced by his agreement "that the abortion patient has a right not only to be rid of the growth, called a fetus in her body, but also has a right to a dead fetus". Id., at 431. He also agreed that he "[n]ever ha[s] any intention of trying to protect the fetus, if it can be saved", id., and finally that "as a general principle" "[t]here should not be a live fetus", Id., at 435. Moreover, contrary to every other view, he thought a fetus could survive a D&E abortion, id., at 433-434. None of the other physicians who testified at the trial, those called both by the

plaintiffs and defendants, considered that any use of D&E
after viability was indicated.

lfp/ss 06/04/83

Rider No. 2 (Ashcroft)

ASH2 SALLY-POW

Apparently Dr. Crist practiced only in Kansas, 2 Record 334, 368, 428, a state having no statutes comparable to §188.030.1 and §188.030.2. It is not clear whether he was familiar with Missouri law. Nor did he explain the circumstances when there were "contraindications" against the use of any of the procedures that could preserve viability, or whether his conclusory opinion was limited to emergency situations. Indeed, there is no record evidence that D&E ever will be the methods that poses the least risk to the woman in those rare situations where there are compelling medical reasons for performing an abortion after viability. If there were such instances, they hardly would justify invalidating §188.030.3.

In addition to citing Dr. Crist in a footnote, the district court cited - with no elaboration - Dr. Schmidt. His testimony, reflecting no agreement with Dr. Crist, is enlightening.

(here copy Q and A from p. 3 of Jim's note)

4 Record 836-837. Given that Dr. Crist's schismatic testimony is wholly unsupported, the state's compelling interest in protecting a viable fetus justifies the second-physician requirement even though there may be the rare case when a physician may think honestly that D&E is required for the mother's health. Legislation need not accommodate every conceivable contingency.

OK as
edited.

RIDER C

The dissenters ^{apparently} believe that the issue here is an open one, and adhere to the views that they expressed in Bellotti II. Post, at 10-11. ^{But} Those views ^{have never been adopted by} ~~were clearly not the views of a majority of this Court.~~ If stare decisis means anything in this area, it has to mean that the Court has settled the issue that the dissent reargues.

While a majority have expressed ~~se~~ quite differing views. See (cetera Bellotti II & Matheson)

Jim: I prefer not to rely on stare decisis as no majority has agreed on the issue.

The sole record for their statement
appears to be the testimony of

select
Dr. Crist
for their
physician.

RIDER B

It may be that
this method is
the choice, certainly
by those who choose it.
Crist.

JUSTICE BLACKMUN's dissenting opinion would hold §188.030.3
unconstitutionally overbroad because a fetus cannot survive a D&E
abortion after viability. Post, at 6-7. The sole testimony upon
which the dissenting opinion can rely for the proposition that D&E
is the "method of choice for some women who need post-viability
abortions" is Dr. Robert Crist, ^{a physician} an expert called by plaintiffs. See
2 Record 427, 438. This same expert testified that he never ^{intends to} has any
intention of protecting the fetus after an abortion, that an
abortion patient has a right not only to be rid of her pregnancy but
to a "dead fetus", and that as a general principle, in the case of
an abortion, there should never be a live fetus. ^{even though one could survive a} Id., at 431-435. ^{D&E}
None of the other witnesses at trial, ^{both} those called by the ^{both abortion.}
plaintiffs and those called by the defendants, indicated any use of
D&E late in a pregnancy after viability, under any circumstances.
See 1 Record 21 (limiting use of D&E to under 18 weeks); 2 Record
381, 410-413 (Dr. Robert Kretzschmar) (D&E up to 17 weeks; would
never perform D&E at 26 weeks); 4 Record 787 (almost "inconceivable"
to use D&E after viability); 7 Record 52 (D&E safest up to 18
weeks); id., at 110 (doctor not performing D&E past 20 weeks); id.,
at 111 (risks of doing outpatient D&E equivalent to childbirth at 24
weeks); 8 Record 33, 78-81 (Dr. Willard Cates) (16 weeks latest D&E
performed). Apparently the dissenters are willing to build their
entire constitutional challenge to §188.030.3 on the testimony of
one doctor who readily professes to disregard Missouri law.

Libel suit →

Rider X

im-
pho-
but words
when
you can

2
7
No. 11 ~~Physicians with Dr. Crist's~~ ^{well} ~~disseminated~~ ^{expressed fetal} ~~in preserving fetal life may be few in number,~~ ^{disseminated} ~~but this viewpoint illustrates the need for~~ ^{disseminated}
Moreover, the dissenting opinion conveniently disregards Dr. Crist's ^{the requirement of a second physician after} testimony that a fetus can survive D&E. Id., at 433. ^{viability.}

41 We need not, however, hold the dubious finding that D&E is the method of choice in the third trimester clearly erroneous to reject the dissenting opinion's conclusion that \$188,030.3 is overbroad.

42 ^{all} Because all third-trimester abortions are subject to the requirements of \$188,030.2, D&E ^{should not} ~~cannot~~ be used when the fetus is viable; when other methods are more likely to preserve its life; and when alternative procedures do not pose a greater risk to the woman's life or health. ^{But} The dissent points to nothing in the record to indicate that D&E will ever be the method that poses the least risk to the woman in any situation ^{where} ~~in which~~ there are compelling medical reasons for performing an abortion after viability. ^{And} ~~the dissent does not even~~ acknowledge the

complications that may arise and force the performing physician to complete a D&E abortion by another, less fetal destructive method.

92 ^{appears} ^{therefore} ^{that} ^{the} Thus, the crucial premise of the dissent's ~~highly suspect~~ factual assumption that D&E is the method of choice in the third trimester ~~and is actually chosen~~ has no basis in the record. Nor does the ~~medical literature give the dissenters~~ ^{disseminated identity} support ^{that} ^{for} ^{their} ~~for their~~ assumption.

Cf. American College of Obstetricians and Gynecologists (ACOG) Technical Bulletin No. 56, Methods of Midtrimester Abortion 4 (1979) (mortality rate for D&E less than or similar to that of instillation abortions up to 20 weeks); App. 79-80. The dissenters thus point to no support for ^{their} ~~its~~ assumption that "maternal health considerations will preclude the use of procedures that might result in a live birth" after viability. Post, at 6.

lfp/ss 06/02/83

Rider ^(X) (Ashcroft)

(to go on Jim
Rider B)

ASHCROFTX SALLY-POW

4 There may well be few physicians with Dr. Crist's expressed total disinterest in preserving fetal life, and who perform third-trimester abortions with no regard to the state's compelling interest in preserving fetal life when this is possible without endangering the health of the mother. Yet, the fact that there are such physicians illustrates the reasonableness of the state's requirement of the presence of a second physician after viability. The dissent's overbreadth argument, based on primarily on Dr. Crist's views, is without other support in the record.

lfp/ss 05/30/83

Ashcroft Footnote B

ASHFNB SALLY-POW

The dissenting opinion relies on medical opinion that does not agree with the state's judgment that examination by a pathologist is necessary following almost all surgical procedures. Medical opinion, however, is far from being unanimous on this question. Moreover, the professional views expressed do not disclose whether consideration was given to the fact that there has been a measure of serious abuse in some abortion clinics. See n. ___, supra. In this case, Dr. Bernard Nathanson, a widely experienced abortion practitioner, testified that he requires a pathologist examination after each of the 60,000 abortions performed under his direction at the New York Center for Reproductive and Sexual Health. He

considers it "absolutely necessary to obtain a pathologist's report on each and every specimen of tissue removed for abortion or for that matter from any other surgical procedure which involved the removal of tissue from the human body". App. 143-144. See also App. 146-147 (testimony of Dr. Keitges); 5 Record 798-799 (testimony of Schmidt). In weighing the balance between protection of a woman's health and the comparatively small additional cost of a pathologist's examination, we cannot say that the Constitution requires that a state subordinate its interest in health to minimize ^{to this extent} the cost of abortions. The evidence in this case indicates charges for first-trimester abortions range from _____ to _____, whereas the additional cost for the health protective tissue examination ranges from _____ to _____.

*Jim - My editing is rough but is
substantive for reasons I'll state
to you. I have not examined the
notes critically.*

OK In regulating hospital services within the State, Missouri requires that "[a]ll tissue surgically removed with the exception of such tissue as tonsils, adenoids, hernial sacs and prepuces, shall be examined by a pathologist, either on the premises or by arrangement outside of the hospital." 13 Mo. Admin. Code 50-20.030(3)(A)7 (1977). With respect to abortions, whether performed in hospitals or in some other facility, §188.047 requires the pathologist to "file a copy of the tissue report with the State Division of Health...." See n. 2, supra. The pathologist also is required to "provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced." Thus, Missouri appears to require that tissue following abortions, as well as almost all other surgeries performed in hospitals, must be submitted to a pathologist, not merely to a pathological examination by the performing doctor. The narrow question before us is whether the State may also require the tissue removed following an abortion performed in clinics as well as in hospitals to be submitted to a pathologist. We believe that it can.

OK On its face and in effect, §188.047 is reasonably related to generally accepted medical standards and "further[s] important health-related State concerns." City of Akron, ante, at 12. As the Court of Appeals recognized, pathology examinations are clearly "useful and even necessary in some cases," because "abnormalities in the tissue may warn of serious, possibly fatal disorders." 655 F.2d, at 870.¹⁰ As rule, it is good medical practice to submit all

Footnote(s) 1 will appear on following pages.

tissue to the examination of a pathologist. The standards of the American College of Obstetricians and Gynecologists (ACOG) at the time of the District Court's trial stated ^{with respect} ~~in regard~~ to "staff activit[ies that] are recommended in some form for all obstetric-gynecologic services":

The purpose of a tissue or operative review committee is to make certain that the highest possible surgical standards are maintained by the hospital staff members. This is accomplished by a continuing review of all the surgical procedures performed in the hospital, ~~in the hospital~~. For this purpose, pathologic examination should be performed on all tissue removed at obstetric-gynecologic operations.

ACOG, Standards for Obstetric-Gynecologic Services 13 (4th ed. 1974). The current ACOG standards state for all surgical services performed on an ambulatory basis: "Tissue removed should be submitted to a pathologist for an examination." ACOG, Standards for Obstetric-Gynecologic Services 52 (5th ed. 1982) (emphasis added).

This is particularly important following abortion, because questions ^{remain as to} ~~about~~ the long-range complications of abortions and their effect on subsequent pregnancies, ~~remain~~. See App. 72-73 (testimony of Dr.

^{10X} A pathological examination is designed to assist in the detection of fatal ectopic pregnancies, hydatridaforme moles or other precancerous growths, and a variety of other problems that can only be discovered through a pathological examination. The need for pathological examination is clear. See American College of Obstetricians and Gynecologists (ACOG), Standards for Obstetric-Gynecologic Services 52 (5th ed. 1982); National Abortion Federation (NAF), National Abortion Federation Standards 6 (1981) (compliance with standards obligatory for NAF member facilities to remain in good standing); Planned Parenthood of Metropolitan Washington, D.C., Inc., 1980 Guidelines for Operation, Maintenance and Evaluation of First Trimester Outpatient Abortion Facilities 10; Brief of the American Public Health Association as Amicus Curiae in Nos. 81-185, 81-746, 81-1172, at 29, n. 6.

general medical utility of
 Jim - In ACOG 5th Ed '82 the one H A B
 refers to ~~it~~ - as I recall? 9/20
 is our use of it here a full disclosure?

any answer to this?

Willard Cates, Jr.); Levin, et al., Association of Induced Abortion with Subsequent Pregnancy Loss, 243 J. A.M.A. 2495, 2499 (1980). Recorded pathology reports, in concert with abortion complication reports, provide a statistical basis for studying those complications. Cf. Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 81 (1976).

Plaintiffs argue that the physician performing the abortion is as qualified as a pathologist to make the examination.² Such arguments must have been persuasive to the ACOG and National Abortion Federation, for they recently have created for abortion an "exception to the practice" of submitting aspirated tissue to a pathologist for examination. See ACOG, supra, at 52 (5th ed.).¹²

¹² This argument ignores the fact that Missouri requires a pathologist--not the performing physician--to examine tissue after almost every type of surgery. Although this requirement is in a provision relating to surgical procedures in hospitals, many of the same procedures included within the Missouri statute customarily are performed also in outpatient clinics. No reason has been suggested why the prudence required in a hospital should not be equally appropriate in such a clinic. Indeed, there may be good reason to impose stricter standards on clinics performing abortions than on hospitals. See n. 3, infra.

¹² The professional views that the plaintiffs find to support their position do not disclose whether consideration was given to the fact that there has been a measure of serious abuse in some abortion clinics. But it is clear that a State reasonably could conclude that a pathology requirement is more necessary in outpatient clinics than in general hospitals--particularly with respect to abortions. There is abundant evidence that abortion has been a surgical procedure associated with a high incidence of questionable practices. See Bellotti v. Baird, 443 U.S. 622, 641, n. 21 (1979) (minors may resort to "incompetent or unethical" abortion clinics); Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 91, n. 2 (1976) (Stewart, J., concurring). The Sun-Times of Chicago, in a series of special reports, disclosed widespread questionable practices in abortion clinics, including the failure to obtain proper pathology reports. See "The Abortion Profiteers," Chicago Sun-Footnote continued on next page.

L.F.P.
2/1/83

job 01/27/83

FIRST DRAFT: Planned Parenthood Association v. Ashcroft,

Nos. 81-1255, 81-1623

JUSTICE POWELL delivered the opinion of the Court:

These cases present several issues relating to state regulation of the woman's fundamental right to decide whether to have an abortion: (i) whether the State of Missouri may require that every abortion subsequent to the first twelve weeks of pregnancy be performed in a hospital; (ii) whether the State may require that a tissue sample be taken of every abortion and submitted to a qualified pathologist for an examination and report; (iii) whether the State may require the attendance of a second physician [&] ~~in addition to the primary surgeon~~ at the abortion of a ^{"unborn child"} ~~viable fetus~~; and (iv) whether the State's parental consent statute is consistent with this Court's prior decisions.¹

¹The petition also raises the issue whether an award of attorneys' fees, made pursuant to 42 U.S.C. §1988, should be proportioned to reflect accurately the extent to which plaintiffs prevailed. ~~Because this issue is identical to the one presented in Hensley v. Eckerhart,~~
Footnote continued on next page.

See n 8, infra.

Jim -
Are there
issues
and
identified
on next
page,
perhaps
we could
start the
opinion
with p 2,
& then say
each of these
provisions
is challenged
except
what do my
"editors"
think?

I

On June 29, 1979, the Governor of the State of Missouri signed into law ^{comprehensive regulation} ~~statutes relating generally~~ to ^{of} ~~abortion~~^s. The next day, plaintiffs--Planned Parenthood of Kansas City, Missouri, Inc., two doctors that perform abortions, and an abortion clinic--^(the "plaintiffs") filed a complaint in the District Court for the Western District of Missouri challenging, as unconstitutional, several sections of ^{the new} ~~these~~ statutes. The sections relevant here include §188.025, providing that abortions after twelve-weeks ^{pregnancy} ~~gestation~~ must be performed in ^a hospitals;² §188.047, requiring a pathology report after every abortion;³ §188.030, ^{requiring the presence of a 2nd physician} ~~regulating abortions~~ after viability;⁴ and

U.S. (1983), we need not discuss it here.

²Mo. Rev. Stat. §188.025 provides: "Every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital."

³Mo. Rev. Stat. §188.047 states:

A representative sample of tissue removed at the time of abortion shall be submitted to a board eligible or certified pathologist, who shall file a copy of the tissue report with the state division of health, and who shall provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced and the pathologist's report shall be made a part of the patient's permanent record.

⁴Mo. Rev. Stat. §188.030.3 provides:

Footnote continued on next page.

Jim -
who
are
defendants

?

§188.028, requiring minors to secure parental or judicial consent.⁵

An abortion of a viable unborn child shall be performed or induced only where there is in attendance a physician other than the physician performing or adducing the abortion who shall take control of and provide immediate medical care for a child born as a result of the abortion. During the performance of the abortion, the physician performing it, and subsequent to the abortion, the physician required by this section to be in attendance, shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman.

⁵Mo. Rev. Stat. §188.028 reads:

1. No person shall knowingly perform an abortion upon a pregnant woman under the age of eighteen years unless:

(1) The attending physician has secured the informed written consent of the minor and one parent or guardian; or

(2) The minor is emancipated and the attending physician has received the informed written consent of the minor; or

(3) The minor has been granted the right to self-consent to the abortion by court order pursuant to subsection 2 of this section, and the attending physician has received the informed written consent of the minor; or

(4) The minor has been granted consent to the abortion by court order, and the court has given its informed written consent in accordance with subsection 2 of this section, and the minor is having the abortion willingly, in compliance with subsection 3 of this section.

2. The right of a minor to self-consent to an abortion under subdivision (3) of subsection 1 of this section or court consent under subdivision (4) of subsection 1 of this section may be granted by a court pursuant to the following procedures:

(1) The minor or next friend shall make an application to the juvenile court which shall

Footnote continued on next page.

4. After a full trial, at which a number of expert witnesses testified,

~~After a full trial, at which a number of expert witnesses testified, the court found that the minor was not competent to make the decision.~~
After numerous expert witnesses testified in support

assist the minor or next friend in preparing the petition and notices required pursuant to this section. The minor or the next friend of the minor shall thereafter file a petition setting forth the initials of the minor; the age of the minor; the names and addresses of each parent, guardian, or, if the minor's parents are deceased and no guardian has been appointed, any other person standing in loco parentis of the minor; that the minor has been fully informed of the risks and consequences of the abortion; that the minor is of sound mind and has sufficient intellectual capacity to consent to the abortion; that, if the court does not grant the minor majority rights for the purpose of consent to the abortion, the court should find that the abortion is in the best interest of the minor and give judicial consent to the abortion; that the court should appoint a guardian ad litem of the child; and if the minor does not have private counsel, that the court should appoint counsel. The petition shall be signed by the minor or the next friend;

....

(3) A hearing on the merits of the petition, to be held on the record, shall be held as soon as possible, within five days of the filing of the petition. ... At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect and understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other evidence that the court may find useful in determining whether the minor should be granted majority rights for the purpose of consenting to the abortion or whether the abortion is in the best interests of the minor;

(4) In the decree, the court shall for good cause:

(a) Grant the petition for majority rights for the purpose of consenting to the abortion; or

(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

(c) Deny the petition, setting forth the grounds on which the petition is denied;

....

Footnote continued on next page.

Jim - Keeping straight what the courts below did is not easy. You may think of a clever way then my editing

~~of or in opposition to the statutes under challenge, the~~

The District Court *invalidated each of these sections* ~~declared unconstitutional §188.025, the~~

second-trimester hospitalization requirement; §188.028,

the minors' consent provision; and §188.030, the provision

requiring a second physician at a post-viability abortion.

except it

~~It~~ upheld §188.047, the pathology requirement.⁶ The Court

of Appeals for the Eighth Circuit reversed the District

Court's judgment with respect to §188.028, *thereby* ~~in effect~~

upholding the requirement that a minor secure parental or

judicial consent to an abortion, *It also, ~~held that the~~ reversed the* ~~and with respect to~~

District Court erred in sustaining

1 §188.047, ~~in effect invalidating~~ the pathology

requirement. The District Court's judgment with regard to

the second-physician requirement was affirmed, and the

case was remanded for further proceedings and findings

3. If a minor desires an abortion, then she shall be orally informed of and, if possible, sign the written consent required by section 188.039 in the same manner as an adult person. No abortion shall be performed on any minor against her will, except that an abortion may be performed against the will of a minor pursuant to a court order described in subdivision (4) of subsection 1 of this section that the abortion is necessary to preserve the life of the minor.

⁶See 483 F. Supp. 679, 699-701. The District Court awarded attorneys' fees for every hour claimed by the plaintiff's attorneys.

relating to the second-trimester hospitalization requirement. 655 F.2d 848, 872-873 (1981). On remand, the District Court reaffirmed its ^{holding} ~~legal conclusion~~ that the ~~State's~~ second-trimester hospitalization requirement was unconstitutional. The Court of Appeals affirmed this judgment. 664 F.2d 687, 691.

We granted certiorari, ___ U.S. ___ (1982), to resolve the conflict in the Courts of Appeals on the hospitalization requirement⁷ and because the other issues presented are ~~important~~ questions of federal law that should be settled ~~by this Court~~. We now affirm the judgment of the Court of Appeals invalidating the Missouri hospitalization requirement and upholding the parental consent requirement, but reverse the judgment holding unconstitutional the pathology report and the second-physician requirement.⁸

⁷See Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198 (CA6 1981), rev'd in part & aff'd in part, ___ U.S. ___ (1983). Many states require hospitalization for second-trimester abortions. See Brief for Americans United for Life as Amicus Curiae 4 n. 1 (listing ~~over~~ 23 states).

⁸The judgment as to the attorneys' fees issue is vacated and remanded in light of our decision in Hensley v. Eckerhart, ___ U.S. ___ (1983).

II

The Court today in City of Akron v. Akron Center for Reproductive Health, Inc., ___ U.S. ___ (1983), has stated fully the principles that govern judicial review of state statutes regulating abortion procedures, and that discussion need not be repeated here. With these principles in mind, we turn to the ~~state~~ statutes at issue here.

A

In City of Akron, we held invalid a hospitalization requirement for second-trimester abortions. The ordinance there required doctors to perform such abortions in general hospitals or facilities accredited by the Joint Commission on Accreditation of Hospitals or by the American Osteopathic Association. ___ U.S., at ___. The

^{Missouri} detailed requirements that a facility must meet ~~in Akron~~ to constitute a hospital, id., at ___, ^{appear to be} ~~are~~ similar to ^{by Akron, id., at ___.} ⁹ We therefore those required here, ~~and we~~ need not discuss in detail.

^{The term} ^{the requirements} ⁹Missouri does not define the term "hospital" in its statutory provisions regulating abortions, ~~and we can only assume that it has its common meaning of a general, acute-care facility.~~ Cf. Mo. Rev. Stat. §188.015(2) (defining "abortion facility" as a "clinic, a physician's

Footnote continued on next page.

We therefore must assume, as did the courts below,

Just - is our right

~~any differences in the two definitions.~~¹⁰ What is important for our purposes is that both laws require all second-trimester abortions to be performed in general, acute-care facilities.

In short, §188.025

Thus, the statute here does not require extended analysis, because it imposes burdens similar to those found to interfere with the woman's right to decide to

ASH GINA-POW abortion in City of Akron and is likewise not

RIDER A page 8 related to the State's compelling interest in

81-1255 and 81-1623 - Ashcroft v. Missouri

In short, Section 188.025 imposes on a woman's abortion decision requirements we found to be *unduly* burdensome in City of Akron. For the reasons stated in that case at some length, we agree with the Court of Appeals that this statute is invalid.

Note to Jim: The only purpose of the foregoing is to save a few lines, and to avoid using language that possibly may be viewed as different.

Jim - Attached is what
I commenced to dictate
as a Reader. I can - with
some editing - be a substitute

of Appeals that §188.025 cannot be upheld. for your
Superior B.

B

Missouri clearly views the life of a viable fetus as important and the protection of that life as a compelling interest. The State proscribes post-viability abortions except when necessary to preserve the health or lives of pregnant women. See Mo. Rev. Stat. §188.030.1. It also precludes the use of procedures fatal to the viable fetus unless alternative procedures pose a greater risk to the health of the mother. See id., §188.030.2.

It is clear that the cost of a second physician in attendance at the abortion of a viable fetus would be a direct burden upon the availability and delivery of such abortion services. After viability, however, the compelling interest of the State in potential human life is paramount, authorizing the proscription of abortions not necessary to maternal life and health. Because it has the power to preclude, it necessarily has much discretion in regulating the effectuation of abortions that it does allow. See Beal v. Doe, 432 U.S. 438, 445-446 (1977); Roe v. Wade, 410 U.S. 113, 165 (1973).

Reader A
to end
of Sub-part
B.

Plaintiffs argue that this second-physician requirement is an aberration of the traditional doctor-patient relationship, and is impractical, unnecessary, and burdensome. No other Missouri statute requires two doctors in attendance for any other medical or surgical procedure, including for childbirth or for the delivery of a premature infant. Requiring two doctors to be present strains medical resources and places an enormous financial burden directly upon the woman seeking to terminate the pregnancy.¹¹

¹¹Plaintiffs also argue that the statutory provision is overbroad, because no viable fetus can survive a D&E procedure. The District Court found D&E to be the "procedure of choice" after viability and that D&E "carries no chance of fetal survival." 483 F. Supp., at 694. We agree with the Court of Appeals that the District Court's finding of fact as to the chances of fetal survival is not clearly erroneous and that "[t]here is no error in the district court's factual conclusion that for some patients and physicians, D&E is the method of choice even after viability is possible." 655 F.2d, at 865. We disagree, however, with both courts' legal conclusion that the second-physician requirement is overbroad. The Court of Appeals did not reach the issue whether a State could require a second physician when there is some possibility the fetus may survive, see *id.*, at 866 & n.30, but nonetheless held §188.030.3 unconstitutional. As the Court of Appeals noted, however, the choice of D&E after viability is subject to the requirements of §188.030.2. See *id.*, at 865 & n. 28. Thus, D&E is not to be used when the fetus is viable and other methods are more likely to preserve its life but not pose a greater risk to the woman's life or health. Moreover, the experts in the District Court disagreed whether D&E should ever be used after viability. See 655 F.2d, at 865 & n. 29. It is arguable that the coincidence of situations in which there are both compelling medical reasons for an abortion after viability and the risk-based choice is D&E may be rare. In this case, however, the District Court's failure to

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think
disenters
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concerned
with this.

Plaintiffs' objections, however, fail to take into account the state's compelling interest in the life of the unborn and his uniquely vulnerable status given his mother's immediate needs. The abortion decision at this stage in the pregnancy is no longer "primarily" a medical decision between the mother and her physician, and "'the usual remedies, judicial and intra-professional,'" Roe, 410 U.S., at 166, that are available to protect the woman are not adequate, in Missouri's reasonable judgment, to protect the viable fetus. By definition, this statute applies to the fetus capable of independent life. The State is entitled to preserve and nurture that potential life and, when successful, actual life.

We believe that it is reasonable for the State to assume that the concern of the abortionist is not, generally, with the health and well-being of the fetus, but with the health and desires of his patient, the mother. The second doctor will provide immediate medical

make any findings that would permit us to judge the frequency of post-viability abortions by the D&E procedure renders plaintiffs' overbreadth challenge unpersuasive.

care for the child when born, and his presence may help the doctor performing the abortion to reduce the trauma inflicted upon the fetus. Moreover, certain procedures that are almost certainly fatal to the fetus may not be necessary to protect the health or life of the woman.¹² In those situations where fatal procedures are not mandated, it is necessary, if Missouri's compelling interest in the life of the fetus is to have any meaning, that the State have someone present to scrutinize the choice of the procedures used.

We recognize that a preservable human life may not often be possible as a result of an abortion, but we also know that abortions should not often be performed after viability, and then only for serious medical reasons.¹³

¹²At a stage late enough in the pregnancy so that viability is possible, the fetus is sufficiently large that it must be dismembered, and the skull must be crushed, to evacuate the uterus by the D&E procedure. See Planned Parenthood Association of Kansas City v. Ashcroft, 655 F.2d, at 865 & n. 29.

¹³There is no clearly expressed exception on the face of the statute for the performance of an abortion of a viable fetus without the second physician in attendance. It is possible that emergency circumstances might well warrant the same. The last clause of §188.030.3 qualifies at least the last part of the provision with the phrase "provided that it does not pose an increased risk to the life or health of the woman." It may be that this clause would not require a second doctor where it was simply not possible. See H.L. v. Matheson, 450 U.S. 398, 407 n.14

Footnote continued on next page.

The State legitimately, however, may choose to be prepared for those rare instances of live birth. We believe the second-doctor requirement "has both logical and biological justifications," id., at 163, and bears a very close relationship to the compelling State interest in protecting the lives of viable unborn children. Thus, in requiring a second physician to be in attendance at the abortion of a viable fetus, Missouri has acted precisely within the principles set forth in Roe and reaffirmed today in City of Akron.

C

The most vulnerable State regulations are those that apply to adult women during the first trimester, and the pathology provision on its face, by imposing a requirement of an examination of all abortion tissue by a certified

lfp/ss 02/01/83

Rider A, p. 13 (Ashcroft)

ASH13 SALLY-POW

Section 188.047, requiring a pathology report after every abortion, is such a regulation. The question is whether in view of the state interest, the requirement unduly burdens a woman's abortion decision. We think that it does not.

state, Missouri requires "[a]ll tissue surgically removed, with the exception of such tissue as tonsils, adenoids, hernial sacs, and prepuces, shall be examined by a pathologist, either on the premises or by arrangement outside the hospital." See 13 CSR 50-20.030 (1977).

Although Missouri apparently does not require pathology reports in all procedures, or in all surgical operations outside of a hospital, "not all distinction between abortion and other procedures is forbidden." Bellotti v.

Baird (Bellotti I), 428 U.S. 132, 149 (1976). Section

§188.047, on its face and in effect, ^{is} reasonably ^{related} encourages

^{to generally accepted} ~~good~~ medical standards and maternal health.¹⁴ ^{At the state} ~~Missouri~~

¹⁴The District Court noted that several medical experts testified that pathology should be done in every case of abortion. See 483 F. Supp., at 700 n. 49. Moreover, the standards for abortion services of the American College of Obstetricians and Gynecologists (ACOG) state that for all abortions:

Aspirated tissue should be examined to ensure the presence of villi or fetal parts prior to the patient's release from the facility. If villi or fetal parts are not identified with certainty, the tissue specimen must be sent for further pathologic examination, and the patient must be alerted to the possibility of an ectopic pregnancy.

ACOG, Standards for Obstetric-Gynecologic Services 54 (5th ed. 1982). The standards of the National Abortion Federation, whose members include the institutional plaintiffs in this case, itself provides:

All tissue must be examined grossly at the time of the abortion procedure by a physician or
Footnote continued on next page.

argues that the requirement of a pathological examination

is designed as a means
~~will help to ensure~~ the detection of fatal ectopic

pregnancies, uterine perforations, hydatridiform moles or

other precancerous growths, and a variety of other

problems that can only be discovered through a

pathological examination. *The state*
[^] Missouri may be justified in

singling out abortions because it is the one surgical

~~not~~ *frequently* ~~during the first trimester~~
 procedure [^] routinely performed outside of hospitals that

affects the reproductive capabilities of patients. There

unanswered
 are still some questions ~~to be answered about~~ ^{as to} the long-

range complications of abortions and their effect on

subsequent pregnancies, *It is thought that*
[^] ~~and~~ recorded pathology reports, in

concert with abortion complication reports, should provide

a statistical basis on which to study those

trained assistant and the results recorded in the chart. In the absence of visible fetal parts or placenta upon gross examination, obtained tissue may be examined under a low power microscope for the detection of villi. If this examination is inconclusive, the tissue should be sent to the nearest suitable pathology laboratory for microscopic examination.

National Abortion Federation, National Abortion Federation Standards 22 (1981). See Brief of the American Public Health Association as Amicus Curiae 29 n. 6 in Nos. 81-185, 81-746 & 81-1172 (supporting the National Abortion Federation standards for nonhospital abortion facilities as constituting "minimum standards").

*June:
 Any cited
 to Record,
 the Court
 opinion
 below, or
 the AG's
 brief to
 support this
 parade of
 "horribles"*

Citation?

complications.¹⁵

Plaintiffs contend that the additional cost of a tissue examination is unduly burdensome; that the requirement of an examination by a pathological cannot be justified under traditional medical cost/benefit analysis; that such an examination in every case is simply unnecessary and serves no rational purpose; and is duplicative of the gross examination the performing physician makes in every case. Indeed, plaintiffs note, §188.047 does not specify whether the pathologist must make a microscopic examination¹⁶ and does not impose any time limits within which the examination must be conducted, thereby obviating somewhat the reasons for the examination. We need not, however, balance the costs and benefits to determine whether §188.047 is constitutional. We agree with the District Court that "the Court has not been shown that the increase in cost per abortion

¹⁵Section 188.047 requires that a copy of the report be sent to the State's division of health.

¹⁶State regulations, however, state: "All reports shall contain the findings of a gross examination. If fetal parts or placenta are not identified, then an accompanying microscopic tissue report must also be filed with the Division of Health." 13 CSR 50-151.030.

procedure resulting from the required tissue examination will constitute an undue burden on a woman seeking an abortion." 483 F. Supp., at 699-700. The estimated cost of compliance for plaintiff Reproductive Health Services is \$19.40 per abortion performed.¹⁷

Regular pathology reports clearly are useful: Pathologists may discover something in a close case that is out of the ordinary and would not be noticed by the performing doctor. ~~In sum,~~

the pathology requirement, like the recordkeeping requirements upheld in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), "can be useful to the State's interest in protecting the health of its female citizens, and may be a resource that is relevant to decisions involving medical experience and judgment," id., at 81.¹⁸ ~~As an empirical judgment,~~ *In sum,* "we see no legally

¹⁷There was testimony in the District Court that the additional cost of pathology would range from \$10.00, for a gross examination, to \$40.00, in cases where multiple microscopic examinations of the tissue were necessary. See 483 F. Supp., at 700 n. 48.

¹⁸The ~~Danforth~~ Court also noted that "[t]he added requirements for confidentiality, with the sole exception for public health officers, and for retention for seven years, a period not unreasonable in length, assist and persuade us in our determination of the constitutional limits." 428 U.S., at 81. Missouri provides for identical safeguards. See Mo. Rev. Stat. §§188.055.2, 188.060.

Where does
the \$19.40
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The note
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support it

~~the~~ Accordingly, we reverse
the ~~the~~ Court of Appeals.

significant impact or consequence on the abortion decision or on the physician-patient relationship." See id., at

81. A pathology requirement may have some impact on a woman's limited resources, but we are not persuaded that it, standing alone, will decrease the availability of the procedure.¹⁹

D

It is ~~clear~~ ^{settled} that the State's special concern for ~~the parent-child relationship~~ ^{the parent-child relationship} minors will not support a State-granted parental veto over

a minor's abortion decision. See Danforth, 428 U.S., at

74-75.²⁰ Nor may the State itself retain the arbitrary

right of veto over a mature minor's abortion. A majority

of the Justices of this Court, however, has indicated ~~that~~

¹⁹As in Danforth, we emphasize that, although \$188.047 is not constitutionally offensive in itself, it "perhaps approach[es] impermissible limits." 428 U.S., at 52. Small burdens in cost, even to promote maternal health, may not be "abused or overdone," id. Obviously, even a few additional small requirements, even when they individually promote good medical practices, eventually will burden the abortion decision to the point that women will be deterred from having an otherwise medically desirable abortion.

²⁰This Court in Danforth held unconstitutional Missouri's parental consent requirement for all unmarried minors under the age of 18. See 428 U.S., at 72, 75. In response to our decision, Missouri enacted the section challenged here. This new statute became effective shortly before our decision in Bellotti v. Baird, 443 U.S. 622 (1979).

Jim - this
is an apology
& will
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Dissenters
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pleased
by this
type of
"sop".

It would approve ^{al or} a narrowly drafted statute allowing minors judicially determined to be mature to make their own abortion decisions, while requiring immature minors to obtain a consent-substitute, such as parental permission or judicial authorization predicated upon a determination of the minor's best interests.²¹ See Bellotti v. Baird (Bellotti II), 443 U.S. 622, 643-644, 647-648 (1979)

²¹The plurality in Bellotti v. Baird, 443 U.S. 622 (1979), also require that the alternative to parental consent must "assure" that the resolution of this issue "will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." Id., at 644. Confidentiality is assured by the statutory requirement that allows the minor to use her initials on the petition. See Mo. Stat. §188.028.2(1). As to expedition of appeals, §188.028.2(6) provides in relevant part:

The notice of intent to appeal shall be given within twenty-four hours from the date of issuance of the order. The record on appeal shall be completed and the appeal shall be perfected within five days from the filing of notice to appeal. Because time may be of the essence regarding the performance of the abortion, the supreme court of this state shall, by court rule, provide for expedited appellate review of cases appealed under this section.

We believe the section provides the framework for a constitutionally sufficient means of expediting judicial proceedings. Immediately after the effective date of this statutory enactment, the District Court enjoined enforcement: No unemancipated pregnant minor has been required to comply with this statutory section before an abortion is performed. Thus, to this point in time, there has been no need for the state Supreme Court to promulgate rules concerning appellate review. There is no reason to believe that Missouri will not expedite any appeal consistent with the mandate in our prior opinions, and we believe that, upon the affirmance by this Court of the judgment of the Court of Appeals concerning the constitutionality of this section, the Supreme Court of Missouri shall proceed with diligence to enact relevant rules.

(plurality opinion for four Justices); id., at 656-657 (WHITE, J., dissenting) (expressing approval of absolute parental consent requirement).²² The reasons for, and arguments against, these rules have been thoroughly explored in prior opinions, and we need not discuss them again in detail.

cite prior cases

The issue here is one purely of statutory construction.²³ The Missouri statute, in relevant part, provides:

(4) In the decree, the court shall for good cause:

²²Cf. H.L. v. Matheson, 450 U.S. 398, 407 & n.14, 411 (1981) (upholding a parental notification requirement but not extending holding to mature or emancipated minors or to immature minors showing such notification detrimental to their best interests). The lower courts found that §188.028's notice requirement was unconstitutional. See 655 F.2d, at 873; 483 F. Supp., at 679. Thus, in the posture in which it appears before this Court for review, §188.028 contains no requirement for parental notification.

Why? {

²³The Missouri statute also exempts "emancipated" women under the age of 18 both from the requirement of parental consent and from the alternative requirement of a judicial proceeding. The word "emancipated" in this context is not void for vagueness. Although the question whether a minor is emancipated turns upon the peculiar facts and circumstances of each individual case, the Missouri courts have declared general legal rules to guide that determination, and the term is one of general usage and understanding in the Missouri common law. See Black v. Cole, 626 S.W.2d 397, 398 (Mo. App. 1981) (quoting 67 C.J.S. Parent and Child §88, at 811 (1950 ed.)); In re the Marriage of Heddy, 535 S.W.2d 276, 279 (Mo. App. 1976) (same); Wurth v. Wurth, 313 S.W.2d 161, 164 (Mo. App. 1958). It should also be noted that, before a person may be successfully prosecuted for a violation of §188.028, the State must show that defendant "knowingly" violated the section.

(a) Grant the petition for majority rights for the purpose of consenting to the abortion; or

(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

(c) Deny the petition, setting forth the grounds on which the petition is denied[.]

On its face, §188.028.2(4) authorizes juvenile courts to do (a), (b), or (c). The Court of Appeals concluded that a denial of the petition permitted in subsection (c) "would initially require the court to find that the minor was not emancipated and was not mature enough to make her own decision and that an abortion was not in her best interests." 655 F.2d, at 858. Plaintiffs contend that this interpretation is unreasonable. We ^{do not} ~~disagree~~.

Where fairly possible, courts should construe a statute so as to avoid a danger of unconstitutionality. The Court of Appeals was cognizant of the fact that if the statute provides discretion to deny permission to a minor for any "good cause," it would violate the principles set forth in Danforth and Bellotti II. See 655 F.2d, at 858. The court, however, reached the logical conclusion that "findings and the ultimate denial of the petition must be

supported by a showing of 'good cause.'" Ibid. Before exercising any option, the juvenile court must receive evidence on "the emotional development, maturity, intellect and understanding of the minor." The Court of Appeals rationally found that a court could not deny a petition, "for good cause," unless it first found--after having received the required evidence--that the minor was not mature enough to make her own decision.²⁴ Clearly, after Bellotti II, there would be no legally sufficient reason to deny a petition if evidence demonstrated that a minor was sufficiently mature to make her own decision. Thus, we believe the Court of Appeals correctly

²⁴Missouri argues that, under state law, "for good cause" is "'a cause or reason sufficient in law.'" State v. Davis, 469 S.W.2d 1, 5 (Mo. 1971) (quoting Webster's Third New International Dictionary 978 (1976)). The Missouri courts ~~frankly admit~~, however, in a variety of contexts, that the commonly used legal phrase "for good cause" "is not susceptible of precise definition," Vaughn v. Ripley, 416 S.W.2d 226, 228 (Mo. App. 1967), and that "'good cause' depends upon the circumstances of the individual case," Wilson v. Morris, 369 S.W.2d 402, 407 (Mo. 1963). A finding of its existence "lies largely in the discretion of the ... court to which the decision is committed," ibid., and the phrase "connotes a remedial purpose in a matter addressed primarily to the conscience of the court," Corzine v. Scott, 505 S.W.2d 162, 164 (Mo. App. 1974). This discretion, however, no doubt is limited to choices that are "a cause or reason sufficient in law." We are unwilling to assume that the discretion given to the Missouri courts ~~by the state legislature~~ includes the privilege of ignoring this Court's ~~construction of the~~ ~~supreme law governing fundamental rights.~~

*constitutional
decision.*

interpreted the statute, and as interpreted, §188.028 avoids the infirmities of the state statute reviewed in Bellotti II.²⁵

III

The judgment of the Court of Appeals, insofar as it invalidated Missouri's second-trimester hospitalization requirement and upheld the State's parental consent provision, is affirmed. The judgment invalidating the requirement of a pathology report for all abortions and the requirement that a second physician attend the abortion of any viable fetus is reversed. We vacate the judgment upholding an award of attorneys' fees for all hours expended by plaintiffs' attorneys and remand for proceedings consistent with Hensley v. Eckerhart, ____ U.S.

²⁵Plaintiffs also argue that, in light of the clear ambiguity of §188.028.2(4), as evidenced by the differing interpretations placed upon it by reasonable judicial minds, perhaps the appropriate course of judicial restraint is abstention. This Court has found such an approach appropriate. See H.L. v. Matheson, 450 U.S. 398, 407 (1981); Bellotti I, 428 U.S., at 146-147. Plaintiffs did not, however, argue in the Court of Appeals that the court should abstain, and Missouri has no certification procedure whereby this Court can refer questions of state statutory construction to the state supreme court, see 655 F.2d, at 861 n. 20, which procedure "greatly simplifie[d]" our analysis in Bellotti I, 428 U.S., at 151. Moreover, where, as here, a statute is susceptible to a fair construction that obviates the need to have the state courts render the saving construction, there is no need for the federal courts to abstain.

It is

so ordered.

Jim - I'd like ~~as~~ a prefatory
sentence generally as follows:

L.F.P.
2/5/83

This case, like City of Akron v
Akron Center, et al — U.S. —, ante at —,
presents questions as to the validity of
regulations by the State of Mo.
~~regulations~~ of the performance of abortions.
job 02/02/83

SECOND DRAFT: Planned Parenthood Association v. Ashcroft,

Nos. 81-1255, 81-1623

JUSTICE POWELL delivered the opinion of the Court:

On June 29, 1979, the Governor of Missouri signed
into law comprehensive regulations of abortions. The next
day, plaintiffs--Planned Parenthood of Kansas City,
Missouri, Inc., two doctors that perform abortions, and an
abortion clinic (the "plaintiffs")--filed a complaint in the
District Court for the Western District of Missouri
challenging, as unconstitutional, several sections of the
new statutes. Named as defendants were the Attorney
General of Missouri and the prosecuting attorney of
Jackson County, Missouri, who was sued both in that
capacity and as representative of the class of all
prosecuting attorneys of the various counties in Missouri.
See 483 F. Supp. 679, 683 (WD Mo. 1980). The sections
relevant here include Mo. Rev. Stat. §188.025 (Supp.
1982), providing that abortions after twelve-weeks
of pregnancy must be performed in a hospital;¹ §188.047,

Footnote(s) 1 will appear on following pages.

requiring a pathology report after every abortion;²
 §188.030, requiring the presence of a second physician
 after viability;³ and §188.028, requiring minors to secure
 parental or judicial consent.⁴

¹Mo. Rev. Stat. §188.025 provides: "Every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital."

²Mo. Rev. Stat. §188.047 states:

A representative sample of tissue removed at the time of abortion shall be submitted to a board eligible or certified pathologist, who shall file a copy of the tissue report with the state division of health, and who shall provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced and the pathologist's report shall be made a part of the patient's permanent record.

³Mo. Rev. Stat. §188.030.3 provides:

An abortion of a viable unborn child shall be performed or induced only where there is in attendance a physician other than the physician performing or adducing the abortion who shall take control of and provide immediate medical care for a child born as a result of the abortion. During the performance of the abortion, the physician performing it, and subsequent to the abortion, the physician required by this section to be in attendance, shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman.

⁴Mo. Rev. Stat. §188.028 reads:

1. No person shall knowingly perform an abortion upon a pregnant woman under the age of eighteen years unless:

(1) The attending physician has secured the informed written consent of the minor and one parent or guardian; or

(2) The minor is emancipated and the attending physician has received the informed

Footnote continued on next page.

4 After a full trial, at which a number of expert

written consent of the minor; or

(3) The minor has been granted the right to self-consent to the abortion by court order pursuant to subsection 2 of this section, and the attending physician has received the informed written consent of the minor; or

(4) The minor has been granted consent to the abortion by court order, and the court has given its informed written consent in accordance with subsection 2 of this section, and the minor is having the abortion willingly, in compliance with subsection 3 of this section.

2. The right of a minor to self-consent to an abortion under subdivision (3) of subsection 1 of this section or court consent under subdivision (4) of subsection 1 of this section may be granted by a court pursuant to the following procedures:

(1) The minor or next friend shall make an application to the juvenile court which shall assist the minor or next friend in preparing the petition and notices required pursuant to this section. The minor or the next friend of the minor shall thereafter file a petition setting forth the initials of the minor; the age of the minor; the names and addresses of each parent, guardian, or, if the minor's parents are deceased and no guardian has been appointed, any other person standing in loco parentis of the minor; that the minor has been fully informed of the risks and consequences of the abortion; that the minor is of sound mind and has sufficient intellectual capacity to consent to the abortion; that, if the court does not grant the minor majority rights for the purpose of consent to the abortion, the court should find that the abortion is in the best interest of the minor and give judicial consent to the abortion; that the court should appoint a guardian ad litem of the child; and if the minor does not have private counsel, that the court should appoint counsel. The petition shall be signed by the minor or the next friend;

....

(3) A hearing on the merits of the petition, to be held on the record, shall be held as soon as possible, within five days of the filing of the petition. ... At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect and

Footnote continued on next page.

witnesses testified, the District Court invalidated each of these sections, except ~~§188.047~~, the pathology requirement.⁵ The Court of Appeals for the Eighth Circuit reversed the District Court's judgment with respect to §188.028, thereby upholding the requirement that a minor secure parental or judicial consent to an abortion. It

understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other evidence that the court may find useful in determining whether the minor should be granted majority rights for the purpose of consenting to the abortion or whether the abortion is in the best interests of the minor;

(4) In the decree, the court shall for good cause:

(a) Grant the petition for majority rights for the purpose of consenting to the abortion; or

(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

(c) Deny the petition, setting forth the grounds on which the petition is denied;

....

3. If a minor desires an abortion, then she shall be orally informed of and, if possible, sign the written consent required by section 188.039 in the same manner as an adult person. No abortion shall be performed on any minor against her will, except that an abortion may be performed against the will of a minor pursuant to a court order described in subdivision (4) of subsection 1 of this section that the abortion is necessary to preserve the life of the minor.

⁵See 483 F. Supp. 679, 699-701. The District Court also awarded attorneys' fees for ~~every~~ ^{all} hour claimed by the plaintiff's attorneys.

also held that the District Court erred in sustaining \$188.047, the pathology requirement. The District Court's judgment with ~~regard~~^{respect} to the second-physician requirement was affirmed, and the case was remanded for further proceedings and findings relating to the second-trimester hospitalization requirement. 655 F.2d 848, 872-873 (1981). On remand, the District Court affirmed its holding that the second-trimester hospitalization requirement was unconstitutional. The Court of Appeals affirmed this judgment. 664 F.2d 687, 691.

We granted certiorari, ___ U.S. ___ (1982), to resolve the conflict in the Courts of Appeals on the hospitalization requirement⁶ and because the other issues presented are questions of federal law that should be settled. We now affirm the judgment of the Court of Appeals invalidating the Missouri hospitalization requirement and upholding the parental consent

⁶See Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198 (CA6 1981), rev'd in part & aff'd in part, ___ U.S. ___ (1983). Many states require hospitalization for second-trimester abortions. See Brief for Americans United for Life as Amicus Curiae 4 n. 1 (listing 23 states).

requirement, but reverse the judgment holding unconstitutional the pathology report and the second-physician requirements.⁷

II

The Court today in City of Akron v. Akron Center for Reproductive Health, Inc., ___ U.S. ___ (1983), has stated fully the principles that govern judicial review of state statutes regulating abortion procedures, and ~~that~~ ^{these} ~~discussion~~ need not be repeated here. With these principles in mind, we turn to the statutes at issue, ~~here~~ ^{here}.

II

In City of Akron, we held invalid a hospitalization requirement for second-trimester abortions. The ordinance there required ~~doctors~~ ^{physicians} to perform such abortions in general hospitals or facilities accredited by the Joint Commission on Accreditation of Hospitals or by the American Osteopathic Association. ___ U.S., at ___. The

⁷The petition also raises the issue whether an award of attorneys' fees, made pursuant to 42 U.S.C. §1988, should be proportioned to reflect accurately the extent to which plaintiffs prevailed. See n. 5, supra. The judgment as to this issue is vacated and remanded in light of our decision in Hensley v. Eckerhart, ___ U.S. (1983).

Missouri hospitalization

requirements that a facility must meet to constitute a

are
hospital appear to be similar to those required by Akron.⁸

We therefore need not discuss *them* the requirements in detail.⁹

The central critical point

What is important for our purposes is that both laws

require all second-trimester abortions to be performed in

general, acute-care facilities.

regulations

In short, §188.025 imposes on a woman's abortion

that are not "reasonably related" to the
decision requirements we found to be unduly burdensome in
preservation and protection of maternal
health". Roe v Wade 410 U.S. 113 (1973).

⁸Missouri does not define the term "hospital" in its statutory provisions regulating abortions. We therefore must assume, as did the courts below, see 483 F. Supp., at 686 n. 10; 664 F.2d, at 689-690 & nn. 3, 5 & 6, that the term has its common meaning of a general, acute-care facility. Cf. Mo. Rev. Stat. §188.015(2) (defining "abortion facility" as a "clinic, a physician's office, or any other place or facility in which abortions are performed other than a hospital"). Section 197.020, part of Missouri's hospital licensing laws, reads:

Hospital means a place devoted primarily to the maintenance and operation of facilities for the diagnosis, treatment or care for not less than twenty-four hours in any week of three or more abnormal physical conditions; or a place devoted primarily to provide for not less than twenty-four hours in any week medical ... care for three or more nonrelated individuals.

Cf. Mo. Rev. Stat. §197.200 (defining "ambulatory surgical center" to include facilities "with an organized medical staff of physicians" and "with continuous physician services and registered professional nursing services whenever a patient is in the facility"); 13 CSR 50-30.010(1)(A) (1976) (same). The regulations for the Department of Social Services, 13 CSR 50-20.010 to -20.030 (1977), establishes standards for the construction, physical facilities, and administration of hospitals--not unlike those set by the Joint Commission on Accreditation of Hospitals. See City of Akron, ___ U.S., at ___.

⁹The parties have drawn no factual distinction between the State's requirements of a "hospital" and the City's requirements in City of Akron.

~~Therefore,~~ *Therefore,*
~~City of Akron.~~ *City of Akron we*

For the reasons state in ~~that case at some~~

~~length, we~~ *length,* agree with the Court of Appeals that this

~~statute is invalid.~~

III B

In Roe v. Wade, 410 U.S. 113 (1973), the Court recognized as compelling the interest of a State in the life of a viable fetus: "[T]he State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." Id., at 164-165. Several of Missouri's statutes undertake this regulation. Post-viability abortions are proscribed except when necessary to preserve the life or the health of the mother. See Mo. Rev. Stat. §188.030.1. The State also forbids the use of abortion procedures fatal to the viable fetus unless alternative procedures pose a greater risk to the health of the mother. See id., §188.030.2. *in this case*
 The statute at issue ~~here,~~ *here,* §188.030.3, requires the attendance of a second physician at the abortion of a viable fetus. The ~~lower~~ courts below both agreed that

this requirement is invalid.

The plaintiffs, respondents here on this issue, urge affirmance, advancing a number of arguments. They say that ^{the} ~~this~~ second-physician requirement is an aberration of the traditional doctor-patient relationship, and is impractical, unnecessary, burdensome, and costly. No other Missouri statute requires two physicians in attendance for any other medical or surgical procedure, including childbirth or delivery of a premature infant. These are not insubstantial arguments, and we view the issue as a close one.

Our cases repeatedly have held, however, that the State's interest in the potential life of a fetus is compelling. It therefore has substantial discretion in the regulations it may adopt with respect to abortions that are permissible after viability. See Beal v. Dole, 432 U.S. 438, 445-446 (1977); Roe, 410 U.S., at 165. The fetus uniquely vulnerable at this stage, and as recognized in Roe, the abortion ^{decision} no longer is solely one to be made between the mother and her physician. See id., at 166.

Section 188.030.3 provides that the second physician

"shall take control of and provide immediate medical care for a child born as a result of the abortion." Moreover, the statute requires that the physician "be in attendance" during the abortion and "take all reasonable steps in keeping with good medical practice ... to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman." See n. 3, supra. It is clear from these provisions that Missouri has made a judgment that there are some physicians primarily interested in performing abortions when desired by the woman, and that there may be tension between this interest and the state interest in protecting the potential life of an unborn child. For example, the District Court found, and the record supports its finding, that the dilatation-and-evacuation procedure (D&E) of abortion "carries no chance of fetal survival." 483 F. Supp., at 694.¹⁰ The presence of a second

¹⁰At a stage late enough in the pregnancy so that viability is possible, the fetus is sufficiently large that it must be dismembered, and the skull must be crushed, to evacuate the uterus by the D&E procedure. See Planned Parenthood Association of Kansas City v. Ashcroft, 655 F.2d, at 865 & n. 29.

physician could be a safeguard against the improper use of this procedure.

Perhaps the most persuasive argument relied on by plaintiffs is that the presence of a second physician is not required for any other medical or surgical procedure, including childbirth or delivery of a premature infant. The answer given by the State to this argument, in effect, is that abortions are unique. In other situations, the patient's primary interest is in preserving her own health. Exceptions to this, of course, are childbirth and where an infant must be delivered prematurely. Yet, in these situations, the mother ardently desires that ^{the child} it be born safely and ⁱⁿ healthy. She also naturally hopes to survive herself in good health. Thus, there rarely if ever is a conflict of interests between the principal actors.

The situation is different with respect to the woman who on her own initiative seeks an abortion. This is a surgical procedure she may desire for no health reason and solely to avoid childbirth. To be sure, if told that the fetus is or may be viable, many mothers who otherwise

Jim - I "reviewed" up the H below & even if you can read it now, I do not think I understand what you were addressing.

would like to have an abortion may determine not to do so.

But ^{this} it does not alter the decision of all mothers and the

State's assumption that some physicians will accord

primacy to the wishes of the woman cannot be viewed as

unreasonable. After all, the State's interest is

compelling and this necessarily supports the right of a

State to impose some burdens on the woman's choice

following viability of the fetus.

the protection
both the health
of the mother
and preserving
the life of
the fetus.

~~The second doctor will provide immediate medical care~~

~~for the child when born, and his presence may help the~~

~~doctor performing the abortion to reduce the trauma~~

~~inflicted upon the fetus. Moreover, certain procedures~~

~~that are almost certainly fatal to the fetus may not be~~

~~necessary to protect the health or life of the woman or~~

~~may have to be abandoned when complications arise. We~~

~~recognize that a preservable human life may not often be~~

~~possible as a result of an abortion,¹¹ but we also know~~

¹¹See generally ACOG Technical Bulletin No. 56, supra n. 11, at 4 (live-birth rate as high as 7% for intrauterine instillation of uterotonic agents); Grimes & Cates, The Brief for Hypertonic Saline, 15 Contemporary Ob/Gyn 29, 38 (1980); Stroh & Hinman, Reported Live Births Following Induced Abortion: Two and One-Half Years' Experience in Upstate New York, 126 Am. J. Obstet. Gynecol. 83 (1976) (26 following saline induced-abortions;

Footnote continued on next page.

It is true that
medical literature indicates that third
trimester abortions do not even preserving
the potential life of a viable fetus during
a third trimester abortion is often is
not possible.¹¹

Jim -
The
relevance
of this
sentence in
this
paragraph
is not
clear. It
is possible
I do not
understand
the entire H.

live birth is possible.

that abortions should not often be performed after viability, and then only for serious medical reasons.¹²

nevertheless
The State ~~legitimately, however,~~ may choose to be prepared *provide safeguards for instances when* for those rare instances of live birth. We believe the

second-doctor requirement "has both logical and biological justifications," *id.*, at 163, and bears a reasonable relationship to the State interest in protecting the lives of viable unborn children. We reverse the Court of Appeals on this issue.

IV

The most vulnerable State regulations are those that apply to adult women during the first trimester. Section 188.047, requiring a pathology report after every

9 following hysterotomy; 1 following oxytocin-induced abortion);

¹²There is no clearly expressed exception on the face of the statute for the performance of an abortion of a viable fetus without the second physician in attendance. *It is possible that emergency circumstances might well warrant the same.* The last clause of §188.030.3 qualifies at least the last part of the provision with the phrase "provided that it does not pose an increased risk to the life or health of the woman." *It may be that this clause would not require a second doctor where it was simply not possible.* See *H.L. v. Matheson*, 450 U.S. 398, 407 n.14 (1981) (rejecting argument that statute might apply to individuals with emergency health care needs). *In any case, we need not invalidate all otherwise constitutional laws simply because they may, if applied in certain circumstances, raise constitutional issues.*

These are emergency situations where the health of the mother may be endangered by delay.

does
reasonably could be construed to apply to such a situation.

abortion, is such a regulation. The question is whether

~~in view of~~ the requirement burdens a woman's abortion decision. We think it does not.

In its regulation of hospital services within the state, Missouri requires ^{that} "[a]ll tissue surgically removed, with the exception of such tissue as tonsils, adenoids, hernial sacs, and prepuces, shall be examined by a pathologist, either on the premises or by arrangement outside the hospital." See 13 CSR 50-20.030(3)(A).7 (1977). Although Missouri apparently does not require pathology reports in all procedures, or in all surgical operations outside of a hospital, "not all distinction between abortion and other procedures is forbidden." Bellotti v. Baird (Bellotti I), 428 U.S. 132, 149 (1976). Section §188.047, on its face and in effect, is reasonably related to generally accepted medical standards and maternal health.¹³

¹³The District Court noted that several medical experts testified that pathology should be done in every case of abortion. See 483 F. Supp., at 700 n. 49. Moreover, the standards for abortion services of the American College of Obstetricians and Gynecologists (ACOG) state that for all surgical services performed on an ambulatory outpatient basis:

As the Court of Appeals recognized, pathology examinations are "clearly" "useful and even necessary in some cases," because "abnormalities in the tissue may warn of serious, possibly fatal disorders." 655 F.2d, at 870. The State may be justified in singling out abortions because it is the one surgical procedure frequently performed outside of hospitals that affects the reproductive capabilities of patients. There are still

Tissue removed should be submitted to a pathologist for an examination. ... In the situation of elective termination of pregnancy, the attending physician should record a description of the gross products. Unless definite embryonic or fetal parts can be identified, the products of elective interruptions of pregnancy must be submitted to a pathologist for gross and microscopic examination.

ACOG, Standards for Obstetric-Gynecologic Services 52 (5th ed. 1982) (emphasis added). The standards of the National Abortion Federation, whose members include the institutional plaintiffs in this case, itself provides:

Jim: need not emphasize unless in original

{ All tissue must be examined grossly at the time of the abortion procedure by a physician or trained assistant and the results recorded in the chart. In the absence of visible fetal parts or placenta upon gross examination, obtained tissue may be examined under a low power microscope for the detection of villi. If this examination is inconclusive, the tissue should be sent to the nearest suitable pathology laboratory for microscopic examination. (emphasis added?)

National Abortion Federation, National Abortion Federation Standards 22 (1981). See Brief of the American Public Health Association as Amicus Curiae 29 n. 6 in Nos. 81-185, 81-746 & 81-1172 (supporting the National Abortion Federation standards for nonhospital abortion facilities as constituting "minimum standards").

some unanswered questions about the long-range complications of abortions and their effect on subsequent pregnancies. See App. 72-73 (testimony of Dr. Willard Cates). It is thought that recorded pathology reports, in concert with abortion complication reports, should provide a statistical basis on which to study those complications.¹⁴

Plaintiffs contend that the additional cost of a tissue examination is ~~unduly~~ⁱ burdensome; that the requirement of an examination by a pathological cannot be justified under traditional medical cost/benefit analysis; that such an examination in every case is simply unnecessary and serves no rational purpose; and is duplicative of the gross examination the performing physician makes in every case. Indeed, plaintiffs note, §188.047 does not specify whether the pathologist must make a microscopic examination¹⁵ and does not impose any

¹⁴Section 188.047 requires that a copy of the report be sent to the State's division of health.

¹⁵State regulations, however, state: "All reports shall contain the findings of a gross examination. If fetal parts or placenta are not identified, then an accompanying microscopic tissue report must also be filed with the Division of Health." 13 CSR 50-151.030(1).

time limits within which the examination must be conducted, thereby obviating somewhat the reasons for the examination. ⁷ We need not, however, balance the costs and benefits to determine whether \$188.047 is constitutional.

We agree with the District Court that "the Court has not been shown that the increase in cost per abortion procedure resulting from the required tissue examination will constitute an undue burden on a woman seeking an abortion." 483 F. Supp., at 699-700. The estimated cost of compliance for plaintiff Reproductive Health Services is \$19.40 per abortion performed.¹⁶ The pathology requirement, like the Missouri record-keeping requirements upheld in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), "can be useful to the State's interest in protecting the health of its female citizens, and may be a resource that is relevant to decisions involving medical experience and judgment," id.,

¹⁶See 483 F. Supp., at 700 n. 48. There was also testimony in the District Court that the additional cost of pathology would range from \$10.00, for a gross examination, to \$40.00, in cases where multiple microscopic examinations of the tissue were necessary. See ibid.

on
Jim. My initial reading of Part V below, I
thought it was about right. A second reading
raises doubt. Those who read my opinion
will not know as much as we do about the
no provision. I think this Part needs
a description of the statutory provision, including
in the text much of Note 19, & a clearer
at 81.¹⁷ In sum, "we see no legally significant impact or

consequence on the abortion decision or on the physician-
patient relationship." See id., at 81. Accordingly, we
reverse the judgment of the Court of Appeals.

V 80

It is settled that the State's special concern for
the parent-child relationship will not support a State-
granted parental veto over a minor's abortion decision.
See Danforth, 428 U.S., at 74-75.¹⁸ Nor may the State
itself retain the arbitrary right of veto over a mature
minor's abortion. A majority of the Justices of this
Court, however, ~~has~~ ^{have} indicated approval of a narrowly
drafted statute allowing minors judicially determined to

¹⁷The Danforth Court also noted that "[t]he added requirements for confidentiality, with the sole exception for public health officers, and for retention for seven years, a period not unreasonable in length, assist and persuade us in our determination of the constitutional limits." 428 U.S., at 81. Missouri extends the identical safeguards found reassuring in Danforth to the pathology reports at issue here. See Mo. Rev. Stat. §§188.055.2, 188.060.

¹⁸This Court in Danforth held unconstitutional Missouri's parental consent requirement for all unmarried minors under the age of 18. See 428 U.S., at 72, 75. In response to our decision, Missouri enacted the section challenged here. This new statute became effective shortly before our decision in Bellotti v. Baird, 443 U.S. 622 (1979).

Part V
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identification
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before us.
Also it would
help to
compare
this case
with Glover
on this issue

be mature to make their own abortion decisions, while requiring immature minors to obtain a consent-substitute, such as parental permission or judicial authorization predicated upon a determination of the minor's best interests.¹⁹ See Bellotti v. Baird (Bellotti II), 443 U.S. 622, 643-644, 647-648 (1979) (plurality opinion for four Justices); id., at 656-657 (WHITE, J., dissenting) (expressing approval of absolute parental consent

¹⁹The plurality in Bellotti v. Baird, 443 U.S. 622 (1979), also require that the alternative to parental consent must "assure" that the resolution of this issue "will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." Id., at 644. Confidentiality is assured by the statutory requirement that allows the minor to use her initials on the petition. See Mo. Stat. §188.028.2(1). As to expedition of appeals, §188.028.2(6) provides in relevant part:

The notice of intent to appeal shall be given within twenty-four hours from the date of issuance of the order. The record on appeal shall be completed and the appeal shall be perfected within five days from the filing of notice to appeal. Because time may be of the essence regarding the performance of the abortion, the supreme court of this state shall, by court rule, provide for expedited appellate review of cases appealed under this section.

✓ We believe the ¹⁹section provides the framework for a constitutionally sufficient means of expediting judicial proceedings. Immediately after the effective date of this statutory enactment, the District Court enjoined enforcement: No unemancipated pregnant minor has been required to comply with this ~~statutory~~ section before an abortion is performed. Thus, to this point in time, there has been no need for the state Supreme Court to promulgate rules concerning appellate review. There is no reason to believe that Missouri will not expedite any appeal consistent with the mandate in our prior opinions.

requirement).²⁰ The reasons for, and arguments against, these rules have been thoroughly explored in prior opinions, see, e. g., H.L. v. Matheson, 450 U.S. 398, 434-454 (1981) (MARSHALL, J., dissenting); Bellotti II, 443 U.S., at 633-651, and we need not discuss them again in detail.

The issue here is one purely of statutory construction.²¹ The Missouri statute, ^{§ 188.028.2 (4)} in relevant part, provides:

(4) In the decree, the court shall for good

²⁰Cf. H.L. v. Matheson, 450 U.S. 398, 407 & n.14, 411 (1981) (upholding a parental notification requirement but not extending the holding to mature or emancipated minors or to immature minors showing such notification detrimental to their best interests). The lower courts found that §188.028's notice requirement was unconstitutional. See 655 F.2d, at 873; 483 F. Supp., at 679. The State has not sought review of that judgment here. Thus, in the posture in which it appears before this Court for review, §188.028 contains no requirement for parental notification.

²¹The Missouri statute also exempts "emancipated" women under the age of 18 both from the requirement of parental consent and from the alternative requirement of a judicial proceeding. The word "emancipated" in this context is not void for vagueness. Although the question whether a minor is emancipated turns upon the peculiar facts and circumstances of each individual case, the Missouri courts have declared general legal rules to guide that determination, and the term is one of general usage and understanding in the Missouri common law. See Black v. Cole, 626 S.W.2d 397, 398 (Mo. Ct. App. 1981) (quoting 67 C.J.S. Parent and Child §88, at 811 (1950 ed.)); In re the Marriage of Heddy, 535 S.W.2d 276, 279 (Mo. Ct. App. 1976) (same); Wurth v. Wurth, 313 S.W.2d 161, 164 (Mo. Ct. App. 1958), rev'd on other grounds, 322 S.W.2d 745 (Mo. 1959). It should also be noted that, before a person may be successfully prosecuted for a violation of §188.028, the State must show that defendant "knowingly" violated the section.

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*In all of the discussion
of "good cause" necessary?
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21.

cause:

(a) Grant the petition for majority rights for the purpose of consenting to the abortion; or

(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

(c) Deny the petition, setting forth the grounds on which the petition is denied[.]

On its face, §188.028.2(4) authorizes juvenile courts to do (a), (b), or (c). The Court of Appeals concluded that a denial of the petition permitted in subsection (c) "would initially require the court to find that the minor was not emancipated and was not mature enough to make her own decision and that an abortion was not in her best interests." 655 F.2d, at 858. Plaintiffs contend that this interpretation is unreasonable. We do not agree.

Where fairly possible, courts should construe a statute ~~so as~~ to avoid a danger of unconstitutionality. The Court of Appeals was ^{aware} ~~cognizant of the fact~~ that if the statute provides discretion to deny permission to a minor for any "good cause," it would violate the principles set forth in Danforth and Bellotti II. See 655 F.2d, at 858. The court, however, reached the logical conclusion that "findings and the ultimate denial of the petition must be

supported by a showing of 'good cause.'" Ibid. Before exercising any option, the juvenile court must receive evidence on "the emotional development, maturity, intellect and understanding of the minor." The Court of Appeals rationally found that a court could not deny a petition, "for good cause," unless it first found--after having received the required evidence--that the minor was not mature enough to make her own decision.²² Clearly,

See at ~~after Bellotti II, there would be no legally sufficient reason to deny a petition if evidence demonstrated that a minor was sufficiently mature to make her own decision.~~

We conclude that Thus, ~~we believe~~ the Court of Appeals correctly interpreted the statute, and as interpreted, §188.028

²²Missouri argues that, under state law, "for good cause" is "'a cause or reason sufficient in law.'" State v. Davis, 469 S.W.2d 1, 5 (Mo. 1971) (quoting Webster's Third New International Dictionary 978 (1976)). The Missouri courts concede, however, in a variety of contexts, that the commonly used legal phrase "for good cause" "is not susceptible of precise definition," Vaughn v. Ripley, 416 S.W.2d 226, 228 (Mo. Ct. App. 1967), and that "'good cause' depends upon the circumstances of the individual case," Wilson v. Morris, 369 S.W.2d 402, 407 (Mo. 1963). A finding of its existence "lies largely in the discretion of the ... court to which the decision is committed," ibid., and the phrase "connotes a remedial purpose in a matter addressed primarily to the conscience of the court," Corzine v. Scott, 505 S.W.2d 162, 164 (Mo. Ct. App. 1974). [This discretion, however, no doubt is limited to choices that are "a cause or reason sufficient in law." We are unwilling to assume that the discretion given to the Missouri courts includes the privilege of ignoring this Court's constitutional decisions.]

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avoids the infirmities of the state statute reviewed in

Bellotti II.²³

VI ~~III~~

The judgment of the Court of Appeals, insofar as it invalidated Missouri's second-trimester hospitalization requirement and upheld the State's parental consent provision, is affirmed. The judgment invalidating the requirement of a pathology report for all abortions and the requirement that a second physician attend the abortion of any viable fetus is reversed. We vacate the judgment upholding an award of attorneys' fees for all hours expended by plaintiffs' attorneys and remand for proceedings consistent with Hensley v. Eckerhart, ___ U.S.

²³ Plaintiffs also argue that, in light of the ~~clear~~ ambiguity of §188.028.2(4), as evidenced by the differing interpretations placed upon it, ~~by reasonable judicial minds, perhaps~~, the appropriate course of judicial restraint is abstention. This Court has found such an approach appropriate. See H.L. v. Matheson, 450 U.S. 398, 407 (1981); Bellotti I, 428 U.S., at 146-147. Plaintiffs did not, however, argue in the Court of Appeals that the court should abstain, and Missouri has no certification procedure whereby this Court can refer questions of state statutory construction to the state supreme court, see 655 F.2d, at 861 n. 20; 17 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §4248, at 525 n. 29 (Supp. 1982), which procedure "greatly simplifie[d]" our analysis in Bellotti I, 428 U.S., at 151. Moreover, where, as here, a statute is susceptible to a fair construction that obviates the need to have the state courts render the saving construction, ~~there is no need for the federal courts to abstain.~~

There are facts not

There is no reason for ~~that~~

It is so ordered.

JUSTICE POWELL delivered the opinion of the Court:

This case, like City of Akron v. Akron Center for Reproductive Health, Inc., ante, p. ___, and Simopoulos v. Virginia, post, p. ___, presents questions as to the validity of state regulations governing the performance of abortions.

I

On June 30, 1979, the day after Missouri's abortion regulations went into effect, Planned Parenthood of Kansas City, Missouri, Inc., two doctors who perform abortions, and an abortion clinic ("plaintiffs") filed a complaint in the District Court for the Western District of Missouri challenging, as unconstitutional, several sections of the new bill. The sections relevant here include Mo. Rev. Stat. §188.025 (Supp. 1982), requiring that abortions after twelve weeks of pregnancy be performed in a hospital¹; §188.047, requiring a pathology report for each abortion performed²; §188.030, requiring the presence of a second physician

¹Mo. Rev. Stat. §188.025 provides: "Every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital."

²Mo. Rev. Stat. §188.047 provides:

"A representative sample of tissue removed at the time of abortion shall be submitted to a board eligible or certified pathologist, who shall file a copy of the tissue report with the state division of health, and who shall provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced and the pathologist's report shall be made a part of the patient's permanent record."

during abortions performed after viability³; and §188.028, requiring minors to secure parental or judicial consent.⁴

³Mo. Rev. Stat. §188.030.3 provides:

"An abortion of a viable unborn child shall be performed or induced only where there is in attendance a physician other than the physician performing or adducing the abortion who shall take control of and provide immediate medical care for a child born as a result of the abortion. During the performance of the abortion, the physician performing it, and subsequent to the abortion, the physician required by this section to be in attendance, shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman."

⁴Mo. Rev. Stat. §188.028 provides:

"1. No person shall knowingly perform an abortion upon a pregnant woman under the age of eighteen years unless:

"(1) The attending physician has secured the informed written consent of the minor and one parent or guardian; or

"(2) The minor is emancipated and the attending physician has received the informed written consent of the minor; or

"(3) The minor has been granted the right to self-consent to the abortion by court order pursuant to subsection 2 of this section, and the attending physician has received the informed written consent of the minor; or

"(4) The minor has been granted consent to the abortion by court order, and the court has given its informed written consent in accordance with subsection 2 of this section, and the minor is having the abortion willingly, in compliance with subsection 3 of this section.

"2. The right of a minor to self-consent
Footnote continued on next page.

After hearing testimony from a number of expert witnesses, the

to an abortion under subdivision (3) of subsection 1 of this section or court consent under subdivision (4) of subsection 1 of this section may be granted by a court pursuant to the following procedures:

"(1) The minor or next friend shall make an application to the juvenile court which shall assist the minor or next friend in preparing the petition and notices required pursuant to this section. The minor or the next friend of the minor shall thereafter file a petition setting forth the initials of the minor; the age of the minor; the names and addresses of each parent, guardian, or, if the minor's parents are deceased and no guardian has been appointed, any other person standing in loco parentis of the minor; that the minor has been fully informed of the risks and consequences of the abortion; that the minor is of sound mind and has sufficient intellectual capacity to consent to the abortion; that, if the court does not grant the minor majority rights for the purpose of consent to the abortion, the court should find that the abortion is in the best interest of the minor and give judicial consent to the abortion; that the court should appoint a guardian ad litem of the child; and if the minor does not have private counsel, that the court should appoint counsel. The petition shall be signed by the minor or the next friend;

....

"(3) A hearing on the merits of the petition, to be held on the record, shall be held as soon as possible, within five days of the filing of the petition. ... At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect and understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other evidence that the court may find useful in determining whether the minor should be granted majority rights for the purpose of consenting to the abortion or whether the abortion is in the best interests of the minor;

"(4) In the decree, the court shall for
Footnote continued on next page.

District Court invalidated each of these sections, except the pathology requirement. 483 F. Supp. 679, 699-701 (1980).⁵ The Court of Appeals for the Eighth Circuit reversed the District Court's judgment with respect to §188.028, thereby upholding the requirement that a minor secure parental or judicial consent to an abortion. It also held that the District Court erred in sustaining §188.047, the pathology requirement. The District Court's judgment with respect to the second-physician requirement was affirmed, and the case was remanded for further proceedings and findings relating

good cause:

"(a) Grant the petition for majority rights for the purpose of consenting to the abortion; or

"(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

"(c) Deny the petition, setting forth the grounds on which the petition is denied;

....

"3. If a minor desires an abortion, then she shall be orally informed of and, if possible, sign the written consent required by section 188.039 in the same manner as an adult person. No abortion shall be performed on any minor against her will, except that an abortion may be performed against the will of a minor pursuant to a court order described in subdivision (4) of subsection 1 of this section that the abortion is necessary to preserve the life of the minor."

⁵The District Court also awarded attorney's fees for all hours claimed by the plaintiffs' attorneys. See 655 F.2d 848, 872 (CA8 1981).

to the second-trimester hospitalization requirement. 655 F.2d 848, 872-873 (1981). On remand, the District Court affirmed its holding that the second-trimester hospitalization requirement was unconstitutional. The Court of Appeals affirmed this judgment. 664 F.2d 687, 691 (1981).

We granted certiorari. ____ U.S. ____ (1982). We now affirm the Court of Appeals' judgment invalidating the Missouri hospitalization requirement and upholding the parental consent requirement, but reverse the judgment holding the pathology report and the second-physician requirements unconstitutional.⁶

The Court today in City of Akron, ante, at 8-12, has stated fully the principles that govern judicial review of state statutes regulating abortions, and these need not be repeated here. With these principles in mind, we turn to the statutes at issue.

II

In City of Akron, we invalidated a city ordinance requiring physicians to perform all second-trimester abortions at general or special hospitals accredited by the Joint Commission on Accreditation of Hospitals (JCAH) or by the American Osteopathic Association. Ante, at 13. Missouri's hospitalization requirements are similar to those enacted by Akron, as all second-trimester abortions must be performed in general, acute-care facilities.⁷ For

⁶The petition also raises the issue whether an award of attorney's fees, made pursuant to 42 U.S.C. §1988, should be proportioned to reflect the extent to which plaintiffs prevailed. See n. 5, supra. As to this issue, the judgment is vacated and remanded in light of our decision in Hensley v. Eckerhart, ____ U.S. ____ (1983).

Footnote(s) 7 will appear on following pages.

the reasons stated at some length in City of Akron, we held that such a requirement "unreasonably infringes upon a woman's constitutional right to obtain an abortion." Ante, at 20-21. For the same reasons, we affirm the Court of Appeals' judgment that §188.025 is unconstitutional. We turn now to the State's second-physician requirement.

III

In Roe v. Wade, 410 U.S. 113 (1973), the Court recognized as

⁷Missouri does not define the term "hospital" in its statutory provisions regulating abortions. We therefore must assume, as did the courts below, see 483 F. Supp., at 686 n. 10; 664 F.2d, at 689-690 & nn. 3, 5 & 6, that the term has its common meaning of a general, acute-care facility. Cf. Mo. Rev. Stat. §188.015(2) (Supp. 1982) (defining "abortion facility" as "a clinic, physician's office, or any other place or facility in which abortions are performed other than a hospital"). Section 197.020.2 (1978), part of Missouri's hospital licensing laws, reads:

"'Hospital' means a place devoted primarily to the maintenance and operation of facilities for the diagnosis, treatment or care for not less than twenty-four hours in any week of three or more nonrelated individuals suffering from illness, disease, injury, deformity or other abnormal physical conditions; or a place devoted primarily to provide for not less than twenty-four hours in any week medical ... care for three or more nonrelated individuals...."

Cf. Mo. Rev. Stat. §197.200(1) (1978) (defining "ambulatory surgical center" to include facilities "with an organized medical staff of physicians" and "with continuous physician services and registered professional nursing services whenever a patient is in the facility"); 13 Mo. Admin Code 50-30.010(1)(A) (1977) (same). The regulations for the Department of Social Services establish standards for the construction, physical facilities, and administration of hospitals. See id., §§50-20.010 to -20.030 (1977). These are not unlike those set by the JCAH. See City of Akron, ante, at 13 & n. 16.

compelling the interest of a State in the life of a viable fetus: "[T]he State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." Id., at 164-165. Several of the Missouri statutes undertake such regulation. Post-viability abortions are proscribed except when necessary to preserve the life or the health of the mother. Mo. Rev. Stat. §188.030.1 (Supp. 1982). The State also forbids the use of abortion procedures fatal to the viable fetus unless alternative procedures pose a greater risk to the health of the mother. See §188.030.2. The statute at issue in this case requires the attendance of a second physician at the abortion of a viable fetus. See §188.030.3. The lower courts held that this requirement is invalid.

The plaintiffs, respondents here on this issue, urge affirmance on the grounds that the second-physician requirement distorts the traditional doctor-patient relationship, and is both impractical and costly. They note that Missouri does not require two physicians in attendance for any other medical or surgical procedure, including childbirth or delivery of a premature infant. These are not insubstantial arguments, and we view the issue as a close one.

Our cases repeatedly have held that the State's interest in the potential life of a viable fetus is compelling. The State has latitude in regulating after viability. See Beal v. Doe, 432 U.S. 438, 445-446 (1977); Roe, 410 U.S., at 164-165. The fetus is uniquely vulnerable at this stage and, as recognized in Roe, the

abortion decision no longer is entrusted solely to the mother and her physician. See id., at 165-166.

Section 188.030.3 provides that the second physician "shall take control of and provide immediate medical care for a child born as a result of the abortion." Moreover, the statute requires that the physician "be in attendance" during the abortion and "take all reasonable steps in keeping with good medical practice ... to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman." See n. 3, supra. It is clear from these provisions that Missouri has made a judgment that there are some physicians primarily interested in performing abortions when desired by the woman, and that there may be tension between this interest and the state interest in protecting the potential life of an unborn child. For example, the District Court found that the dilatation-and-evacuation procedure (D&E) of abortion "carries no chance of fetal survival."⁸ 483 F. Supp., at 694. The presence of a second physician could be a safeguard against the improper and unnecessary use of this procedure.

The tension between the State's interest and the primary concern of the woman's physician also explains why a second physician is required for third-trimester abortions but not for any

⁸At a stage late enough in the pregnancy so that viability is possible, the fetus is sufficiently large that it must be dismembered, and the skull must be crushed, to evacuate the uterus by the D&E procedure. See 655 F.2d, at 865 & n. 29.

other medical or surgical procedure, including childbirth or delivery of a premature infant.⁹ In most situations, a patient's primary interest is in preserving her own health. Exceptions to this, of course, are childbirth and where an infant must be delivered prematurely. In these situations, the mother ardently desires that the child be born safely and is healthy, although she naturally hopes to survive in good health.

The situation often is different with respect to the woman who seeks an abortion. Many pregnant women who otherwise would have an abortion may determine not to do so if the fetus is viable. But the

⁹The courts below found the statutory provision unconstitutional because there is no possible justification for a second-physician requirement: no viable fetus can survive a D&E procedure. See 483 F. Supp., at 694; 655 F.2d, at 865. As the Court of Appeals noted, however, the choice of D&E after viability is subject to the requirements of §188.030.2. See *id.*, at 865 & n. 28. Thus, D&E is not to be used when the fetus is viable and other methods are more likely to preserve its life but not pose a greater risk to the woman's life or health. Cf. *id.*, at 865 (some physicians testified they would not use D&E in third-trimester); American College of Obstetricians and Gynecologists (ACOG) Technical Bulletin No. 56, Methods of Midtrimester Abortion 4 (1979) (mortality rate for D&E less than or similar to that of instillation abortions up to 20 weeks). There is nothing in the record to indicate that there is an exact correspondence between the situations in which there are compelling medical reasons for performing any abortion after viability and the method that presents the least risk to the mother is D&E. Cf. 655 F.2d, at 865 (experts disagree whether D&E should ever be used after viability). We therefore cannot assume that all third-trimester abortions will be D&E abortions, thus precluding all possibility of live birth. The possibility that does exist, plus the constant threat that any D&E abortion might have to be abandoned because of complications, justifies the State in requiring a second physician at every third-trimester abortion.

viability of the fetus will not alter the decision of all women, and the State's assumption that some physicians will accord primacy to the wishes of these woman cannot be viewed as unreasonable. The State's interest is compelling, and this necessarily justifies imposition of some burdens on the woman's choice following viability of the fetus.

We believe the second-physician requirement furthers the State's compelling interest in potential life, particularly in those cases where the abortion does result in a live birth.¹⁰ It is true that the medical literature indicates that preserving the potential life of a viable fetus during a third trimester abortion often is not possible.¹¹ But use of methods that are fatal to the fetus are not always required to preserve the life and health of the mother. The State legitimately may choose to provide safeguards for these few instances of live birth. The second physician, in those emergency situations under which Missouri permits any third-trimester abortion,¹² may be of assistance to the mother's physician

¹⁰See ACOG Technical Bulletin No. 56, supra n. 9, at 4 (as high as 7% live-birth rate for intrauterine instillation of uterotonic agents); Grimes & Cates, The Brief for Hypertonic Saline, 15 Contemporary Ob/Gyn 29, 38 (1980) (increasing number of live-born fetuses in prostaglandin abortions); Stroh & Hinman, Reported Live Births Following Induced Abortion: Two and One-Half Years' Experience in Upstate New York, 126 Am. J. Obstet. Gynecol. 83, 83-84 (1976) (26 live births following saline induced-abortions; 9 following hysterotomy; 1 following oxytocin-induced abortion).

¹¹See Stoh & Himman, supra n. 10, at 88 (one survival out of thirty-eight live births).

¹²There is no clearly expressed exception on the face of the statute for the performance of an abortion of

Footnote continued on next page.

in preserving the health of the child. We thus believe the second-doctor requirement bears a reasonable relationship to the State interest in protecting the lives of viable unborn children. We reverse the judgment of the Court of Appeals holding that §188.030.3 is unconstitutional.

IV

The most suspect state regulations are those that apply to mature women during the first trimester. We have made clear that even "minor regulations on the abortion procedure during the first trimester may not interfere with physician-patient consultation or with the woman's choice between abortions and childbirth." City of Akron, ante, at 12. Nevertheless, even in the early weeks of pregnancy, "[c]ertain regulations that have no significant impact on the woman's exercise of her right may be permissible where justified by important state health objectives." Ante, at 11. Section 188.047 requires a pathology report for every abortion performed. The question is whether this requirement unconstitutionally burdens a woman's abortion decision. We hold that it does not.

In regulating hospital services within the State, Missouri requires that "[a]ll tissue surgically removed, with the exception

a viable fetus without the second physician in attendance. There may be emergency situations where, for example, the woman's health may be endangered by delay. Section §188.030.3 is qualified, at least in part, by the phrase "provided that it does not pose an increased risk to the life or health of the woman." This clause reasonably could be construed to apply to such a situation. Cf. H.L. v. Matheson, 450 U.S. 398, 407 n. 14 (1981) (rejecting argument that Utah statute might apply to individuals with emergency health care needs).

of such tissue as tonsils, adenoids, hernial sacs and prepuces, shall be examined by a pathologist, either on the premises or by arrangement outside of the hospital." 13 Mo. Admin. Code 50-20.030(3)(A)7 (1977). Although Missouri apparently does not require pathology reports in all procedures, "[t]his does not mean that a State never may enact a regulation touching on the woman's abortion right during the first weeks of pregnancy." City of Akron, ante, at 11. The specific issue here is whether §188.047, which on its face and in effect is reasonably related to generally accepted medical standards and maternal health,¹³ "further[s] important health-

¹³A pathological examination is designed to assist in the detection of fatal ectopic pregnancies, hydatritiforme moles or other precancerous growths, and a variety of other problems that can only be discovered through a pathological examination. The District Court noted that several medical experts testified that pathology should be done in every case of abortion. 483 F. Supp., at 700 n. 49. See The Abortion Profiteers, Chicago Sun Times (1978) (special report), at 26, col. 3 (quoting Dr. Willard Cates, head of abortion surveillance for the National Center for Disease Control, as saying "pathological reports are so important that no clinic should allow a patient to leave the premises without one"). Moreover, the ACOG standards for abortion services state that for all surgical services performed on an ambulatory outpatient basis: "Tissue removed should be submitted to a pathologist for an examination. ... In the situation of elective termination of pregnancy, the attending physician should record a description of the gross products. Unless definite embryonic or fetal parts can be identified, the products of elective interruptions of pregnancy must be submitted to a pathologist for gross and microscopic examination." ACOG, Standards for Obstetric-Gynecologic Services 52 (5th ed. 1982) (emphasis added). The standards of the National Abortion Federation (NAF), whose members include the institutional plaintiffs in this case, itself provides: "All tissue must be examined grossly at the time of the abortion procedure by a physician or trained assistant and the results recorded in the chart. In the absence of visible fetal parts or placenta upon gross examination, obtained tissue may be

Footnote continued on next page.

related State concerns," ante, at 12, without interfering with the woman's decision to have an abortion.

As the Court of Appeals recognized, pathology examinations are "clearly" "useful and even necessary in some cases," because "abnormalities in the tissue may warn of serious, possibly fatal disorders." 655 F.2d, at 870. Examining tissue removed during an abortion provides a State with an unique opportunity to further its interest in promoting the health of its citizens. Additionally, questions about the long-range complications of abortions and their effect on subsequent pregnancies remain. See App. 72-73 (testimony of Dr. Willard Cates, Jr.); Levin, et al., Association of Induced Abortion with Subsequent Pregnancy Loss, 243 J. A.M.A. 2495, 2499 (1980). Recorded pathology reports, in concert with abortion complication reports, provide a statistical basis to study those complications.¹⁴ Cf. Planned Parenthood of Central Missouri v.

examined under a low power microscope If this examination is inconclusive, the tissue should be sent to the nearest suitable pathology laboratory for microscopic examination." NAF, National Abortion Federation Standards 6 (1981) (emphasis in original) (compliance with standards obligatory for NAF member facilities to remain in good standing). See Brief of the American Public Health Association as Amicus Curiae in Simopoulos and City of Akron 29 n. 6 (supporting the NAF standards for non-hospital abortion facilities as constituting "minimum standards"). Cf. Planned Parenthood of Metropolitan Washington, D.C., Inc., 1980 Guidelines for Operation, Maintenance and Evaluation of First Trimester Outpatient Abortion Facilities 10 ("Gross examination must be performed on all specimens. Microscopic tissue analysis must be done for all cases when immediate gross evaluation is inadequate or does not confirm a normal gestation.").

¹⁴Section 188.047 requires that a copy of the report be sent to the State's division of health.

Danforth, 428 U.S. 52, 81 (1976).

Plaintiffs contend, however, that the additional cost of a tissue examination is a significant burden on a pregnant woman's abortion decision.¹⁵ The estimated cost of compliance for plaintiff Reproductive Health Services was \$19.40 per abortion performed. 483 F. Supp., at 700 n. 48.¹⁶ We think this minor burden is justified, like the Missouri record-keeping requirements upheld in Planned Parenthood of Central Missouri v. Danforth, supra, as "useful to the State's interest in protecting the health of its female citizens, and [as] a resource that is relevant to decisions involving medical experience and judgment," 428 U.S., at 81.¹⁷ In sum, "we see no legally significant impact or consequence on the abortion decision or on the physician-patient relationship." See id., at 81. Accordingly, we reverse the judgment of the Court of Appeals on this

¹⁵Plaintiffs also note that §188.047 does not specify whether the pathologist must make a microscopic examination. State regulations, however, state: "All reports shall contain the findings of a gross examination. If fetal parts or placenta are not identified, then an accompanying microscopic tissue report must also be filed with the Division of Health." 13 Mo. Admin. Code 50-151.030(1) (1981).

¹⁶There was testimony in the District Court that the additional cost of pathology would range from \$10.00 to \$40.00. See 483 F. Supp., at 700 n. 48.

¹⁷The Danforth Court also noted that "[t]he added requirements for confidentiality, with the sole exception for public health officers, and for retention for seven years, a period not unreasonable in length, assist and persuade us in our determination of the constitutional limits." 428 U.S., at 81. Missouri extends the identical safeguards found reassuring in Danforth to the pathology reports at issue here. See Mo. Rev. Stat. §§188.055.2, 188.060 (Supp. 1982).

point.

V

As we noted in City of Akron, the relevant legal standards with respect to parental consent requirements are not in dispute. A State's interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial. We have cautioned, however, that "the State must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests."¹⁸ City of Akron, ante, at 21-22.¹⁹ The issue here is

¹⁸The plurality in Bellotti v. Baird, 443 U.S. 622 (1979) (Bellotti II), also required that the alternative to parental consent must "assure" that the resolution of this issue "will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." Id., at 644. Confidentiality here is assured by the statutory requirement that allows the minor to use her initials on the petition. Mo. Rev. Stat. §188.028.2(1) (Supp. 1982). As to expedition of appeals, §188.028.2(6) provides in relevant part:

"The notice of intent to appeal shall be given within twenty-four hours from the date of issuance of the order. The record on appeal shall be completed and the appeal shall be perfected within five days from the filing of notice to appeal. Because time may be of the essence regarding the performance of the abortion, the supreme court of this state shall, by court rule, provide for expedited appellate review of cases appealed under this section."

We believe this section provides the framework for a constitutionally sufficient means of expediting judicial proceedings. Immediately after the effective date of this statutory enactment, the District Court enjoined enforcement. No unemancipated pregnant minor has been

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Footnote(s) 19 will appear on following pages.

one purely of statutory construction: whether Missouri provides a judicial alternative that is consistent with these established legal standards.²⁰

The Missouri statute, §188.028.2,²¹ in relevant part, provides:

required to comply with this section. Thus, to this point in time, there has been no need for the state Supreme Court to promulgate rules concerning appellate review. There is no reason to believe that Missouri will not expedite any appeal consistent with the mandate in our prior opinions.

¹⁹Cf. H.L. v. Matheson, 450 U.S., at 406-407 & n.14, 411 (upholding a parental notification requirement but not extending the holding to mature or emancipated minors or to immature minors showing such notification detrimental to their best interests). The lower courts found that §188.028's notice requirement was unconstitutional. See 655 F.2d, at 873; 483 F. Supp., at 701. The State has not sought review of that judgment here. Thus, in the posture in which it appears before this Court for review, §188.028 contains no requirement for parental notification.

²⁰The Missouri statute also exempts "emancipated" women under the age of 18 both from the requirement of parental consent and from the alternative requirement of a judicial proceeding. Plaintiffs argue that the word "emancipated" in this context is void for vagueness, but we disagree. Cf. H.L. v. Matheson, supra, at 407 (using word to describe a minor). Although the question whether a minor is emancipated turns upon the facts and circumstances of each individual case, the Missouri courts have adopted general rules to guide that determination, and the term is one of general usage and understanding in the Missouri common law. See Black v. Cole, 626 S.W.2d 397, 398 (Mo. App. 1981) (quoting 67 C.J.S. Parent and Child §86, at 811 (1950)); In re the Marriage of Heddy, 535 S.W.2d 276, 279 (Mo. App. 1976) (same); Wurth v. Wurth, 313 S.W.2d 161, 164 (Mo. App. 1958) (same), rev'd on other grounds, 322 S.W.2d 745 (Mo. 1959). It should also be noted that, before a person may be successfully prosecuted for a violation of §188.028, the State must show that the defendant "knowingly" violated the section.

²¹See n. 4, supra. This Court in Danforth held unconstitutional Missouri's parental consent requirement for all unmarried minors under the age of 18. 428 U.S., at 75. In response to our decision, Missouri enacted the

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"(4) In the decree, the court shall for good cause:

"(a) Grant the petition for majority rights for the purpose of consenting to the abortion; or

"(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

"(c) Deny the petition, setting forth the grounds on which the petition is denied[.]"

On its face, §188.028.2(4) authorizes juvenile courts to do (a), (b), or (c). The Court of Appeals concluded that a denial of the petition permitted in subsection (c) "would initially require the court to find that the minor was not emancipated and was not mature enough to make her own decision and that an abortion was not in her best interests." 655 F.2d, at 858. Plaintiffs contend that this interpretation is unreasonable. We do not agree.

Where fairly possible, courts should construe a statute to avoid a danger of unconstitutionality. The Court of Appeals was aware that if the statute provides discretion to deny permission to a minor for any "good cause," it would violate the principles that this Court has set forth. Ibid. The court, however, reached the logical conclusion that "findings and the ultimate denial of the petition must be supported by a showing of 'good cause.'" Ibid. Before exercising any option, the juvenile court must receive evidence on "the emotional development, maturity, intellect and understanding of the minor." Mo. Rev. Stat. §188.028.2(3) (Supp. 1982). The Court of Appeals rationally found that a court could not

section challenged here. This new statute became effective shortly before our decision in Bellotti II.

deny a petition, "for good cause," unless it first found--after having received the required evidence--that the minor was not mature enough to make her own decision.²² See Bellotti v. Baird, 443 U.S. 622, 643-644, 647-648 (1979) (plurality opinion). We conclude that the Court of Appeals correctly interpreted the statute, and as interpreted §188.028 avoids constitutional infirmities.²³

²²Missouri argues that, under state law, "for good cause" is "'a cause or reason sufficient in law.'" State v. Davis, 469 S.W.2d 1, 5 (Mo. 1971) (quoting Webster's Third New International Dictionary). The Missouri courts recognize, however, in a variety of contexts, that the commonly used legal phrase "for good cause" "is not susceptible of precise definition," Vaughn v. Ripley, 416 S.W.2d 226, 228 (Mo. App. 1967), and that "'[g]ood cause' depends upon the circumstances of the individual case," Wilson v. Morris, 369 S.W.2d 402, 407 (Mo. 1963). A finding of its existence "lies largely in the discretion of the ... court to which the decision is committed," ibid., and the phrase "connotes a remedial purpose in a matter addressed primarily to the conscience of the court," Corzine v. Stoff, 505 S.W.2d 162, 164 (Mo. App. 1973). This discretion, however, no doubt is limited to choices that are not inconsistent with the federal Constitution.

²³Plaintiffs also argue that, in light of the ambiguity of §188.028.2(4), as evidenced by the differing interpretations placed upon it, the appropriate course of judicial restraint is abstention. This Court has found such an approach appropriate. See H.L. v. Matheson, 450 U.S., at 407; Bellotti v. Baird, 428 U.S. 132, 146-147 (1976) (Bellotti I). Plaintiffs did not, however, argue in the Court of Appeals that the court should abstain, and Missouri has no certification procedure whereby this Court can refer questions of state statutory construction to the state supreme court. See 655 F.2d, at 861 n. 20; 17 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §4248, at 525 n. 29 (1978 & Supp. 1982). Such a procedure "greatly simplifie[d]" our analysis in Bellotti I. Supra, at 151. Moreover, where, as here, a statute is susceptible to a fair construction that obviates the need to have the state courts render the saving construction, there is no reason for federal courts to abstain. Cf. City of Akron, ante, at 23-24.

VI

The judgment of the Court of Appeals, insofar as it invalidated Missouri's second-trimester hospitalization requirement and upheld the State's parental consent provision, is affirmed. The judgment invalidating the requirement of a pathology report for all abortions and the requirement that a second physician attend the abortion of any viable fetus is reversed. We vacate the judgment upholding an award of attorneys' fees for all hours expended by plaintiffs' attorneys and remand for proceedings consistent with Hensley v. Eckerhart, ____ U.S. ____ (1983).

It is so ordered.

7-8 Revised

FEB 29 1983

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

L7D

From: Justice Powell

Circulated: _____

Recirculated: _____

2nd CHAMBERS DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 81-1255 AND 81-1623

PLANNED PARENTHOOD ASSOCIATION OF
KANSAS CITY, MISSOURI, INC.,
ET AL., PETITIONERS

81-1255

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF
MISSOURI, ET AL.

JOHN ASHCROFT, ATTORNEY GENERAL OF
MISSOURI, ET AL., PETITIONERS

81-1623

v.

PLANNED PARENTHOOD ASSOCIATION OF
KANSAS CITY, MISSOURI, INC.,
ET AL., PETITIONERS

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

JUSTICE POWELL delivered the opinion of the Court:

These cases, like *City of Akron v. Akron Center for Reproductive Health, Inc.*, ante, p. —, and *Simopoulos v. Virginia*, post, p. —, present questions as to the validity of state statutes regulating the performance of abortions.

I

Planned Parenthood of Kansas City, Missouri, Inc., two doctors who perform abortions, and an abortion clinic ("plaintiffs") filed a complaint in the District Court for the Western District of Missouri challenging, as unconstitutional, several sections of the Missouri statutes regulating the performance

physicians

of abortions. The sections relevant here include Mo. Rev. Stat. § 188.025 (Supp. 1982), requiring that abortions after 12 weeks of pregnancy be performed in a hospital;¹ § 188.047, requiring a pathology report for each abortion performed;² § 188.030, requiring the presence of a second physician during abortions performed after viability;³ and § 188.028, requiring minors to secure parental or judicial consent.⁴

After hearing testimony from a number of expert wit-

¹ Mo. Rev. Stat. § 188.025 provides: "Every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital."

² Mo. Rev. Stat. § 188.047 provides:

"A representative sample of tissue removed at the time of abortion shall be submitted to a board eligible or certified pathologist, who shall file a copy of the tissue report with the state division of health, and who shall provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced and the pathologist's report shall be made a part of the patient's permanent record."

³ Mo. Rev. Stat. § 188.030.3 provides:

"An abortion of a viable unborn child shall be performed or induced only when there is in attendance a physician other than the physician performing or adducing the abortion who shall take control of and provide immediate medical care for a child born as a result of the abortion. During the performance of the abortion, the physician performing it, and subsequent to the abortion, the physician required by this section to be in attendance, shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman."

⁴ Mo. Rev. Stat. § 188.028 provides:

"1. No person shall knowingly perform an abortion upon a pregnant woman under the age of eighteen years unless:

"(1) The attending physician has secured the informed written consent of the minor and one parent or guardian; or

"(2) The minor is emancipated and the attending physician has received the informed written consent of the minor; or

"(3) The minor has been granted the right to self-consent to the abortion by court order pursuant to subsection 2 of this section, and the attending physician has received the informed written consent of the minor; or

"(4) The minor has been granted consent to the abortion by court order, and the court has given its informed written consent in accordance with subsection 2 of this section, and the minor is having the abortion willingly,

nesses, the District Court invalidated all of these sections except the pathology requirement. 483 F. Supp. 679, 699-701 (1980).⁵ The Court of Appeals for the Eighth Circuit reversed the District Court's judgment with respect to

in compliance with subsection 3 of this section.

"2. The right of a minor to self-consent to an abortion under subdivision (3) of subsection 1 of this section or court consent under subdivision (4) of subsection 1 of this section may be granted by a court pursuant to the following procedures:

"(1) The minor or next friend shall make an application to the juvenile court which shall assist the minor or next friend in preparing the petition and notices required pursuant to this section. The minor or the next friend of the minor shall thereafter file a petition setting forth the initials of the minor; the age of the minor; the names and addresses of each parent, guardian, or, if the minor's parents are deceased and no guardian has been appointed, any other person standing in loco parentis of the minor; that the minor has been fully informed of the risks and consequences of the abortion; that the minor is of sound mind and has sufficient intellectual capacity to consent to the abortion; that, if the court does not grant the minor majority rights for the purpose of consent to the abortion, the court should find that the abortion is in the best interest of the minor and give judicial consent to the abortion; that the court should appoint a guardian ad litem of the child; and if the minor does not have private counsel, that the court should appoint counsel. The petition shall be signed by the minor or the next friend;

"(3) A hearing on the merits of the petition, to be held on the record, shall be held as soon as possible within five days of the filing of the petition. . . . At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect and understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other evidence that the court may find useful in determining whether the minor should be granted majority rights for the purpose of consenting to the abortion or whether the abortion is in the best interests of the minor;

"(4) In the decree, the court shall for good cause:

"(a) Grant the petition for majority rights for the purpose of consenting to the abortion; or

"(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

"(c) Deny the petition, setting forth the grounds on which the petition is denied;

§ 188.028, thereby upholding the requirement that a minor secure parental or judicial consent to an abortion. It also held that the District Court erred in sustaining § 188.047, the pathology requirement. The District Court's judgment with respect to the second-physician requirement was affirmed, and the case was remanded for further proceedings and findings relating to the second-trimester hospitalization requirement. 655 F. 2d 848, 872-873 (1981). On remand, the District Court affirmed its holding that the second-trimester hospitalization requirement was unconstitutional. The Court of Appeals affirmed this judgment. 664 F. 2d 687, 691 (1981). We granted certiorari. — U. S. — (1982).

omission

The Court today in *City of Akron*, ante, at 8-12, has stated fully the principles that govern judicial review of state statutes regulating abortions, and these need not be repeated here. With these principles in mind, we turn to the statutes at issue.

II

In *City of Akron*, we invalidated a city ordinance requiring physicians to perform all second-trimester abortions at general or special hospitals accredited by the Joint Commission on Accreditation of Hospitals (JCAH) or by the American Osteopathic Association. Ante, at 13. Missouri's hospitalization requirements are similar to those enacted by Akron, as

"3. If a minor desires an abortion, then she shall be orally informed of and, if possible, sign the written consent required by section 188.039 in the same manner as an adult person. No abortion shall be performed on any minor against her will, except that an abortion may be performed against the will of a minor pursuant to a court order described in subdivision (4) of subsection 1 of this section that the abortion is necessary to preserve the life of the minor."

⁵The District Court also awarded attorney's fees for all hours claimed by the plaintiffs' attorneys. See 655 F. 2d 848, 872 (CA8 1981). The petition for certiorari raises the issue whether an award of attorney's fees, made pursuant to 42 U. S. C. § 1988, should be proportioned to reflect the extent to which plaintiffs prevailed.

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all second-trimester abortions must be performed in general, acute-care facilities.⁶ For the reasons stated in *City of Akron*, we held that such a requirement “unreasonably infringes upon a woman’s constitutional right to obtain an abortion.” *Ante*, at 20–21. For the same reasons, we affirm the Court of Appeals’ judgment that §188.025 is unconstitutional.

III

We turn now to the State’s second-physician requirement. In *Roe v. Wade*, 410 U. S. 113 (1973), the Court recognized that the State has a compelling interest in the life of a viable fetus: “[T]he State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of

⁶ Missouri does not define the term “hospital” in its statutory provisions regulating abortions. We therefore must assume, as did the courts below, see 483 F. Supp., at 686, n. 10; 664 F. 2d, at 689–690, and nn. 3, 5 and 6, that the term has its common meaning of a general, acute-care facility. Cf. Mo. Rev. Stat. § 188.015(2) (Supp. 1982) (defining “abortion facility” as “a clinic, physician’s office, or any other place or facility in which abortions are performed other than a hospital”). Section 197.020.2 (1978), part of Missouri’s hospital licensing laws, reads:

“‘Hospital’ means a place devoted primarily to the maintenance and operation of facilities for the diagnosis, treatment or care for not less than twenty-four hours in any week of three or more nonrelated individuals suffering from illness, disease, injury, deformity or other abnormal physical conditions; or a place devoted primarily to provide for not less than twenty-four hours in any week medical . . . care for three or more nonrelated individuals. . . .”

Cf. Mo. Rev. Stat. § 197.200(1) (1978) (defining “ambulatory surgical center” to include facilities “with an organized medical staff of physicians” and “with continuous physician services and registered professional nursing services whenever a patient is in the facility”); 13 Mo. Admin. Code 50–30.010(1)(A) (1977) (same). The regulations for the Department of Social Services establish standards for the construction, physical facilities, and administration of hospitals. *Id.*, 50–20.010 to 50–20.030 (1977). These are not unlike those set by JCAH. See *City of Akron*, *ante*, at 13, and n. 16.

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the mother." *Id.*, at 164-165. See *Colautti v. Franklin*, 439 U. S. 379, 386-387 (1979); *Beal v. Doe*, 432 U. S. 438, 445-446 (1977). Several of the Missouri statutes undertake such regulation. Post-viability abortions are proscribed except when necessary to preserve the life or the health of the woman. Mo. Rev. Stat. §188.030.1 (Supp. 1982). The State also forbids the use of abortion procedures fatal to the viable fetus unless alternative procedures pose a greater risk to the health of the woman. §188.030.2. ~~The statute at issue in this case requires the attendance of a second physician at the abortion of a viable fetus. §188.030.3.~~

9t also Section 188.030.3 provides that the second physician "shall take control of and provide immediate medical care for a child born as a result of the abortion." Moreover, the statute requires that the physician "be in attendance" during the abortion and "take all reasonable steps in keeping with good medical practice . . . to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman." See n. 3, *supra*. ~~It is clear from these provisions that Missouri has made a judgment that there are some physicians who may choose a method of abortion without fully considering the state interest in protecting the potential life of an unborn child.~~ For

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Relocate

⁷ Some physicians perform the abortion with no consideration of alternative methods. The mode of one clinic was described in *Danforth*:

"The counseling . . . occurs entirely on the day the abortion is to be performed It lasts for two hours and takes place in groups that include both minors and adults who are strangers to one another The physician takes no part in this counseling process Counseling is typically limited to a description of abortion procedures, possible complications, and birth control techniques

"The abortion itself takes five to seven minutes The physician has no prior contact with the minor, and on the days that abortions are being performed at the [clinic], the physician, . . . may be performing abortions on many other adults and minors. . . . On busy days patients are scheduled in separate groups, consisting of five patients After the abortion [the physician] spends a brief period with the minor and others in the

added

Jim - This doesn't fit here as we have no reason to believe this clinic does 3rd Trm abortions. I'd still like to get these two H's into either Akron or the Va case.

example, if a physician chooses the dilatation-and-evacuation method (D&E) of abortion, then this method "carries no chance of fetal survival."⁸ 483 F. Supp., at 694. The presence of a second physician could be a safeguard against the improper and unnecessary use of this procedure.

The lower courts invalidated this requirement. The plaintiffs, respondents here on this issue, urge affirmance on the grounds that the second-physician requirement distorts the traditional doctor-patient relationship, and is both impractical and costly. They note that Missouri does not require two physicians in attendance for any other medical or surgical procedure, including childbirth or delivery of a premature infant. These are not insubstantial arguments, and we view the issue as a close one.

The tension that may exist between the State's interest and the primary concern of the woman's physician explains why a second physician is required for third-trimester abortions but not for any other medical or surgical procedure, including childbirth or delivery of a premature infant.⁹ In

group in the recovery room"

428 U. S., at 91-92 n. 2 (Stewart, J., concurring) (quoting Brief for Appellants in *Bellotti I*, O. T. 1975, pp.43-44).

⁸At a stage late enough in the pregnancy so that viability is possible, the fetus is sufficiently large that it must be dismembered, and the skull crushed, to evacuate the uterus by the D&E procedure. See 655 F. 2d, at 865, and n. 29.

⁹The courts below found the statutory provision unconstitutional because there is no possible justification for a second-physician requirement whenever D&E is used, since no viable fetus can survive a D&E procedure. 483 F. Supp., at 694; 655 F. 2d, at 865. As the Court of Appeals noted, however, the choice of D&E after viability is subject to the requirements of § 188.030.2. See *id.*, at 865, and n. 28. Thus, D&E is not to be used when the fetus is viable and when other methods are more likely to preserve its life ~~but~~ do not pose a greater risk to the woman's life or health. Cf. *id.*, at 865 (some physicians testified they would not use D&E in third-trimester); American College of Obstetricians and Gynecologists (ACOG) Technical Bulletin No. 56, Methods of Midtrimester Abortion 4 (1979) (mortality rate for D&E less than or similar to that of instillation abortions

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most situations, a patient's primary interest is in preserving her own health. Exceptions to this, of course, are childbirth and where an infant must be delivered prematurely. In these situations, the mother ardently desires that the child be born safely and is healthy, although she naturally hopes to survive in good health.

The woman's interest in an abortion often will be at odds with the State's interest in preserving potential life. We find that the second physician requirement may be necessary to further ~~that~~ interest. ^(the State's) It may be that preserving the potential life of a viable fetus during a third trimester abortion often is not possible.¹⁰ But the State legitimately may choose to provide safeguards for the comparatively few instances of live birth. And of course, the State has a compelling interest in preserving the life of any child that survives the abortion procedure. Viable fetuses will be in immediate and grave danger because of their prematurity. The second physician, in situations where Missouri permits third-trimester abortions,¹¹ may be of assistance to the woman's physician

omissions; rewritten or restated

up to 20 weeks). There is nothing in the record to indicate that D&E will be the method that poses the least risk to the woman in every situation in which there are compelling medical reasons for performing an abortion after viability. Cf. 655 F. 2d, at 865 (experts disagree whether D&E should ever be used after viability). We therefore cannot assume that all third-trimester abortions will be D&E abortions, or that there will be no live births. Thus, the State's compelling interest in preserving the life of the fetus when there is a live birth justifies the State in requiring a second physician at every third-trimester abortion.

¹⁰ See ACOG Technical Bulletin No. 56, *supra* n. 10, at 4 (as high as 7% live-birth rate for intrauterine instillation of uterotonic agents); Stroh & Hinman, Reported Live Births Following Induced Abortion: Two and One-Half Years' Experience in Upstate New York, 126 Am. J. Obstet. Gynecol. 83, 83-84 (1976) (26 live births following saline induced-abortions; 9 following hysterotomy; 1 following oxytocin-induced abortion) (one survival out of 38 live births.)

¹¹ There is no clearly expressed exception on the face of the statute for the performance of an abortion of a viable fetus without the second physician in attendance. There may be emergency situations where, for exam-

footnote combined

in preserving the health of the child. We thus believe the second-physician requirement bears a reasonable relationship to the State interest in protecting the lives of viable unborn children. We reverse the judgment of the Court of Appeals holding that § 188.030.3 is unconstitutional. We turn now to the pathology requirement.

IV

Section 188.047 requires a pathology report for every abortion performed. But even in the early weeks of pregnancy, "[c]ertain regulations that have no significant impact on the woman's exercise of her right [to decide to have an abortion] may be permissible where justified by important state health objectives." *City of Akron*, at 11. See *Planned Parenthood of Central Mo. v. Danforth*, 428 U. S. 52, 80-81 (1976). The question is whether § 188.047 unconstitutionally burdens a woman's abortion decision. We hold that it does not.

In regulating hospital services within the State, Missouri requires that "[a]ll tissue surgically removed, with the exception of such tissue as tonsils, adenoids, hernial sacs and prepuces, shall be examined by a pathologist, either on the premises or by arrangement outside of the hospital." 13 Mo. Admin. Code 50-20.030(3)(A)7 (1977). Although Missouri apparently does not require pathology reports in all procedures, this does not mean that such a requirement is invalid simply because it touches on the woman's abortion right during the first weeks of pregnancy. Rather, the specific issue here is whether § 188.047, which on its face and in effect is reasonably related to generally accepted medical standards and maternal health,¹² "further[s] important health-related

ple, the woman's health may be endangered by delay. Section § 188.030.3 is qualified, at least in part, by the phrase "provided that it does not pose an increased risk to the life or health of the woman." This clause reasonably could be construed to apply to such a situation. Cf. *H.L. v. Matheson*, 450 U. S. 398, 407, n. 14 (1981) (rejecting argument that Utah statute might apply to individuals with emergency health care needs).

¹² A pathological examination is designed to assist in the detection of

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State concerns," *ante*, at 12, without interfering with the woman's decision to have an abortion.

As the Court of Appeals recognized, pathology examinations are clearly "useful and even necessary in some cases," because "abnormalities in the tissue may warn of serious, possibly fatal disorders." 655 F. 2d, at 870. Examining tissue removed during an abortion provides a State with an

fatal ectopic pregnancies, hydatritiforme moles or other precancerous growths, and a variety of other problems that can only be discovered through a pathological examination. The District Court noted that several medical experts testified that pathology should be done in every case of abortion. 483 F. Supp., at 700, n. 49. Moreover, the ACOG standards for abortion services state that for all surgical services performed on an ambulatory outpatient basis: "Tissue removed *should* be submitted to a pathologist for an examination. . . . In the situation of elective termination of pregnancy, the attending physician should record a description of the gross products. Unless definite embryonic or fetal parts can be identified, the products of elective interruptions of pregnancy *must* be submitted to a pathologist for gross and microscopic examination." ACOG, Standards for Obstetric-Gynecologic Services 52 (5th ed. 1982) (emphasis added). The standards of the National Abortion Federation (NAF), whose members include the institutional plaintiffs in this case, itself provides: "*All tissue must be examined grossly at the time of the abortion procedure by a physician or trained assistant and the results recorded in the chart.* In the absence of visible fetal parts or placenta upon gross examination, obtained tissue may be examined under a low power microscope If this examination is inconclusive, the tissue should be sent to the nearest suitable pathology laboratory for microscopic examination." NAF, National Abortion Federation Standards 6 (1981) (emphasis in original) (compliance with standards obligatory for NAF member facilities to remain in good standing). See Brief of the American Public Health Association as *Amicus Curiae* in Nos. 81-185, 81-746, 81-1172, at 29, n. 6 (supporting the NAF standards for non-hospital abortion facilities as constituting "minimum standards"). Cf. Planned Parenthood of Metropolitan Washington, D. C., Inc., 1980 Guidelines for Operation, Maintenance and Evaluation of First Trimester Outpatient Abortion Facilities 10 ("Gross examination must be performed on all specimens. Microscopic tissue analysis must be done for all cases when immediate gross evaluation is inadequate or does not confirm a normal gestation.").

opportunity to further its interest in promoting the health of its citizens. Additionally, questions about the long-range complications of abortions and their effect on subsequent pregnancies remain. See App. 72-73 (testimony of Dr. Willard Cates, Jr.); Levin, et al., Association of Induced Abortion with Subsequent Pregnancy Loss, 243 J. A. M. A. 2495, 2499 (1980). Recorded pathology reports, in concert with abortion complication reports, provide a statistical basis for studying those complications.¹³ Cf. *Danforth*, 428 U. S., at 81.

In light of these factors, we think the small additional cost¹⁴ of a tissue examination¹⁵ does not significantly burden a pregnant woman's abortion decision.

In *Danforth*, this Court unanimously upheld Missouri's recordkeeping requirement as "useful to the State's interest in protecting the health of its female citizens, and [as] a resource that is relevant to decisions involving medical experience and judgment," 428 U. S., at 81.¹⁶ We view the re-

rewritten

¹³ Section 188.047 requires that a copy of the report be sent to the State's division of health.

¹⁴ The estimated cost of compliance for plaintiff Reproductive Health Services was \$19.40 per abortion performed. 483 F. Supp., at 700, n. 48. There was testimony in the District Court that the additional cost of pathology would range from \$10.00 to \$40.00. See 483 F. Supp., at 700, n. 48.

¹⁵ Plaintiffs also note that § 188.047 does not specify whether the pathologist must make a microscopic examination. State regulations, however, state: "All reports shall contain the findings of a gross examination. If fetal parts or placenta are not identified, then an accompanying microscopic tissue report must also be filed with the Division of Health." 13 Mo. Admin. Code 50-151.030(1) (1981).

¹⁶ The *Danforth* Court also noted that "[t]he added requirements for confidentiality, with the sole exception for public health officers, and for retention for seven years, a period not unreasonable in length, assist and persuade us in our determination of the constitutional limits." 428 U. S., at 81. Missouri extends the identical safeguards found reassuring in *Danforth* to the pathology reports at issue here. See Mo. Rev. Stat.

quirement for a pathology report as comparable and as a relatively insignificant burden. Accordingly, we reverse the judgment of the Court of Appeals on this point.

V

As we noted in *City of Akron*, the relevant legal standards with respect to parental consent requirements are not in dispute. A State's interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial. We have cautioned, however, that "the State must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests."¹⁷ *City of Akron*, ante, at 21-22.¹⁸ The issue here is one purely of stat-

§§ 188.055.2, 188.060 (Supp. 1982).

¹⁷The plurality in *Bellotti v. Baird*, 443 U. S. 622 (1979) (*Bellotti II*), also required that the alternative to parental consent must "assure" that the resolution of this issue "will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." *Id.*, at 644. Confidentiality here is assured by the statutory requirement that allows the minor to use her initials on the petition. Mo. Rev. Stat. § 188.028.2(1) (Supp. 1982). As to expedition of appeals, § 188.028.2(6) provides in relevant part:

"The notice of intent to appeal shall be given within twenty-four hours from the date of issuance of the order. The record on appeal shall be completed and the appeal shall be perfected within five days from the filing of notice to appeal. Because time may be of the essence regarding the performance of the abortion, the supreme court of this state shall, by court rule, provide for expedited appellate review of cases appealed under this section."

We believe this section provides the framework for a constitutionally sufficient means of expediting judicial proceedings. Immediately after the effective date of this statutory enactment, the District Court enjoined enforcement. No unemancipated pregnant minor has been required to comply with this section. Thus, to this point in time, there has been no need for the State Supreme Court to promulgate rules concerning appellate review. There is no reason to believe that Missouri will not expedite any appeal consistent with the mandate in our prior opinions.

¹⁸Cf. *H.L. v. Matheson*, 450 U. S., at 406-407, and n. 14, 411 (upholding

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utory construction: whether Missouri provides a judicial alternative that is consistent with these established legal standards.¹⁹

The Missouri statute, § 188.028.2,²⁰ in relevant part, provides:

“(4) In the decree, the court shall for good cause:

“(a) Grant the petition for majority rights for the purpose of consenting to the abortion; or

“(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

“(c) Deny the petition, setting forth the grounds on which the petition is denied[.]”

a parental notification requirement but not extending the holding to mature or emancipated minors or to immature minors showing such notification detrimental to their best interests). The lower courts found that § 188.028's notice requirement was unconstitutional. 655 F. 2d, at 873; 483 F. Supp., at 701. The State has not sought review of that judgment here. Thus, in the posture in which it appears before this Court for review, § 188.028 contains no requirement for parental notification.

¹⁹The Missouri statute also exempts “emancipated” women under the age of 18 both from the requirement of parental consent and from the alternative requirement of a judicial proceeding. Plaintiffs argue that the word “emancipated” in this context is void for vagueness, but we disagree. Cf. *H.L. v. Matheson*, *supra*, at 407 (using word to describe a minor). Although the question whether a minor is emancipated turns upon the facts and circumstances of each individual case, the Missouri courts have adopted general rules to guide that determination, and the term is one of general usage and understanding in the Missouri common law. See *Black v. Cole*, 626 S. W. 2d 397, 398 (Mo. App. 1981) (quoting 67 C. J. S. Parent and Child § 86, at 811 (1950)); *In re the Marriage of Heddy*, 535 S. W. 2d 276, 279 (Mo. App. 1976) (same); *Wurth v. Wurth*, 313 S. W. 2d 161, 164 (Mo. App. 1958) (same), *rev'd on other grounds*, 322 S. W. 2d 745 (Mo. 1959).

²⁰See n. 4, *supra*. This Court in *Danforth* held unconstitutional Missouri's parental consent requirement for all unmarried minors under the age of 18. 428 U. S., at 75. In response to our decision, Missouri enacted the section challenged here. This new statute became effective shortly before our decision in *Bellotti II*.

omission

On its face, § 188.028.2(4) authorizes juvenile courts²¹ to choose among any of the alternatives outlined in the section. The Court of Appeals concluded that a denial of the petition permitted in subsection (c) "would initially require the court to find that the minor was not emancipated and was not mature enough to make her own decision and that an abortion was not in her best interests." 655 F. 2d, at 858. Plaintiffs contend that this interpretation is unreasonable. We do not agree.

Where fairly possible, courts should construe a statute to avoid a danger of unconstitutionality. The Court of Appeals was aware, if the statute provides discretion to deny permission to a minor for *any* "good cause," that arguably it would violate the principles that this Court has set forth. *Ibid.* It recognized, however, that before exercising any option the juvenile court must receive evidence on "the emotional development, maturity, intellect and understanding of the minor." Mo. Rev. Stat. § 188.028.2(3) (Supp. 1982). The court then reached the logical conclusion that "findings and the ultimate denial of the petition must be supported by a showing of 'good cause.'" 655 F. 2d, at 858. The Court of Appeals reasonably found that a court could not deny a petition "for good cause" unless it first found—after having received the required evidence—that the minor was not mature enough to make her own decision. See *Bellotti v. Baird*, 443 U. S. 622, 643–644, 647–648 (1979) (plurality opinion). We conclude that the Court of Appeals correctly interpreted the statute and that § 188.028, as interpreted, avoids any constitutional infirmities.²²

²¹ We have indicated in prior opinions that a minor should have access to an "independent decisionmaker." *H.L. v. Matheson*, *supra*, at 420 (Powell, J., concurring). Missouri has provided for a judicial decisionmaker. We therefore need not consider whether a qualified and independent non-judicial decisionmaker would be appropriate. Cf. *Bellotti II*, 443 U.S., at 643 n. 22.

²² Plaintiffs also argue that, in light of the ambiguity of § 188.028.2(4), as

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The judgment of the Court of Appeals, insofar as it invalidated Missouri's second-trimester hospitalization requirement and upheld the State's parental consent provision, is affirmed. The judgment invalidating the requirement of a pathology report for all abortions and the requirement that a second physician attend the abortion of any viable fetus is reversed. We vacate the judgment upholding an award of attorneys' fees for all hours expended by plaintiffs' attorneys and remand for proceedings consistent with *Hensley v. Eckhardt*, — U. S. — (1983).

It is so ordered.

evidenced by the differing interpretations placed upon it, the appropriate course of judicial restraint is abstention. This Court has found such an approach appropriate. See *Bellotti v. Baird*, 428 U. S. 132, 146-147 (1976) (*Bellotti I*). Plaintiffs did not, however, argue in the Court of Appeals that the court should abstain, and Missouri has no certification procedure whereby this Court can refer questions of state statutory construction to the state supreme court. See 655 F. 2d, at 861, n. 20; 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4248, at 525, n. 29 (1978 and Supp. 1982). Such a procedure "greatly simplifie[d]" our analysis in *Bellotti I*, *supra*, at 151. Moreover, where, as here, a statute is susceptible to a fair construction that obviates the need to have the state courts render the saving construction, there is no reason for federal courts to abstain.

omission

2/27/83

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

27.0.
2/27

From: Justice Powell

Circulated: _____

Recirculated: _____

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Various
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SUPREME COURT OF THE UNITED STATES

No. 81-1255 AND 81-1623

PLANNED PARENTHOOD ASSOCIATION OF KANSAS
CITY, MISSOURI, INC., ET AL.,
PETITIONERS

81-1255

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF
MISSOURI, ET AL.

JOHN ASHCROFT, ATTORNEY GENERAL OF
MISSOURI, ET AL., PETITIONERS

81-1623

v.

PLANNED PARENTHOOD ASSOCIATION OF KANSAS
CITY, MISSOURI, INC., ET AL.,
PETITIONERS

JUSTICE POWELL delivered the opinion of the Court:

This case, like *City of Akron v. Akron Center for Reproductive Health, Inc.*, ante, p. —, and *Simopoulos v. Virginia*, post, p. —, presents questions as to the validity of state regulations governing the performance of abortions.

statutes
regulating

I

On June 30, 1979, the day after Missouri's abortion regulations went into effect, Planned Parenthood of Kansas City, Missouri, Inc., two doctors who perform abortions, and an abortion clinic ("plaintiffs") filed a complaint in the District Court for the Western District of Missouri challenging, as unconstitutional, several sections of the new bill. The sections relevant here include Mo. Rev. Stat. § 188.025 (Supp. 1982), requiring that abortions after twelve weeks of pregnancy be

statutes

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(first line)

performed in a hospital¹; § 188.047, requiring a pathology report for each abortion performed²; § 188.030, requiring the presence of a second physician during abortions performed after viability³; and § 188.028, requiring minors to secure parental or judicial consent.⁴

¹ Mo. Rev. Stat. § 188.025 provides: "Every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital."

² Mo. Rev. Stat. § 188.047 provides:

"A representative sample of tissue removed at the time of abortion shall be submitted to a board eligible or certified pathologist, who shall file a copy of the tissue report with the state division of health, and who shall provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced and the pathologist's report shall be made a part of the patient's permanent record."

³ Mo. Rev. Stat. § 188.030.3 provides:

"An abortion of a viable unborn child shall be performed or induced only where there is in attendance a physician other than the physician performing or adducing the abortion who shall take control of and provide immediate medical care for a child born as a result of the abortion. During the performance of the abortion, the physician performing it, and subsequent to the abortion, the physician required by this section to be in attendance, shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman."

⁴ Mo. Rev. Stat. § 188.028 provides:

"1. No person shall knowingly perform an abortion upon a pregnant woman under the age of eighteen years unless:

"(1) The attending physician has secured the informed written consent of the minor and one parent or guardian; or

"(2) The minor is emancipated and the attending physician has received the informed written consent of the minor; or

"(3) The minor has been granted the right to self-consent to the abortion by court order pursuant to subsection 2 of this section, and the attending physician has received the informed written consent of the minor; or

"(4) The minor has been granted consent to the abortion by court order, and the court has given its informed written consent in accordance with subsection 2 of this section, and the minor is having the abortion willingly, in compliance with subsection 3 of this section.

After hearing testimony from a number of expert witnesses, the District Court invalidated each of these sections, except the pathology requirement. 483 F. Supp. 679, 699-701 (1980).⁵ The Court of Appeals for the Eighth Cir-

"2. The right of a minor to self-consent to an abortion under subdivision (3) of subsection 1 of this section or court consent under subdivision (4) of subsection 1 of this section may be granted by a court pursuant to the following procedures:

"(1) The minor or next friend shall make an application to the juvenile court which shall assist the minor or next friend in preparing the petition and notices required pursuant to this section. The minor or the next friend of the minor shall thereafter file a petition setting forth the initials of the minor; the age of the minor; the names and addresses of each parent, guardian, or, if the minor's parents are deceased and no guardian has been appointed, any other person standing in loco parentis of the minor; that the minor has been fully informed of the risks and consequences of the abortion; that the minor is of sound mind and has sufficient intellectual capacity to consent to the abortion; that, if the court does not grant the minor majority rights for the purpose of consent to the abortion, the court should find that the abortion is in the best interest of the minor and give judicial consent to the abortion; that the court should appoint a guardian ad litem of the child; and if the minor does not have private counsel, that the court should appoint counsel. The petition shall be signed by the minor or the next friend;

"(3) A hearing on the merits of the petition, to be held on the record, shall be held as soon as possible, within five days of the filing of the petition. . . . At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect and understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other evidence that the court may find useful in determining whether the minor should be granted majority rights for the purpose of consenting to the abortion or whether the abortion is in the best interests of the minor;

"(4) In the decree, the court shall for good cause:

"(a) Grant the petition for majority rights for the purpose of consenting to the abortion; or

"(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

"(c) Deny the petition, setting forth the grounds on which the petition is

cuit reversed the District Court's judgment with respect to § 188.028, thereby upholding the requirement that a minor secure parental or judicial consent to an abortion. It also held that the District Court erred in sustaining § 188.047, the pathology requirement. The District Court's judgment with respect to the second-physician requirement was affirmed, and the case was remanded for further proceedings and findings relating to the second-trimester hospitalization requirement. 655 F. 2d 848, 872-873 (1981). On remand, the District Court affirmed its holding that the second-trimester hospitalization requirement was unconstitutional. The Court of Appeals affirmed this judgment. 664 F. 2d 687, 691 (1981).

We granted certiorari. — U. S. — (1982). We now affirm the Court of Appeals' judgment invalidating the Missouri hospitalization requirement and upholding the parental consent requirement, but reverse the judgment holding the pathology report and the second-physician requirements unconstitutional.⁶

The Court today in *City of Akron, ante*, at 8-12, has stated fully the principles that govern judicial review of state

denied;

"3. If a minor desires an abortion, then she shall be orally informed of and, if possible, sign the written consent required by section 188.039 in the same manner as an adult person. No abortion shall be performed on any minor against her will, except that an abortion may be performed against the will of a minor pursuant to a court order described in subdivision (4) of subsection 1 of this section that the abortion is necessary to preserve the life of the minor."

⁵The District Court also awarded attorney's fees for all hours claimed by the plaintiffs' attorneys. See 655 F. 2d 848, 872 (CA8 1981).

⁶The petition also raises the issue whether an award of attorney's fees, made pursuant to 42 U. S. C. § 1988, should be proportioned to reflect the extent to which plaintiffs prevailed. See n. 5, *supra*. As to this issue, the judgment is vacated and remanded in light of our decision in *Hensley v. Eckerhart*, U. S. (1983).

statutes regulating abortions, and these need not be repeated here. With these principles in mind, we turn to the statutes at issue.

II

In *City of Akron*, we invalidated a city ordinance requiring physicians to perform all second-trimester abortions at general or special hospitals accredited by the Joint Commission on Accreditation of Hospitals (JCAH) or by the American Osteopathic Association. *Ante*, at 13. Missouri's hospitalization requirements are similar to those enacted by Akron, as all second-trimester abortions must be performed in general, acute-care facilities.⁷ For the reasons stated at some length in *City of Akron*, we held that such a requirement "unreasonably infringes upon a woman's constitutional right to obtain

⁷ Missouri does not define the term "hospital" in its statutory provisions regulating abortions. We therefore must assume, as did the courts below, see 483 F. Supp., at 686, n. 10; 664 F. 2d, at 689-690, and nn. 3, 5 and 6, that the term has its common meaning of a general, acute-care facility. Cf. Mo. Rev. Stat. § 188.015(2) (Supp. 1982) (defining "abortion facility" as "a clinic, physician's office, or any other place or facility in which abortions are performed other than a hospital"). Section 197.020.2 (1978), part of Missouri's hospital licensing laws, reads:

"'Hospital' means a place devoted primarily to the maintenance and operation of facilities for the diagnosis, treatment or care for not less than twenty-four hours in any week of three or more nonrelated individuals suffering from illness, disease, injury, deformity or other abnormal physical conditions; or a place devoted primarily to provide for not less than twenty-four hours in any week medical . . . care for three or more nonrelated individuals. . . ."

Cf. Mo. Rev. Stat. § 197.200(1) (1978) (defining "ambulatory surgical center" to include facilities "with an organized medical staff of physicians" and "with continuous physician services and registered professional nursing services whenever a patient is in the facility"); 13 Mo. Admin Code 50-30.010(1)(A) (1977) (same). The regulations for the Department of Social Services establish standards for the construction, physical facilities, and administration of hospitals. See *id.*, §§ 50-20.010 to -20.030 (1977). These are not unlike those set by the JCAH. See *City of Akron*, *ante*, at 13, and n. 16.

an abortion.” *Ante*, at 20–21. For the same reasons, we affirm the Court of Appeals’ judgment that § 188.025 is unconstitutional. We turn now to the State’s second-physician requirement.

III

In *Roe v. Wade*, 410 U. S. 113 (1973), the Court recognized as compelling the interest of a State in the life of a viable fetus: “[T]he State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.” *Id.*, at 164–165. Several of the Missouri statutes undertake such regulation. Post-viability abortions are proscribed except when necessary to preserve the life or the health of the mother. Mo. Rev. Stat. § 188.030.1 (Supp. 1982). The State also forbids the use of abortion procedures fatal to the viable fetus unless alternative procedures pose a greater risk to the health of the mother. See § 188.030.2. The statute at issue in this case requires the attendance of a second physician at the abortion of a viable fetus. See § 188.030.3. The lower courts held that this requirement is invalid.

The plaintiffs, respondents here on this issue, urge affirmance on the grounds that the second-physician requirement distorts the traditional doctor-patient relationship, and is both impractical and costly. They note that Missouri does not require two physicians in attendance for any other medical or surgical procedure, including childbirth or delivery of a premature infant. These are not insubstantial arguments, and we view the issue as a close one.

Our cases repeatedly have held that the State’s interest in the potential life of a viable fetus is compelling. The State has latitude in regulating after viability. See *Beal v. Doe*, 432 U. S. 438, 445–446 (1977); *Roe*, 410 U. S., at 164–165. The fetus is uniquely vulnerable at this stage and, as recog-

nized in *Roe*, the abortion decision no longer is entrusted solely to the mother and her physician. See *id.*, at 165-166.

Section 188.030.3 provides that the second physician "shall take control of and provide immediate medical care for a child born as a result of the abortion." Moreover, the statute requires that the physician "be in attendance" during the abortion and "take all reasonable steps in keeping with good medical practice . . . to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman." See n. 3, *supra*. It is clear from these provisions that Missouri has made a judgment that there are some physicians primarily interested in performing abortions when desired by the woman, and that there may be tension between this interest and the state interest in protecting the potential life of an unborn child. For example, the District Court found that the dilatation-and-evacuation procedure (D&E) of abortion "carries no chance of fetal survival."⁸ 483 F. Supp., at 694. The presence of a second physician could be a safeguard against the improper and unnecessary use of this procedure.

The tension between the State's interest and the primary concern of the woman's physician also explains why a second physician is required for third-trimester abortions but not for any other medical or surgical procedure, including childbirth or delivery of a premature infant.⁹ In most situations, a pa-

⁸ At a stage late enough in the pregnancy so that viability is possible, the fetus is sufficiently large that it must be dismembered, and the skull must be crushed, to evacuate the uterus by the D&E procedure. See 655 F. 2d, at 865, and n. 29.

⁹ The courts below found the statutory provision unconstitutional because there is no possible justification for a second-physician requirement: no viable fetus can survive a D&E procedure. See 483 F. Supp., at 694; 655 F. 2d, at 865. As the Court of Appeals noted, however, the choice of D&E after viability is subject to the requirements of § 188.030.2. See *id.*, at 865, and n. 28. Thus, D&E is not to be used when the fetus is viable and other methods are more likely to preserve its life but not pose a

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tient's primary interest is in preserving her own health. Exceptions to this, of course, are childbirth and where an infant must be delivered prematurely. In these situations, the mother ardently desires that the child be born safely and is healthy, although she naturally hopes to survive in good health.

The situation often is different with respect to the woman who seeks an abortion. Many pregnant women who otherwise would have an abortion may determine not to do so if the fetus is viable. But the viability of the fetus will not alter the decision of all women, and the State's assumption that some physicians will accord primacy to the wishes of these woman cannot be viewed as unreasonable. The State's interest is compelling, and this necessarily justifies imposition of some burdens on the woman's choice following viability of the fetus.

We believe the second-physician requirement furthers the State's compelling interest in potential life, particularly in those cases where the abortion does result in a live birth.¹⁰

greater risk to the woman's life or health. Cf. *id.*, at 865 (some physicians testified they would not use D&E in third-trimester); American College of Obstetricians and Gynecologists (ACOG) Technical Bulletin No. 56, *Methods of Midtrimester Abortion* 4 (1979) (mortality rate for D&E less than or similar to that of instillation abortions up to 20 weeks). There is nothing in the record to indicate that there is an exact correspondence between the situations in which there are compelling medical reasons for performing any abortion after viability and the method that presents the least risk to the mother is D&E. Cf. 655 F. 2d, at 865 (experts disagree whether D&E should ever be used after viability). We therefore cannot assume that all third-trimester abortions will be D&E abortions, thus precluding all possibility of live birth. The possibility that does exist, plus the constant threat that any D&E abortion might have to be abandoned because of complications, justifies the State in requiring a second physician at every third-trimester abortion.

¹⁰ See ACOG Technical Bulletin No. 56, *supra* n. 9, at 4 (as high as 7% live-birth rate for intrauterine instillation of uterotonic agents); Grimes & Cates, *The Brief for Hypertonic Saline*, 15 Contemporary Ob/Gyn 29, 38

Jim: when else is life preserved except when the result is a "live birth"? I do not understand the qualification.

? of course we can't assume this

Jim & Mark: Give further thought as to language in n 9.

At the outset, the reasoning of courts below is not clear. Did they say in effect that no physician would use D & E in 3rd Tr.? Clarify this.

Much of remainder of note 9 suggests that delivery delivery of a live fetus during 3rd Tr is only a "possibility". This is an understatement. If only a possibility, why is interest

compelling? The "possibility" that may exist at 24 wks. may become a probability during final weeks.

It is true that the medical literature indicates that preserving the potential life of a viable fetus during a third trimester abortion often is not possible.¹¹ But use of methods that are fatal to the fetus are not always required to preserve the life and health of the mother. The State legitimately may choose to provide safeguards for these few instances of live birth. The second physician, in these emergency situations under which Missouri permits any third-trimester abortion,¹² may be of assistance to the mother's physician in preserving the health of the child. We thus believe the second-doctor requirement bears a reasonable relationship to the State interest in protecting the lives of viable unborn children. We reverse the judgment of the Court of Appeals holding that § 188.030.3 is unconstitutional.

IV

The most suspect state regulations are those that apply to mature women during the first trimester. We have made clear that even "minor regulations on the abortion procedure during the first trimester may not interfere with physician-patient consultation or with the woman's choice between

(1980) (increasing number of live-born fetuses in prostaglandin abortions); Stroh & Hinman, *Reported Live Births Following Induced Abortion: Two and One-Half Years' Experience in Upstate New York*, 126 Am. J. Obstet. Gynecol. 83, 83-84 (1976) (26 live births following saline induced-abortions; 9 following hysterotomy; 1 following oxytocin-induced abortion).

¹¹ See Stoh & Himman, *supra* n. 10, at 88 (one survival out of thirty-eight live births).

¹² There is no clearly expressed exception on the face of the statute for the performance of an abortion of a viable fetus without the second physician in attendance. There may be emergency situations where, for example, the woman's health may be endangered by delay. Section § 188.030.3 is qualified, at least in part, by the phrase "provided that it does not pose an increased risk to the life or health of the woman." This clause reasonably could be construed to apply to such a situation. Cf. *H.L. v. Matheson*, 450 U. S. 398, 407, n. 14 (1981) (rejecting argument that Utah statute might apply to individuals with emergency health care needs).

the comparatively

Jim - I would not use "emergency" to describe all 3rd Tr abortions. Cf n 12 below

physician

Jim - we also use "even" in next sentence

Jim - I add present n 11 as a "But see" case at end of n 10.

abortions and childbirth.” *City of Akron, ante*, at 12. Nevertheless, even in the early weeks of pregnancy, “[c]ertain regulations that have no significant impact on the woman’s exercise of her right may be permissible where justified by important state health objectives.” *Ante*, at 11. Section 188.047 requires a pathology report for every abortion performed. The question is whether this requirement unconstitutionally burdens a woman’s abortion decision. We hold that it does not.

In regulating hospital services within the State, Missouri requires that “[a]ll tissue surgically removed, with the exception of such tissue as tonsils, adenoids, hernial sacs and prepuces, shall be examined by a pathologist, either on the premises or by arrangement outside of the hospital.” 13 Mo. Admin. Code 50–20.030(3)(A)7 (1977). Although Missouri apparently does not require pathology reports in all procedures, “[t]his does not mean that a State never may enact a regulation touching on the woman’s abortion right during the first weeks of pregnancy.” *City of Akron, ante*, at 11. The specific issue here is whether § 188.047, which on its face and in effect is reasonably related to generally accepted medical standards and maternal health,¹³ “further[s] important health-related State concerns,” *ante*, at 12, without interfer-

¹³ A pathological examination is designed to assist in the detection of fatal ectopic pregnancies, hydatridiforme moles or other precancerous growths, and a variety of other problems that can only be discovered through a pathological examination. The District Court noted that several medical experts testified that pathology should be done in every case of abortion. 483 F. Supp., at 700, n. 49. See *The Abortion Profiteers*, Chicago Sun Times (1978) (special report), at 26, col. 3 (quoting Dr. Willard Cates, head of abortion surveillance for the National Center for Disease Control, as saying “pathological reports are so important that no clinic should allow a patient to leave the premises without one”). Moreover, the ACOG standards for abortion services state that for all surgical services performed on an ambulatory outpatient basis: “Tissue removed *should* be submitted to a pathologist for an examination. . . . In the situation of elective termination of pregnancy, the attending physician should record a description of the gross products. Unless definite embryonic or fetal parts

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ing with the woman's decision to have an abortion.

As the Court of Appeals recognized, pathology examinations are "clearly" "useful and even necessary in some cases," because "abnormalities in the tissue may warn of serious, possibly fatal disorders." 655 F. 2d, at 870. Examining tissue removed during an abortion provides a State with a unique opportunity to further its interest in promoting the health of its citizens. Additionally, questions about the long-range complications of abortions and their effect on subsequent pregnancies remain. See App. 72-73 (testimony of Dr. Willard Cates, Jr.); Levin, *et al.*, *Association of Induced Abortion with Subsequent Pregnancy Loss*, 243 J. A.M.A. 2495, 2499 (1980). Recorded pathology reports, in concert with abortion complication reports, provide a statistical basis to study those complications.¹⁴ Cf. *Planned Parenthood of*

can be identified, the products of elective interruptions of pregnancy *must* be submitted to a pathologist for gross and microscopic examination." ACOG, *Standards for Obstetric-Gynecologic Services* 52 (5th ed. 1982) (emphasis added). The standards of the National Abortion Federation (NAF), whose members include the institutional plaintiffs in this case, itself provides: "*All tissue must be examined grossly at the time of the abortion procedure by a physician or trained assistant and the results recorded in the chart. In the absence of visible fetal parts or placenta upon gross examination, obtained tissue may be examined under a low power microscope If this examination is inconclusive, the tissue should be sent to the nearest suitable pathology laboratory for microscopic examination.*" NAF, *National Abortion Federation Standards* 6 (1981) (emphasis in original) (compliance with standards obligatory for NAF member facilities to remain in good standing). See Brief of the American Public Health Association as *Amicus Curiae* in *Simopoulos and City of Akron* 29, n. 6 (supporting the NAF standards for non-hospital abortion facilities as constituting "minimum standards"). Cf. *Planned Parenthood of Metropolitan Washington, D.C., Inc.*, 1980 *Guidelines for Operation, Maintenance and Evaluation of First Trimester Outpatient Abortion Facilities* 10 ("Gross examination must be performed on all specimens. Microscopic tissue analysis must be done for all cases when immediate gross evaluation is inadequate or does not confirm a normal gestation.").

¹⁴ Section 188.047 requires that a copy of the report be sent to the State's division of health.

Central Missouri v. Danforth, 428 U. S. 52, 81 (1976).

Plaintiffs contend, however, that the additional cost of a tissue examination is a significant burden on a pregnant woman's abortion decision.¹⁵ The estimated cost of compliance for plaintiff Reproductive Health Services was \$19.40 per abortion performed. 483 F. Supp., at 700, n. 48.¹⁶ We think this minor burden is justified, like the Missouri record-keeping requirements upheld in *Planned Parenthood of Central Missouri v. Danforth*, *supra*, as "useful to the State's interest in protecting the health of its female citizens, and [as] a resource that is relevant to decisions involving medical experience and judgment," 428 U. S., at 81.¹⁷ In sum, "we see no legally significant impact or consequence on the abortion decision or on the physician-patient relationship." See *id.*, at 81. Accordingly, we reverse the judgment of the Court of Appeals on this point.

V

As we noted in *City of Akron*, the relevant legal standards with respect to parental consent requirements are not in dispute. A State's interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial. We have cautioned, however, that "the State

¹⁵ Plaintiffs also note that § 188.047 does not specify whether the pathologist must make a microscopic examination. State regulations, however, state: "All reports shall contain the findings of a gross examination. If fetal parts or placenta are not identified, then an accompanying microscopic tissue report must also be filed with the Division of Health." 13 Mo. Admin. Code 50-151.030(1) (1981).

¹⁶ There was testimony in the District Court that the additional cost of pathology would range from \$10.00 to \$40.00. See 483 F. Supp., at 700, n. 48.

¹⁷ The *Danforth* Court also noted that "[t]he added requirements for confidentiality, with the sole exception for public health officers, and for retention for seven years, a period not unreasonable in length, assist and persuade us in our determination of the constitutional limits." 428 U. S., at 81. Missouri extends the identical safeguards found reassuring in *Danforth* to the pathology reports at issue here. See Mo. Rev. Stat. §§ 188.055.2, 188.060 (Supp. 1982).

Reiser A

must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests.”¹⁸ *City of Akron, ante*, at 21–22.¹⁹ The issue here is one purely of statutory construction: whether Missouri provides a judicial alternative that is consistent with these established legal standards.²⁰

¹⁸The plurality in *Bellotti v. Baird*, 443 U. S. 622 (1979) (*Bellotti II*), also required that the alternative to parental consent must “assure” that the resolution of this issue “will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained.” *Id.*, at 644. Confidentiality here is assured by the statutory requirement that allows the minor to use her initials on the petition. Mo. Rev. Stat. § 188.028.2(1) (Supp. 1982). As to expedition of appeals, § 188.028.2(6) provides in relevant part:

“The notice of intent to appeal shall be given within twenty-four hours from the date of issuance of the order. The record on appeal shall be completed and the appeal shall be perfected within five days from the filing of notice to appeal. Because time may be of the essence regarding the performance of the abortion, the supreme court of this state shall, by court rule, provide for expedited appellate review of cases appealed under this section.”

We believe this section provides the framework for a constitutionally sufficient means of expediting judicial proceedings. Immediately after the effective date of this statutory enactment, the District Court enjoined enforcement. No unemancipated pregnant minor has been required to comply with this section. Thus, to this point in time, there has been no need for the state Supreme Court to promulgate rules concerning appellate review. There is no reason to believe that Missouri will not expedite any appeal consistent with the mandate in our prior opinions.

¹⁹*Cf. H.L. v. Matheson*, 450 U. S., at 406–407, and n. 14, 411 (upholding a parental notification requirement but not extending the holding to mature or emancipated minors or to immature minors showing such notification detrimental to their best interests). The lower courts found that § 188.028’s notice requirement was unconstitutional. See 655 F. 2d, at 873; 483 F. Supp., at 701. The State has not sought review of that judgment here. Thus, in the posture in which it appears before this Court for review, § 188.028 contains no requirement for parental notification.

²⁰The Missouri statute also exempts “emancipated” women under the age of 18 both from the requirement of parental consent and from the alternative requirement of a judicial proceeding. Plaintiffs argue that the

The Missouri statute, § 188.028.2,²¹ in relevant part, provides:

“(4) In the decree, the court shall for good cause:

“(a) Grant the petition for majority rights for the purpose of consenting to the abortion; or

“(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

“(c) Deny the petition, setting forth the grounds on which the petition is denied[.]”

On its face, § 188.028.2(4) authorizes juvenile courts to do (a), (b), or (c). The Court of Appeals concluded that a denial of the petition permitted in subsection (c) “would initially require the court to find that the minor was not emancipated and was not mature enough to make her own decision and that an abortion was not in her best interests.” 655 F. 2d, at 858. Plaintiffs contend that this interpretation is unreasonable. We do not agree.

Where fairly possible, courts should construe a statute to

word “emancipated” in this context is void for vagueness, but we disagree. Cf. *H.L. v. Matheson*, *supra*, at 407 (using word to describe a minor). Although the question whether a minor is emancipated turns upon the facts and circumstances of each individual case, the Missouri courts have adopted general rules to guide that determination, and the term is one of general usage and understanding in the Missouri common law. See *Black v. Cole*, 626 S.W. 2d 397, 398 (Mo. App. 1981) (quoting 67 C.J.S. Parent and Child § 86, at 811 (1950)); *In re the Marriage of Heddy*, 535 S.W. 2d 276, 279 (Mo. App. 1976) (same); *Wurth v. Wurth*, 313 S.W. 2d 161, 164 (Mo. App. 1958) (same), *rev’d on other grounds*, 322 S.W. 2d 745 (Mo. 1959). It should also be noted that, before a person may be successfully prosecuted for a violation of § 188.028, the State must show that the defendant “knowingly” violated the section.

²¹ See n. 4, *supra*. This Court in *Danforth* held unconstitutional Missouri’s parental consent requirement for all unmarried minors under the age of 18. 428 U. S., at 75. In response to our decision, Missouri enacted the section challenged here. This new statute became effective shortly before our decision in *Bellotti II*.

avoid a danger of unconstitutionality. The Court of Appeals was aware ²that if the statute provides discretion to deny permission to a minor for any "good cause," it would violate the principles that this Court has set forth. *Ibid.* The court, however, reached the logical conclusion that "findings and the ultimate denial of the petition must be supported by a showing of 'good cause.'" *Ibid.* Before exercising any option, the juvenile court must receive evidence on "the emotional development, maturity, intellect and understanding of the minor." Mo. Rev. Stat. §188.028.2(3) (Supp. 1982). The Court of Appeals rationally found that a court could not deny a petition, "for good cause," unless it first found—after having received the required evidence—that the minor was not mature enough to make her own decision.²² See *Bellotti v. Baird*, 443 U. S. 622, 643–644, 647–648 (1979) (plurality opinion). We conclude that the Court of Appeals correctly interpreted the statute, and as interpreted §188.028 avoids constitutional infirmities.²³

that
arguably

²² Missouri argues that, under state law, "for good cause" is "a cause or reason sufficient in law." *State v. Davis*, 469 S.W. 2d 1, 5 (Mo. 1971) (quoting Webster's Third New International Dictionary). The Missouri courts recognize, however, in a variety of contexts, that the commonly used legal phrase "for good cause" "is not susceptible of precise definition," *Vaughn v. Ripley*, 416 S.W. 2d 226, 228 (Mo. App. 1967), and that "[g]ood cause' depends upon the circumstances of the individual case," *Wilson v. Morris*, 369 S.W. 2d 402, 407 (Mo. 1963). A finding of its existence "lies largely in the discretion of the . . . court to which the decision is committed," *ibid.*, and the phrase "connotes a remedial purpose in a matter addressed primarily to the conscience of the court," *Corzine v. Stoff*, 505 S.W. 2d 162, 164 (Mo. App. 1973). This discretion, however, no doubt is limited to choices that are not inconsistent with the federal Constitution.

²³ Plaintiffs also argue that, in light of the ambiguity of §188.028.2(4), as evidenced by the differing interpretations placed upon it, the appropriate course of judicial restraint is abstention. This Court has found such an approach appropriate. See *H.L. v. Matheson*, 450 U. S., at 407; *Bellotti v. Baird*, 428 U. S. 132, 146–147 (1976) (*Bellotti I*). Plaintiffs did not, however, argue in the Court of Appeals that the court should abstain, and Missouri has no certification procedure whereby this Court can refer ques-

VI

The judgment of the Court of Appeals, insofar as it invalidated Missouri's second-trimester hospitalization requirement and upheld the State's parental consent provision, is affirmed. The judgment invalidating the requirement of a pathology report for all abortions and the requirement that a second physician attend the abortion of any viable fetus is reversed. We vacate the judgment upholding an award of attorneys' fees for all hours expended by plaintiffs' attorneys and remand for proceedings consistent with *Hensley v. Eckerhart*, U. S. — (1983).

It is so ordered.

tions of state statutory construction to the state supreme court. See 655 F. 2d, at 861, n. 20; 17 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4248, at 525, n. 29 (1978 and Supp. 1982). Such a procedure "greatly simplifie[d]" our analysis in *Bellotti I. Supra*, at 151. Moreover, where, as here, a statute is susceptible to a fair construction that obviates the need to have the state courts render the saving construction, there is no reason for federal courts to abstain. Cf. *City of Akron, ante*, at 23-24.

MAR 4 1983

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

From: Justice Powell

Circulated: MAR 4 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 81-1255 AND 81-1623

PLANNED PARENTHOOD ASSOCIATION OF
KANSAS CITY, MISSOURI, INC.,
ET AL., PETITIONERS

81-1255

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF
MISSOURI, ET AL.

JOHN ASHCROFT, ATTORNEY GENERAL OF
MISSOURI, ET AL., PETITIONERS

81-1623

v.

PLANNED PARENTHOOD ASSOCIATION OF
KANSAS CITY, MISSOURI, INC.,
ET AL., PETITIONERS

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

[Decided March —, 1983]

JUSTICE POWELL delivered the opinion of the Court:

These cases, like *City of Akron v. Akron Center for Reproductive Health, Inc.*, ante, p. —, and *Simopoulos v. Virginia*, post, p. —, present questions as to the validity of state statutes regulating the performance of abortions.

I

Planned Parenthood of Kansas City, Missouri, Inc., two physicians who perform abortions, and an abortion clinic ("plaintiffs") filed a complaint in the District Court for the Western District of Missouri challenging, as unconstitutional,

several sections of the Missouri statutes regulating the performance of abortions. The sections relevant here include Mo. Rev. Stat. § 188.025 (Supp. 1982), requiring that abortions after 12 weeks of pregnancy be performed in a hospital;¹ § 188.047, requiring a pathology report for each abortion performed;² § 188.030, requiring the presence of a second physician during abortions performed after viability;³ and § 188.028, requiring minors to secure parental or judicial consent.⁴

¹ Mo. Rev. Stat. § 188.025 provides: "Every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital."

² Mo. Rev. Stat. § 188.047 provides:

"A representative sample of tissue removed at the time of abortion shall be submitted to a board eligible or certified pathologist, who shall file a copy of the tissue report with the state division of health, and who shall provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced and the pathologist's report shall be made a part of the patient's permanent record."

³ Mo. Rev. Stat. § 188.030.3 provides:

"An abortion of a viable unborn child shall be performed or induced only when there is in attendance a physician other than the physician performing or adducing the abortion who shall take control of and provide immediate medical care for a child born as a result of the abortion. During the performance of the abortion, the physician performing it, and subsequent to the abortion, the physician required by this section to be in attendance, shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman."

⁴ Mo. Rev. Stat. § 188.028 provides:

"1. No person shall knowingly perform an abortion upon a pregnant woman under the age of eighteen years unless:

"(1) The attending physician has secured the informed written consent of the minor and one parent or guardian; or

"(2) The minor is emancipated and the attending physician has received the informed written consent of the minor; or

"(3) The minor has been granted the right to self-consent to the abortion by court order pursuant to subsection 2 of this section, and the attending

After hearing testimony from a number of expert witnesses, the District Court invalidated all of these sections except the pathology requirement. 483 F. Supp. 679, 699-701 (1980).⁵ The Court of Appeals for the Eighth Circuit re-

physician has received the informed written consent of the minor; or

"(4) The minor has been granted consent to the abortion by court order, and the court has given its informed written consent in accordance with subsection 2 of this section, and the minor is having the abortion willingly, in compliance with subsection 3 of this section.

"2. The right of a minor to self-consent to an abortion under subdivision (3) of subsection 1 of this section or court consent under subdivision (4) of subsection 1 of this section may be granted by a court pursuant to the following procedures:

"(1) The minor or next friend shall make an application to the juvenile court which shall assist the minor or next friend in preparing the petition and notices required pursuant to this section. The minor or the next friend of the minor shall thereafter file a petition setting forth the initials of the minor; the age of the minor; the names and addresses of each parent, guardian, or, if the minor's parents are deceased and no guardian has been appointed, any other person standing in loco parentis of the minor; that the minor has been fully informed of the risks and consequences of the abortion; that the minor is of sound mind and has sufficient intellectual capacity to consent to the abortion; that, if the court does not grant the minor majority rights for the purpose of consent to the abortion, the court should find that the abortion is in the best interest of the minor and give judicial consent to the abortion; that the court should appoint a guardian ad litem of the child; and if the minor does not have private counsel, that the court should appoint counsel. The petition shall be signed by the minor or the next friend;

"(3) A hearing on the merits of the petition, to be held on the record, shall be held as soon as possible within five days of the filing of the petition. . . . At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect and understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other evidence that the court may find useful in determining whether the minor should be granted majority rights for the purpose of consenting to the abortion or whether the abortion is in the best interests of the minor;

"(4) In the decree, the court shall for good cause:

"(a) Grant the petition for majority rights for the purpose of consenting

[Footnote 5 is on p. 4]

versed the District Court's judgment with respect to § 188.028, thereby upholding the requirement that a minor secure parental or judicial consent to an abortion. It also held that the District Court erred in sustaining § 188.047, the pathology requirement. The District Court's judgment with respect to the second-physician requirement was affirmed, and the case was remanded for further proceedings and findings relating to the second-trimester hospitalization requirement. 655 F. 2d 848, 872-873 (1981). On remand, the District Court affirmed its holding that the second-trimester hospitalization requirement was unconstitutional. The Court of Appeals affirmed this judgment. 664 F. 2d 687, 691 (1981). We granted certiorari. — U. S. — (1982).

The Court today in *City of Akron, ante*, at 8-12, has stated fully the principles that govern judicial review of state statutes regulating abortions, and these need not be repeated here. With these principles in mind, we turn to the statutes at issue.

II

to the abortion; or

"(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

"(c) Deny the petition, setting forth the grounds on which the petition is denied;

"3. If a minor desires an abortion, then she shall be orally informed of and, if possible, sign the written consent required by section 188.039 in the same manner as an adult person. No abortion shall be performed on any minor against her will, except that an abortion may be performed against the will of a minor pursuant to a court order described in subdivision (4) of subsection 1 of this section that the abortion is necessary to preserve the life of the minor."

⁵The District Court also awarded attorney's fees for all hours claimed by the plaintiffs' attorneys. The Court of Appeals affirmed this allocation of fees. See 655 F. 2d 848, 872 (CA8 1981). The petition for certiorari raises the issue whether an award of attorney's fees, made pursuant to 42 U. S. C. § 1988, should be proportioned to reflect the extent to which plaintiffs prevailed.

In *City of Akron*, we invalidated a city ordinance requiring physicians to perform all second-trimester abortions at general or special hospitals accredited by the Joint Commission on Accreditation of Hospitals (JCAH) or by the American Osteopathic Association. *Ante*, at 13. Missouri's hospitalization requirements are similar to those enacted by Akron, as all second-trimester abortions must be performed in general, acute-care facilities.⁶ For the reasons stated in *City of Akron*, we held that such a requirement "unreasonably infringes upon a woman's constitutional right to obtain an abortion." *Ante*, at 20-21. For the same reasons, we affirm the Court of Appeals' judgment that § 188.025 is unconstitutional.

III

We turn now to the State's second-physician requirement.

⁶ Missouri does not define the term "hospital" in its statutory provisions regulating abortions. We therefore must assume, as did the courts below, see 483 F. Supp., at 686, n. 10; 664 F. 2d, at 689-690, and nn. 3, 5 and 6, that the term has its common meaning of a general, acute-care facility. Cf. Mo. Rev. Stat. § 188.015(2) (Supp. 1982) (defining "abortion facility" as "a clinic, physician's office, or any other place or facility in which abortions are performed other than a hospital"). Section 197.020.2 (1978), part of Missouri's hospital licensing laws, reads:

"**'Hospital'** means a place devoted primarily to the maintenance and operation of facilities for the diagnosis, treatment or care for not less than twenty-four hours in any week of three or more nonrelated individuals suffering from illness, disease, injury, deformity or other abnormal physical conditions; or a place devoted primarily to provide for not less than twenty-four hours in any week medical . . . care for three or more nonrelated individuals. . . ."

Cf. Mo. Rev. Stat. § 197.200(1) (1978) (defining "ambulatory surgical center" to include facilities "with an organized medical staff of physicians" and "with continuous physician services and registered professional nursing services whenever a patient is in the facility"); 13 Mo. Admin. Code 50-30.010(1)(A) (1977) (same). The regulations for the Department of Social Services establish standards for the construction, physical facilities, and administration of hospitals. *Id.*, 50-20.010 to 50-20.030 (1977). These are not unlike those set by JCAH. See *City of Akron*, *ante*, at 13, and n. 16.

In *Roe v. Wade*, 410 U. S. 113 (1973), the Court recognized that the State has a compelling interest in the life of a viable fetus: “[T]he State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.” *Id.*, at 164–165. See *Colautti v. Franklin*, 439 U. S. 379, 386–387 (1979); *Beal v. Doe*, 432 U. S. 438, 445–446 (1977). Several of the Missouri statutes undertake such regulation. Post-viability abortions are proscribed except when necessary to preserve the life or the health of the woman. Mo. Rev. Stat. §188.030.1 (Supp. 1982). The State also forbids the use of abortion procedures fatal to the viable fetus unless alternative procedures pose a greater risk to the health of the woman. §188.030.2.

The statutory provision at issue in this case requires the attendance of a second physician at the abortion of a viable fetus. §188.030.3. This section requires that the second physician “take all reasonable steps in keeping with good medical practice . . . to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman.” See n. 3, *supra*. It also provides that the second physician “shall take control of and provide immediate medical care for a child born as a result of the abortion.”

The lower courts invalidated §188.030.3.⁷ The plaintiffs, respondents here on this issue, urge affirmance on the

⁷The courts below found that there is no possible justification for a second-physician requirement whenever D&E is used since no viable fetus can survive a D&E procedure. 483 F. Supp., at 694; 655 F. 2d, at 865. Accordingly, they found the provision overbroad. As the Court of Appeals noted, however, the choice of D&E after viability is subject to the requirements of §188.030.2. See *id.*, at 865, and n. 28. Thus, D&E is not to be used when the fetus is viable; when other methods are more likely to preserve its life; and when alternative procedures do not pose a greater risk to the woman’s life or health. Cf. *id.*, at 865 (some physicians testified they

grounds that the second-physician requirement distorts the traditional doctor-patient relationship, and is both impractical and costly. They note that Missouri does not require two physicians in attendance for any other medical or surgical procedure, including childbirth or delivery of a premature infant. These are not insubstantial arguments, and we view the issue as a close one.

The first physician's primary concern will be the life and health of the woman. Many third-trimester abortions in Missouri will be emergency operations,⁸ as the State only permits these late abortions when they are necessary to preserve the life or the health of the woman. It is not unreasonable for the State to assume that during the operation the first physician's attention and skills will be directed to preserving the woman's condition, and not to protecting the actual life of those fetuses who survive the abortion procedure.

would not use D&E in third-trimester); American College of Obstetricians and Gynecologists (ACOG) Technical Bulletin No. 56, Methods of Midtrimester Abortion 4 (1979) (mortality rate for D&E less than or similar to that of instillation abortions up to 20 weeks). There is nothing in the record to indicate that D&E will be the method that poses the least risk to the woman in every situation in which there are compelling medical reasons for performing an abortion after viability. Cf. 655 F. 2d, at 865 (experts disagree whether D&E should ever be used after viability). We therefore cannot assume that all third-trimester abortions will be D&E abortions, or that there will be no live births. Thus, the State's compelling interest in preserving the life of the fetus when there is a live birth justifies the State in requiring a second physician at every third-trimester abortion.

⁸There is no clearly expressed exception on the face of the statute for the performance of an abortion of a viable fetus without the second physician in attendance. There may be emergency situations where, for example, the woman's health may be endangered by delay. Section § 188.030.3 is qualified, at least in part, by the phrase "provided that it does not pose an increased risk to the life or health of the woman." This clause reasonably could be construed to apply to such a situation. Cf. *H.L. v. Matheson*, 450 U. S. 398, 407, n. 14 (1981) (rejecting argument that Utah statute might apply to individuals with emergency health care needs).

Viable fetuses will be in immediate and grave danger because of their premature birth. A second physician, in situations where Missouri permits third-trimester abortions, may be of assistance to the woman's physician in preserving the health and life of the child.

By giving immediate medical attention to a fetus that is delivered alive, the second physician will assure that the State's interests are protected more fully than the first physician alone would be able to do. And given the compelling interest that the State has in preserving life, we cannot say that the Missouri requirement of a second physician in those unusual circumstances where Missouri permits a third-trimester abortion is unconstitutional. Preserving the life of a viable fetus that is aborted may not often be possible,⁹ but the State legitimately may choose to provide safeguards for the comparatively few instances of live birth that occur. We believe the second-physician requirement furthers the State's compelling interest in protecting the lives of viable fetuses, and we reverse the judgment of the Court of Appeals holding that § 188.030.3 is unconstitutional.

IV

Section 188.047 requires a pathology report for every abortion performed. Even in the early weeks of pregnancy, however, "[c]ertain regulations that have no significant impact on the woman's exercise of her right to decide to have an abortion may be permissible where justified by important state health objectives." *City of Akron*, at 11. See

⁹See ACOG Technical Bulletin No. 56, *supra* n. 7, at 4 (as high as 7% live-birth rate for intrauterine instillation of uterotonic agents); Stroh & Hinman, Reported Live Births Following Induced Abortion: Two and One-Half Years' Experience in Upstate New York, 126 Am. J. Obstet. Gynecol. 83, 83-84 (1976) (26 live births following saline induced-abortions; 9 following hysterotomy; 1 following oxytocin-induced abortion) (one survival out of 38 live births.)

Planned Parenthood of Central Mo. v. Danforth, 428 U. S. 52, 80-81 (1976). The question is whether § 188.047 unconstitutionally burdens a woman's abortion decision. We hold that it does not.

In regulating hospital services within the State, Missouri requires that "[a]ll tissue surgically removed, with the exception of such tissue as tonsils, adenoids, hernial sacs and prepuces, shall be examined by a pathologist, either on the premises or by arrangement outside of the hospital." 13 Mo. Admin. Code 50-20.030(3)(A)7 (1977). Although Missouri apparently does not require pathology reports in all procedures, this does not mean that such a requirement is invalid simply because it touches on the woman's abortion right during the first weeks of pregnancy. Rather, the specific issue here is whether § 188.047, which on its face and in effect is reasonably related to generally accepted medical standards and maternal health,¹⁰ "further[s] important health-related

¹⁰ A pathological examination is designed to assist in the detection of fatal ectopic pregnancies, hydatridiforme moles or other precancerous growths, and a variety of other problems that can only be discovered through a pathological examination. The District Court noted that several medical experts testified that pathology should be done in every case of abortion. 483 F. Supp., at 700, n. 49. Moreover, the ACOG standards for abortion services state that for all surgical services performed on an ambulatory outpatient basis: "Tissue removed *should* be submitted to a pathologist for an examination. . . . In the situation of elective termination of pregnancy, the attending physician should record a description of the gross products. Unless definite embryonic or fetal parts can be identified, the products of elective interruptions of pregnancy *must* be submitted to a pathologist for gross and microscopic examination." ACOG, Standards for Obstetric-Gynecologic Services 52 (5th ed. 1982) (emphasis added). The standards of the National Abortion Federation (NAF), whose members include the institutional plaintiffs in this case, itself provides: "*All tissue must be examined grossly at the time of the abortion procedure by a physician or trained assistant and the results recorded in the chart.* In the absence of visible fetal parts or placenta upon gross examination, obtained tissue may be examined under a low power microscope If this

State concerns," *City of Akron, ante*, at 12, without interfering with the woman's decision to have an abortion.

As the Court of Appeals recognized, pathology examinations are clearly "useful and even necessary in some cases," because "abnormalities in the tissue may warn of serious, possibly fatal disorders." 655 F. 2d, at 870. Examining tissue removed during an abortion provides a State with an opportunity to further its interest in promoting the health of its citizens. Additionally, questions about the long-range complications of abortions and their effect on subsequent pregnancies remain. See App. 72-73 (testimony of Dr. Willard Cates, Jr.); Levin, et al., Association of Induced Abortion with Subsequent Pregnancy Loss, 243 J. A. M. A. 2495, 2499 (1980). Recorded pathology reports, in concert with abortion complication reports, provide a statistical basis for studying those complications.¹¹ Cf. *Danforth*, 428 U. S., at 81.

In light of these factors, we think the small additional cost¹²

examination is inconclusive, the tissue should be sent to the nearest suitable pathology laboratory for microscopic examination." NAF, National Abortion Federation Standards 6 (1981) (emphasis in original) (compliance with standards obligatory for NAF member facilities to remain in good standing). See Brief of the American Public Health Association as *Amicus Curiae* in Nos. 81-185, 81-746, 81-1172, at 29, n. 6 (supporting the NAF standards for non-hospital abortion facilities as constituting "minimum standards"). Cf. Planned Parenthood of Metropolitan Washington, D. C., Inc., 1980 Guidelines for Operation, Maintenance and Evaluation of First Trimester Outpatient Abortion Facilities 10 ("Gross examination must be performed on all specimens. Microscopic tissue analysis must be done for all cases when immediate gross evaluation is inadequate or does not confirm a normal gestation.").

¹¹ Section 188.047 requires that a copy of the report be sent to the State's division of health.

¹² The estimated cost of compliance for plaintiff Reproductive Health Services was \$19.40 per abortion performed. 483 F. Supp., at 700, n. 48. There was testimony in the District Court that the additional cost of pathology would range from \$10.00 to \$40.00. See *ibid.*

of a tissue examination¹³ does not significantly burden a pregnant woman's abortion decision. In *Danforth*, this Court unanimously upheld Missouri's recordkeeping requirement as "useful to the State's interest in protecting the health of its female citizens, and [as] a resource that is relevant to decisions involving medical experience and judgment," 428 U. S., at 81.¹⁴ We view the requirement for a pathology report as comparable and as a relatively insignificant burden. Accordingly, we reverse the judgment of the Court of Appeals on this point.

V

As we noted in *City of Akron*, the relevant legal standards with respect to parental consent requirements are not in dispute. See *ante*, at 21; *Bellotti v. Baird*, 443 U. S. 622, 640-642, 643-644 (1979) (plurality opinion) (*Bellotti II*); *id.*, at 656-657 (WHITE, J., dissenting). A State's interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial. It is clear, however, that "the State must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her

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¹⁴ The *Danforth* Court also noted that "[t]he added requirements for confidentiality, with the sole exception for public health officers, and for retention for seven years, a period not unreasonable in length, assist and persuade us in our determination of the constitutional limits." 428 U. S., at 81. Missouri extends the identical safeguards found reassuring in *Danforth* to the pathology reports at issue here. See Mo. Rev. Stat. §§ 188.055.2, 188.060 (Supp. 1982).

best interests.”¹⁵ *City of Akron, ante*, at 21–22.¹⁶ The issue here is one purely of statutory construction: whether Missouri provides a judicial alternative that is consistent with these established legal standards.¹⁷

The Missouri statute, § 188.028.2,¹⁸ in relevant part, provides:

¹⁵ The plurality in *Bellotti II* also required that the alternative to parental consent must “assure” that the resolution of this issue “will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained.” *Id.*, at 644. Confidentiality here is assured by the statutory requirement that allows the minor to use her initials on the petition. Mo. Rev. Stat. § 188.028.2(1) (Supp. 1982). As to expedition of appeals, § 188.028.2(6) provides in relevant part:

“The notice of intent to appeal shall be given within twenty-four hours from the date of issuance of the order. The record on appeal shall be completed and the appeal shall be perfected within five days from the filing of notice to appeal. Because time may be of the essence regarding the performance of the abortion, the supreme court of this state shall, by court rule, provide for expedited appellate review of cases appealed under this section.”

We believe this section provides the framework for a constitutionally sufficient means of expediting judicial proceedings. Immediately after the effective date of this statutory enactment, the District Court enjoined enforcement. No unemancipated pregnant minor has been required to comply with this section. Thus, to this point in time, there has been no need for the state supreme court to promulgate rules concerning appellate review. There is no reason to believe that Missouri will not expedite any appeal consistent with the mandate in our prior opinions.

¹⁶ Cf. *H.L. v. Matheson*, 450 U. S., at 406–407, and n. 14, 411 (upholding a parental notification requirement but not extending the holding to mature or emancipated minors or to immature minors showing such notification detrimental to their best interests). The lower courts found that § 188.028’s notice requirement was unconstitutional. 655 F. 2d, at 873; 483 F. Supp., at 701. The State has not sought review of that judgment here. Thus, in the posture in which it appears before this Court for review, § 188.028 contains no requirement for parental notification.

¹⁷ The Missouri statute also exempts “emancipated” women under the age of 18 both from the requirement of parental consent and from the alternative requirement of a judicial proceeding. Plaintiffs argue that the word “emancipated” in this context is void for vagueness, but we disagree. Cf. *H.L. v. Matheson, supra*, at 407 (using word to describe a minor). Al-

“(4) In the decree, the court shall for good cause:

“(a) Grant the petition for majority rights for the purpose of consenting to the abortion; or

“(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

“(c) Deny the petition, setting forth the grounds on which the petition is denied[.]”

On its face, § 188.028.2(4) authorizes juvenile courts¹⁹ to choose among any of the alternatives outlined in the section. The Court of Appeals concluded that a denial of the petition permitted in subsection (c) “would initially require the court to find that the minor was not emancipated and was not mature enough to make her own decision and that an abortion was not in her best interests.” 655 F. 2d, at 858. Plaintiffs contend that this interpretation is unreasonable. We do not agree.

though the question whether a minor is emancipated turns upon the facts and circumstances of each individual case, the Missouri courts have adopted general rules to guide that determination, and the term is one of general usage and understanding in the Missouri common law. See *Black v. Cole*, 626 S. W. 2d 397, 398 (Mo. App. 1981) (quoting 67 C. J. S. Parent and Child § 86, at 811 (1950)); *In re the Marriage of Heddy*, 535 S. W. 2d 276, 279 (Mo. App. 1976) (same); *Wurth v. Wurth*, 313 S. W. 2d 161, 164 (Mo. App. 1958) (same), rev'd on other grounds, 322 S. W. 2d 745 (Mo. 1959).

¹⁸ See n. 4, *supra*. This Court in *Danforth* held unconstitutional Missouri's parental consent requirement for all unmarried minors under the age of 18. 428 U. S., at 75. In response to our decision, Missouri enacted the section challenged here. This new statute became effective shortly before our decision in *Bellotti II*.

¹⁹ We have indicated in prior opinions that a minor should have access to an “independent decisionmaker.” *H.L. v. Matheson*, *supra*, at 420 (PowELL, J., concurring). Missouri has provided for a judicial decisionmaker. We therefore need not consider whether a qualified and independent non-judicial decisionmaker would be appropriate. Cf. *Bellotti II*, 443 U.S., at 643, n. 22.

Where fairly possible, courts should construe a statute to avoid a danger of unconstitutionality. The Court of Appeals was aware, if the statute provides discretion to deny permission to a minor for *any* "good cause," that arguably it would violate the principles that this Court has set forth. *Ibid.* It recognized, however, that before exercising any option, the juvenile court must receive evidence on "the emotional development, maturity, intellect and understanding of the minor." Mo. Rev. Stat. § 188.028.2(3) (Supp. 1982). The court then reached the logical conclusion that "findings and the ultimate denial of the petition must be supported by a showing of 'good cause.'" 655 F. 2d, at 858. The Court of Appeals reasonably found that a court could not deny a petition "for good cause" unless it first found—after having received the required evidence—that the minor was not mature enough to make her own decision. See *Bellotti II*, 443 U. S., at 643–644, 647–648 (plurality opinion). We conclude that the Court of Appeals correctly interpreted the statute and that § 188.028, as interpreted, avoids any constitutional infirmities.²⁰

VI

The judgment of the Court of Appeals, insofar as it invali-

²⁰ Plaintiffs also argue that, in light of the ambiguity of § 188.028.2(4), as evidenced by the differing interpretations placed upon it, the appropriate course of judicial restraint is abstention. This Court has found such an approach appropriate. See *Bellotti v. Baird*, 428 U. S. 132, 146–147 (1976) (*Bellotti I*). Plaintiffs did not, however, argue in the Court of Appeals that the court should abstain, and Missouri has no certification procedure whereby this Court can refer questions of state statutory construction to the state supreme court. See 655 F. 2d, at 861, n. 20; 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4248, at 525, n. 29 (1978 and Supp. 1982). Such a procedure "greatly simplifie[d]" our analysis in *Bellotti I*, *supra*, at 151. Moreover, where, as here, a statute is susceptible to a fair construction that obviates the need to have the state courts render the saving construction, there is no reason for federal courts to abstain.

dated Missouri's second-trimester hospitalization requirement and upheld the State's parental consent provision, is affirmed. The judgment invalidating the requirement of a pathology report for all abortions and the requirement that a second physician attend the abortion of any viable fetus is reversed. We vacate the judgment upholding an award of attorney's fees for all hours expended by plaintiffs' attorneys and remand for proceedings consistent with *Hensley v. Eckhart*, — U. S. — (1983).

It is so ordered.

MAR 4 1983

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

L.F.P.

From: Justice Powell

Circulated: MAR 4 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 81-1255 AND 81-1623

PLANNED PARENTHOOD ASSOCIATION OF
KANSAS CITY, MISSOURI, INC.,
ET AL., PETITIONERS

81-1255

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF
MISSOURI, ET AL.

JOHN ASHCROFT, ATTORNEY GENERAL OF
MISSOURI, ET AL., PETITIONERS

81-1623

v.

PLANNED PARENTHOOD ASSOCIATION OF
KANSAS CITY, MISSOURI, INC.,
ET AL., PETITIONERS

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

[Decided March —, 1983]

JUSTICE POWELL delivered the opinion of the Court:

These cases, like *City of Akron v. Akron Center for Reproductive Health, Inc.*, ante, p. —, and *Simopoulos v. Virginia*, post, p. —, present questions as to the validity of state statutes regulating the performance of abortions.

I

Planned Parenthood of Kansas City, Missouri, Inc., two physicians who perform abortions, and an abortion clinic ("plaintiffs") filed a complaint in the District Court for the Western District of Missouri challenging, as unconstitutional,

several sections of the Missouri statutes regulating the performance of abortions. The sections relevant here include Mo. Rev. Stat. § 188.025 (Supp. 1982), requiring that abortions after 12 weeks of pregnancy be performed in a hospital;¹ § 188.047, requiring a pathology report for each abortion performed;² § 188.030, requiring the presence of a second physician during abortions performed after viability;³ and § 188.028, requiring minors to secure parental or judicial consent.⁴

¹ Mo. Rev. Stat. § 188.025 provides: "Every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital."

² Mo. Rev. Stat. § 188.047 provides:

"A representative sample of tissue removed at the time of abortion shall be submitted to a board eligible or certified pathologist, who shall file a copy of the tissue report with the state division of health, and who shall provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced and the pathologist's report shall be made a part of the patient's permanent record."

³ Mo. Rev. Stat. § 188.030.3 provides:

"An abortion of a viable unborn child shall be performed or induced only when there is in attendance a physician other than the physician performing or adducing the abortion who shall take control of and provide immediate medical care for a child born as a result of the abortion. During the performance of the abortion, the physician performing it, and subsequent to the abortion, the physician required by this section to be in attendance, shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman."

⁴ Mo. Rev. Stat. § 188.028 provides:

"1. No person shall knowingly perform an abortion upon a pregnant woman under the age of eighteen years unless:

"(1) The attending physician has secured the informed written consent of the minor and one parent or guardian; or

"(2) The minor is emancipated and the attending physician has received the informed written consent of the minor; or

"(3) The minor has been granted the right to self-consent to the abortion by court order pursuant to subsection 2 of this section, and the attending

After hearing testimony from a number of expert witnesses, the District Court invalidated all of these sections except the pathology requirement. 483 F. Supp. 679, 699-701 (1980).⁵ The Court of Appeals for the Eighth Circuit re-

physician has received the informed written consent of the minor; or

"(4) The minor has been granted consent to the abortion by court order, and the court has given its informed written consent in accordance with subsection 2 of this section, and the minor is having the abortion willingly, in compliance with subsection 3 of this section.

"2. The right of a minor to self-consent to an abortion under subdivision (3) of subsection 1 of this section or court consent under subdivision (4) of subsection 1 of this section may be granted by a court pursuant to the following procedures:

"(1) The minor or next friend shall make an application to the juvenile court which shall assist the minor or next friend in preparing the petition and notices required pursuant to this section. The minor or the next friend of the minor shall thereafter file a petition setting forth the initials of the minor; the age of the minor; the names and addresses of each parent, guardian, or, if the minor's parents are deceased and no guardian has been appointed, any other person standing in loco parentis of the minor; that the minor has been fully informed of the risks and consequences of the abortion; that the minor is of sound mind and has sufficient intellectual capacity to consent to the abortion; that, if the court does not grant the minor majority rights for the purpose of consent to the abortion, the court should find that the abortion is in the best interest of the minor and give judicial consent to the abortion; that the court should appoint a guardian ad litem of the child; and if the minor does not have private counsel, that the court should appoint counsel. The petition shall be signed by the minor or the next friend;

"(3) A hearing on the merits of the petition, to be held on the record, shall be held as soon as possible within five days of the filing of the petition. . . . At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect and understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other evidence that the court may find useful in determining whether the minor should be granted majority rights for the purpose of consenting to the abortion or whether the abortion is in the best interests of the minor;

"(4) In the decree, the court shall for good cause:

"(a) Grant the petition for majority rights for the purpose of consenting

[Footnote 5 is on p. 4]

versed the District Court's judgment with respect to § 188.028, thereby upholding the requirement that a minor secure parental or judicial consent to an abortion. It also held that the District Court erred in sustaining § 188.047, the pathology requirement. The District Court's judgment with respect to the second-physician requirement was affirmed, and the case was remanded for further proceedings and findings relating to the second-trimester hospitalization requirement. 655 F. 2d 848, 872-873 (1981). On remand, the District Court affirmed its holding that the second-trimester hospitalization requirement was unconstitutional. The Court of Appeals affirmed this judgment. 664 F. 2d 687, 691 (1981). We granted certiorari. — U. S. — (1982).

The Court today in *City of Akron, ante*, at 8-12, has stated fully the principles that govern judicial review of state statutes regulating abortions, and these need not be repeated here. With these principles in mind, we turn to the statutes at issue.

II

to the abortion; or

"(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

"(c) Deny the petition, setting forth the grounds on which the petition is denied;

"3. If a minor desires an abortion, then she shall be orally informed of and, if possible, sign the written consent required by section 188.039 in the same manner as an adult person. No abortion shall be performed on any minor against her will, except that an abortion may be performed against the will of a minor pursuant to a court order described in subdivision (4) of subsection 1 of this section that the abortion is necessary to preserve the life of the minor."

⁵The District Court also awarded attorney's fees for all hours claimed by the plaintiffs' attorneys. The Court of Appeals affirmed this allocation of fees. See 655 F. 2d 848, 872 (CA8 1981). The petition for certiorari raises the issue whether an award of attorney's fees, made pursuant to 42 U. S. C. § 1988, should be proportioned to reflect the extent to which plaintiffs prevailed.

In *City of Akron*, we invalidated a city ordinance requiring physicians to perform all second-trimester abortions at general or special hospitals accredited by the Joint Commission on Accreditation of Hospitals (JCAH) or by the American Osteopathic Association. *Ante*, at 13. Missouri's hospitalization requirements are similar to those enacted by Akron, as all second-trimester abortions must be performed in general, acute-care facilities.⁶ For the reasons stated in *City of Akron*, we held that such a requirement "unreasonably infringes upon a woman's constitutional right to obtain an abortion." *Ante*, at 20-21. For the same reasons, we affirm the Court of Appeals' judgment that §188.025 is unconstitutional.

III

We turn now to the State's second-physician requirement.

⁶ Missouri does not define the term "hospital" in its statutory provisions regulating abortions. We therefore must assume, as did the courts below, see 483 F. Supp., at 686, n. 10; 664 F. 2d, at 689-690, and nn. 3, 5 and 6, that the term has its common meaning of a general, acute-care facility. Cf. Mo. Rev. Stat. § 188.015(2) (Supp. 1982) (defining "abortion facility" as "a clinic, physician's office, or any other place or facility in which abortions are performed other than a hospital"). Section 197.020.2 (1978), part of Missouri's hospital licensing laws, reads:

"**'Hospital'** means a place devoted primarily to the maintenance and operation of facilities for the diagnosis, treatment or care for not less than twenty-four hours in any week of three or more nonrelated individuals suffering from illness, disease, injury, deformity or other abnormal physical conditions; or a place devoted primarily to provide for not less than twenty-four hours in any week medical . . . care for three or more nonrelated individuals. . . ."

Cf. Mo. Rev. Stat. § 197.200(1) (1978) (defining "ambulatory surgical center" to include facilities "with an organized medical staff of physicians" and "with continuous physician services and registered professional nursing services whenever a patient is in the facility"); 13 Mo. Admin. Code 50-30.010(1)(A) (1977) (same). The regulations for the Department of Social Services establish standards for the construction, physical facilities, and administration of hospitals. *Id.*, 50-20.010 to 50-20.030 (1977). These are not unlike those set by JCAH. See *City of Akron*, *ante*, at 13, and n. 16.

In *Roe v. Wade*, 410 U. S. 113 (1973), the Court recognized that the State has a compelling interest in the life of a viable fetus: "[T]he State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.*, at 164-165. See *Colautti v. Franklin*, 439 U. S. 379, 386-387 (1979); *Beal v. Doe*, 432 U. S. 438, 445-446 (1977). Several of the Missouri statutes undertake such regulation. Post-viability abortions are proscribed except when necessary to preserve the life or the health of the woman. Mo. Rev. Stat. § 188.030.1 (Supp. 1982). The State also forbids the use of abortion procedures fatal to the viable fetus unless alternative procedures pose a greater risk to the health of the woman. § 188.030.2.

The statutory provision at issue in this case requires the attendance of a second physician at the abortion of a viable fetus. § 188.030.3. This section requires that the second physician "take all reasonable steps in keeping with good medical practice . . . to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman." See n. 3, *supra*. It also provides that the second physician "shall take control of and provide immediate medical care for a child born as a result of the abortion."

The lower courts invalidated § 188.030.3.⁷ The plaintiffs, respondents here on this issue, urge affirmance on the

⁷The courts below found that there is no possible justification for a second-physician requirement whenever D&E is used since no viable fetus can survive a D&E procedure. 483 F. Supp., at 694; 655 F. 2d, at 865. Accordingly, they found the provision overbroad. As the Court of Appeals noted, however, the choice of D&E after viability is subject to the requirements of § 188.030.2. See *id.*, at 865, and n. 28. Thus, D&E is not to be used when the fetus is viable; when other methods are more likely to preserve its life; and when alternative procedures do not pose a greater risk to the woman's life or health. Cf. *id.*, at 865 (some physicians testified they

grounds that the second-physician requirement distorts the traditional doctor-patient relationship, and is both impractical and costly. They note that Missouri does not require two physicians in attendance for any other medical or surgical procedure, including childbirth or delivery of a premature infant. These are not insubstantial arguments, and we view the issue as a close one.

The first physician's primary concern will be the life and health of the woman. Many third-trimester abortions in Missouri will be emergency operations,⁸ as the State only permits these late abortions when they are necessary to preserve the life or the health of the woman. It is not unreasonable for the State to assume that during the operation the first physician's attention and skills will be directed to preserving the woman's condition, and not to protecting the actual life of those fetuses who survive the abortion procedure.

would not use D&E in third-trimester); American College of Obstetricians and Gynecologists (ACOG) Technical Bulletin No. 56, Methods of Midtrimester Abortion 4 (1979) (mortality rate for D&E less than or similar to that of instillation abortions up to 20 weeks). There is nothing in the record to indicate that D&E will be the method that poses the least risk to the woman in every situation in which there are compelling medical reasons for performing an abortion after viability. Cf. 655 F. 2d, at 865 (experts disagree whether D&E should ever be used after viability). We therefore cannot assume that all third-trimester abortions will be D&E abortions, or that there will be no live births. Thus, the State's compelling interest in preserving the life of the fetus when there is a live birth justifies the State in requiring a second physician at every third-trimester abortion.

⁸There is no clearly expressed exception on the face of the statute for the performance of an abortion of a viable fetus without the second physician in attendance. There may be emergency situations where, for example, the woman's health may be endangered by delay. Section § 188.030.3 is qualified, at least in part, by the phrase "provided that it does not pose an increased risk to the life or health of the woman." This clause reasonably could be construed to apply to such a situation. Cf. *H.L. v. Matheson*, 450 U. S. 398, 407, n. 14 (1981) (rejecting argument that Utah statute might apply to individuals with emergency health care needs).

Viable fetuses will be in immediate and grave danger because of their premature birth. A second physician, in situations where Missouri permits third-trimester abortions, may be of assistance to the woman's physician in preserving the health and life of the child.

By giving immediate medical attention to a fetus that is delivered alive, the second physician will assure that the State's interests are protected more fully than the first physician alone would be able to do. And given the compelling interest that the State has in preserving life, we cannot say that the Missouri requirement of a second physician in those unusual circumstances where Missouri permits a third-trimester abortion is unconstitutional. Preserving the life of a viable fetus that is aborted may not often be possible,⁹ but the State legitimately may choose to provide safeguards for the comparatively few instances of live birth that occur. We believe the second-physician requirement furthers the State's compelling interest in protecting the lives of viable fetuses, and we reverse the judgment of the Court of Appeals holding that § 188.030.3 is unconstitutional.

IV

Section 188.047 requires a pathology report for every abortion performed. Even in the early weeks of pregnancy, however, "[c]ertain regulations that have no significant impact on the woman's exercise of her right to decide to have an abortion may be permissible where justified by important state health objectives." *City of Akron*, at 11. See

⁹ See ACOG Technical Bulletin No. 56, *supra* n. 7, at 4 (as high as 7% live-birth rate for intrauterine instillation of uterotonic agents); Stroh & Hinman, Reported Live Births Following Induced Abortion: Two and One-Half Years' Experience in Upstate New York, 126 Am. J. Obstet. Gynecol. 83, 83-84 (1976) (26 live births following saline induced-abortions; 9 following hysterotomy; 1 following oxytocin-induced abortion) (one survival out of 38 live births.)

Planned Parenthood of Central Mo. v. Danforth, 428 U. S. 52, 80-81 (1976). The question is whether § 188.047 unconstitutionally burdens a woman's abortion decision. We hold that it does not.

In regulating hospital services within the State, Missouri requires that "[a]ll tissue surgically removed, with the exception of such tissue as tonsils, adenoids, hernial sacs and prepuces, shall be examined by a pathologist, either on the premises or by arrangement outside of the hospital." 13 Mo. Admin. Code 50-20.030(3)(A)7 (1977). Although Missouri apparently does not require pathology reports in all procedures, this does not mean that such a requirement is invalid simply because it touches on the woman's abortion right during the first weeks of pregnancy. Rather, the specific issue here is whether § 188.047, which on its face and in effect is reasonably related to generally accepted medical standards and maternal health,¹⁰ "further[s] important health-related

¹⁰ A pathological examination is designed to assist in the detection of fatal ectopic pregnancies, hydatritiforme moles or other precancerous growths, and a variety of other problems that can only be discovered through a pathological examination. The District Court noted that several medical experts testified that pathology should be done in every case of abortion. 483 F. Supp., at 700, n. 49. Moreover, the ACOG standards for abortion services state that for all surgical services performed on an ambulatory outpatient basis: "Tissue removed *should* be submitted to a pathologist for an examination. . . . In the situation of elective termination of pregnancy, the attending physician should record a description of the gross products. Unless definite embryonic or fetal parts can be identified, the products of elective interruptions of pregnancy *must* be submitted to a pathologist for gross and microscopic examination." ACOG, Standards for Obstetric-Gynecologic Services 52 (5th ed. 1982) (emphasis added). The standards of the National Abortion Federation (NAF), whose members include the institutional plaintiffs in this case, itself provides: "*All tissue must be examined grossly at the time of the abortion procedure by a physician or trained assistant and the results recorded in the chart.* In the absence of visible fetal parts or placenta upon gross examination, obtained tissue may be examined under a low power microscope If this

State concerns," *City of Akron, ante*, at 12, without interfering with the woman's decision to have an abortion.

As the Court of Appeals recognized, pathology examinations are clearly "useful and even necessary in some cases," because "abnormalities in the tissue may warn of serious, possibly fatal disorders." 655 F. 2d, at 870. Examining tissue removed during an abortion provides a State with an opportunity to further its interest in promoting the health of its citizens. Additionally, questions about the long-range complications of abortions and their effect on subsequent pregnancies remain. See App. 72-73 (testimony of Dr. Willard Cates, Jr.); Levin, et al., Association of Induced Abortion with Subsequent Pregnancy Loss, 243 J. A. M. A. 2495, 2499 (1980). Recorded pathology reports, in concert with abortion complication reports, provide a statistical basis for studying those complications.¹¹ Cf. *Danforth*, 428 U. S., at 81.

In light of these factors, we think the small additional cost¹²

examination is inconclusive, the tissue should be sent to the nearest suitable pathology laboratory for microscopic examination." NAF, National Abortion Federation Standards 6 (1981) (emphasis in original) (compliance with standards obligatory for NAF member facilities to remain in good standing). See Brief of the American Public Health Association as *Amicus Curiae* in Nos. 81-185, 81-746, 81-1172, at 29, n. 6 (supporting the NAF standards for non-hospital abortion facilities as constituting "minimum standards"). Cf. Planned Parenthood of Metropolitan Washington, D. C., Inc., 1980 Guidelines for Operation, Maintenance and Evaluation of First Trimester Outpatient Abortion Facilities 10 ("Gross examination must be performed on all specimens. Microscopic tissue analysis must be done for all cases when immediate gross evaluation is inadequate or does not confirm a normal gestation.").

¹¹Section 188.047 requires that a copy of the report be sent to the State's division of health.

¹²The estimated cost of compliance for plaintiff Reproductive Health Services was \$19.40 per abortion performed. 483 F. Supp., at 700, n. 48. There was testimony in the District Court that the additional cost of pathology would range from \$10.00 to \$40.00. See *ibid.*

of a tissue examination¹³ does not significantly burden a pregnant woman's abortion decision. In *Danforth*, this Court unanimously upheld Missouri's recordkeeping requirement as "useful to the State's interest in protecting the health of its female citizens, and [as] a resource that is relevant to decisions involving medical experience and judgment," 428 U. S., at 81.¹⁴ We view the requirement for a pathology report as comparable and as a relatively insignificant burden. Accordingly, we reverse the judgment of the Court of Appeals on this point.

V

As we noted in *City of Akron*, the relevant legal standards with respect to parental consent requirements are not in dispute. See *ante*, at 21; *Bellotti v. Baird*, 443 U. S. 622, 640-642, 643-644 (1979) (plurality opinion) (*Bellotti II*); *id.*, at 656-657 (WHITE, J., dissenting). A State's interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial. It is clear, however, that "the State must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her

¹³ Plaintiffs also note that § 188.047 does not specify whether the pathologist must make a microscopic examination. State regulations, however, state: "All reports shall contain the findings of a gross examination. If fetal parts or placenta are not identified, then an accompanying microscopic tissue report must also be filed with the Division of Health." 13 Mo. Admin. Code 50-151.030(1) (1981).

¹⁴ The *Danforth* Court also noted that "[t]he added requirements for confidentiality, with the sole exception for public health officers, and for retention for seven years, a period not unreasonable in length, assist and persuade us in our determination of the constitutional limits." 428 U. S., at 81. Missouri extends the identical safeguards found reassuring in *Danforth* to the pathology reports at issue here. See Mo. Rev. Stat. §§ 188.055.2, 188.060 (Supp. 1982).

best interests.”¹⁵ *City of Akron, ante*, at 21–22.¹⁶ The issue here is one purely of statutory construction: whether Missouri provides a judicial alternative that is consistent with these established legal standards.¹⁷

The Missouri statute, § 188.028.2,¹⁸ in relevant part, provides:

¹⁵ The plurality in *Bellotti II* also required that the alternative to parental consent must “assure” that the resolution of this issue “will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained.” *Id.*, at 644. Confidentiality here is assured by the statutory requirement that allows the minor to use her initials on the petition. Mo. Rev. Stat. § 188.028.2(1) (Supp. 1982). As to expedition of appeals, § 188.028.2(6) provides in relevant part:

“The notice of intent to appeal shall be given within twenty-four hours from the date of issuance of the order. The record on appeal shall be completed and the appeal shall be perfected within five days from the filing of notice to appeal. Because time may be of the essence regarding the performance of the abortion, the supreme court of this state shall, by court rule, provide for expedited appellate review of cases appealed under this section.”

We believe this section provides the framework for a constitutionally sufficient means of expediting judicial proceedings. Immediately after the effective date of this statutory enactment, the District Court enjoined enforcement. No unemancipated pregnant minor has been required to comply with this section. Thus, to this point in time, there has been no need for the state supreme court to promulgate rules concerning appellate review. There is no reason to believe that Missouri will not expedite any appeal consistent with the mandate in our prior opinions.

¹⁶ Cf. *H.L. v. Matheson*, 450 U. S., at 406–407, and n. 14, 411 (upholding a parental notification requirement but not extending the holding to mature or emancipated minors or to immature minors showing such notification detrimental to their best interests). The lower courts found that § 188.028’s notice requirement was unconstitutional. 655 F. 2d, at 873; 483 F. Supp., at 701. The State has not sought review of that judgment here. Thus, in the posture in which it appears before this Court for review, § 188.028 contains no requirement for parental notification.

¹⁷ The Missouri statute also exempts “emancipated” women under the age of 18 both from the requirement of parental consent and from the alternative requirement of a judicial proceeding. Plaintiffs argue that the word “emancipated” in this context is void for vagueness, but we disagree. Cf. *H.L. v. Matheson, supra*, at 407 (using word to describe a minor). Al-

“(4) In the decree, the court shall for good cause:

“(a) Grant the petition for majority rights for the purpose of consenting to the abortion; or

“(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

“(c) Deny the petition, setting forth the grounds on which the petition is denied[.]”

On its face, § 188.028.2(4) authorizes juvenile courts¹⁹ to choose among any of the alternatives outlined in the section. The Court of Appeals concluded that a denial of the petition permitted in subsection (c) “would initially require the court to find that the minor was not emancipated and was not mature enough to make her own decision and that an abortion was not in her best interests.” 655 F. 2d, at 858. Plaintiffs contend that this interpretation is unreasonable. We do not agree.

though the question whether a minor is emancipated turns upon the facts and circumstances of each individual case, the Missouri courts have adopted general rules to guide that determination, and the term is one of general usage and understanding in the Missouri common law. See *Black v. Cole*, 626 S. W. 2d 397, 398 (Mo. App. 1981) (quoting 67 C. J. S. Parent and Child § 86, at 811 (1950)); *In re the Marriage of Heddy*, 535 S. W. 2d 276, 279 (Mo. App. 1976) (same); *Wurth v. Wurth*, 313 S. W. 2d 161, 164 (Mo. App. 1958) (same), rev'd on other grounds, 322 S. W. 2d 745 (Mo. 1959).

¹⁸ See n. 4, *supra*. This Court in *Danforth* held unconstitutional Missouri's parental consent requirement for all unmarried minors under the age of 18. 428 U. S., at 75. In response to our decision, Missouri enacted the section challenged here. This new statute became effective shortly before our decision in *Bellotti II*.

¹⁹ We have indicated in prior opinions that a minor should have access to an “independent decisionmaker.” *H.L. v. Matheson*, *supra*, at 420 (POWELL, J., concurring). Missouri has provided for a judicial decisionmaker. We therefore need not consider whether a qualified and independent non-judicial decisionmaker would be appropriate. Cf. *Bellotti II*, 443 U.S., at 643, n. 22.

Where fairly possible, courts should construe a statute to avoid a danger of unconstitutionality. The Court of Appeals was aware, if the statute provides discretion to deny permission to a minor for *any* "good cause," that arguably it would violate the principles that this Court has set forth. *Ibid.* It recognized, however, that before exercising any option, the juvenile court must receive evidence on "the emotional development, maturity, intellect and understanding of the minor." Mo. Rev. Stat. § 188.028.2(3) (Supp. 1982). The court then reached the logical conclusion that "findings and the ultimate denial of the petition must be supported by a showing of 'good cause.'" 655 F. 2d, at 858. The Court of Appeals reasonably found that a court could not deny a petition "for good cause" unless it first found—after having received the required evidence—that the minor was not mature enough to make her own decision. See *Bellotti II*, 443 U. S., at 643–644, 647–648 (plurality opinion). We conclude that the Court of Appeals correctly interpreted the statute and that § 188.028, as interpreted, avoids any constitutional infirmities.²⁰

VI

The judgment of the Court of Appeals, insofar as it invali-

²⁰ Plaintiffs also argue that, in light of the ambiguity of § 188.028.2(4), as evidenced by the differing interpretations placed upon it, the appropriate course of judicial restraint is abstention. This Court has found such an approach appropriate. See *Bellotti v. Baird*, 428 U. S. 132, 146–147 (1976) (*Bellotti I*). Plaintiffs did not, however, argue in the Court of Appeals that the court should abstain, and Missouri has no certification procedure whereby this Court can refer questions of state statutory construction to the state supreme court. See 655 F. 2d, at 861, n. 20; 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4248, at 525, n. 29 (1978 and Supp. 1982). Such a procedure "greatly simplifie[d]" our analysis in *Bellotti I*, *supra*, at 151. Moreover, where, as here, a statute is susceptible to a fair construction that obviates the need to have the state courts render the saving construction, there is no reason for federal courts to abstain.

dated Missouri's second-trimester hospitalization requirement and upheld the State's parental consent provision, is affirmed. The judgment invalidating the requirement of a pathology report for all abortions and the requirement that a second physician attend the abortion of any viable fetus is reversed. We vacate the judgment upholding an award of attorney's fees for all hours expended by plaintiffs' attorneys and remand for proceedings consistent with *Hensley v. Eckhart*, — U. S. — (1983).

It is so ordered.

MAR 3 1983

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

L.F.

From: Justice Powell

Circulated: ~~FEB~~ 3 1983

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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

P.M. was five months pregnant, well into the second trimester. Appellant testified that he encouraged her to confer with her parents and discussed with her the alternative of continuing the pregnancy to term. She did return home, but never advised her parents of her decision.

Two days later, P.M. returned to the clinic with her boy friend. The abortion was performed by an injection of saline solution. P.M. told appellant that she planned to deliver the fetus in a motel, and understood him to agree to this course. Appellant gave P.M. a prescription for an analgesic and a "Post-Injection Information" sheet that stated that she had undergone "a surgical procedure" and warned of a "wide range of normal reactions." App. 199. The sheet also advised that she call the physician if "heavy" bleeding began. Although P.M. did not recall being advised to go to a hospital when labor began, this was included on the instruction sheet. *Id.*, at 200.

P.M. went to a motel. Alone, she aborted her fetus in the motel bathroom 48 hours after the saline injection. She left the fetus, follow-up instructions, and pain medication in the wastebasket at the motel. Her boy friend took her home. Police found the fetus later that day and began an investigation.¹

Appellant was indicted² for unlawfully performing an abortion during the second trimester of pregnancy outside of

¹ Except as permitted by statute, persons performing an abortion are guilty of a Class 4 felony under Virginia law and subject to mandatory license revocation. Va. Code §§ 18.2-71, 54-316(3), 54-317(1), 54.321.2 (1982). A Class 4 felony is punishable by a sentence of two to ten years in prison. Va. Code § 18.2-10(d).

² The indictment alleges a violation of Va. Code § 18.2-71, which provides:

"Except as provided in other sections of this article, if any person administer to, or cause to be taken by a woman, any drug or other thing, or use means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and thereby destroy such child, or produce such abortion or

a licensed hospital and was convicted by the Circuit Court of Fairfax County sitting without a jury. The Supreme Court of Virginia unanimously affirmed the conviction. *Simopoulos v. Commonwealth*, 221 Va. 1059, 277 S. E. 2d 194 (1981). This appeal followed. We noted probable jurisdiction, — U. S. —, and now affirm.

II

Appellant broadly attacks Virginia's hospitalization requirements.³ He contends that they restrict the availability

miscarriage, he shall be guilty of a Class 4 felony."

The Virginia Code sets forth four exceptions to this statute: there is no criminal liability if the abortion (i) is performed within the first trimester, § 18.2-72; (ii) is performed in a licensed hospital in the second trimester, § 18.2-73; (iii) is necessary to save the woman's life, § 18.2-74.1; and (iv) is performed during the third trimester under certain circumstances, § 18.2-74.1. The indictment here alleged a violation of § 18.2-71 and expressly negated any defense of hospitalization under § 18.2-73 and any first-trimester defense under § 18.2-72. The indictment did not, however, rebut the other defenses.

³ Questions raised particularly with respect to Virginia's outpatient surgical clinics are considered in Part III, *infra*. Appellant raises two additional issues that do not require extended treatment. He first contends that Va. Code § 18.2-71 was applied unconstitutionally to him, because lack of medical necessity for the abortion was not alleged in the indictment, addressed in the prosecution's case, or mentioned by the trier of fact. Appellant contends that this failure renders the indictment unconstitutional for two reasons: (i) the State failed to meet its burden of alleging necessity in the indictment, as required by *United States v. Vuitch*, 402 U. S. 62 (1971); and (ii) the prosecution failed to meet its burden of persuasion, as required by *Patterson v. New York*, 432 U. S. 197 (1977).

The authoritative construction of § 18.2-71 by the Supreme Court of Virginia makes it clear that, at least with respect to the defense of medical necessity, the prosecution was not obligated to prove lack of medical necessity beyond a reasonable doubt *until* appellant invoked medical necessity as a defense. See 221 Va., at 1069, 277 S. E. 2d, at 200. Appellant's reliance on *Vuitch* thus is misplaced: the District of Columbia statute in *Vuitch*, as construed by this Court, required the prosecution to make this allegation. See 402 U. S., at 70. Placing upon the defendant the burden

of abortions after the first trimester by granting a monopoly to the few licensed hospitals that will permit mid-trimester abortions. He also argues that the Virginia requirements result in negative health consequences and, as applied to him and the abortions he performs in his well-equipped non-licensed clinic, do not further the State's interests.

We need not pause long here to consider the guiding principles, for we have set them out at length today in *City of Akron v. Akron Center for Reproductive Health, Inc.*, ante, at 9-12, 14-16. For present purposes here, the critical point is that we consistently have recognized and reaffirm today that a State has an "important and legitimate interest in the health of the mother" that becomes "'compelling' . . . at approximately the end of the first trimester," *Roe v. Wade*, 410 U. S. 113, 163 (1973), and is compelling throughout the remainder of the pregnancy. This interest, of course, embraces the facilities and circumstances in which abortions are performed. *Id.*, at 150.

A

It is in furtherance of this compelling interest in maternal health that Virginia has enacted its hospitalization requirement for abortions performed during the second trimester. As a general proposition, physicians' offices are not regulated under Virginia law.⁴ Virginia law does not, however, per-

of going forward with evidence on an affirmative defense is normally permissible. See *Engle v. Isaac*, 456 U. S. 107, 120-121, and n. 20 (1982); *Mullaney v. Wilbur*, 421 U. S. 684, 701-703, nn. 28, 30, 31 (1975).

Appellant also contends that the prosecution failed to prove that his acts in fact caused the death of the fetus. In view of the undisputed facts proved at trial, summarized above, this contention is meritless. See 221 Va., at 1069-1070, 277 S. E. 2d, at 200-201.

⁴A physician's office is explicitly excluded from the hospital licensing statutes and regulations unless the office is used principally for performing surgery. Va. Code § 32.1-124(5). Surgery is not defined. Appellant contends that whether his facility principally performs surgery is a ques-

mit a physician licensed in the practice of medicine and surgery to perform an abortion during the second trimester of pregnancy unless "such procedure is performed in a hospital licensed by the State Department of Health." Va. Code § 18.2-73 (1982). The Virginia abortion statute itself does not define the term "hospital." This definition is found in Va. Code § 32.1-123.1, which defines "hospital" to include "outpatient . . . hospitals." Section 20.2.11 of the Department of Health's Rules and Regulations for the Licensure of Outpatient Hospitals in Virginia (1977) ("regulations")⁵ defines outpatient hospital in pertinent part as "[i]nstitutions . . . which primarily provide facilities for the performance of surgical procedures on outpatients"⁶ and provides that second-trimester abortions may be performed in these clinics.⁷

tion of fact that has not been resolved, and that it is uncertain whether his clinic may be licensed as a "hospital." He notes that *after* he performed the abortion on P.M. he requested a certificate of need, see also *id.*, § 32.1-102.3, but was informed by the Office of the Attorney General that his "clinic-office cannot be licensed as a hospital" and that "if you wish to perform this type of procedure, you must, in essence, build a hospital to do it." App. to Reply Brief for Appellant 3a, 4a. Appellant did not seek a license before he performed the abortion at issue here. Thus, without record evidence that appellant's facility qualifies as a surgical outpatient clinic *and* that he was denied a hospital license, the issue of whether the Falls Church facility would qualify under Virginia law is irrelevant to our determination in this case. See n. 7, *infra* (noting State's interpretation of the Virginia regulations).

⁵The regulations were promulgated pursuant to 1947 Va. Acts, c. 15, § 1514-a5, repealed by 1979 Acts, c. 711. Although not relevant to our determination here, we note that new but similar regulations now supersede the regulations in effect when appellant performed the abortion for which he has been prosecuted. See Department of Health, Rules and Regulations for the Licensure of Hospitals in Virginia, pt. IV (1982).

⁶Section 32.1-125 of the Code provides: "No person shall establish, conduct, maintain, or operate in this Commonwealth any hospital . . . unless such hospital . . . is licensed as provided in this article." See also Va. Regs. (Outpatient Hospitals) § 30.1 (similar provision specifically governing outpatient surgical clinics).

⁷Part II of the regulations sets minimum standards for outpatient surgi-

Thus, under Virginia law, a second-trimester abortion may be performed in an outpatient surgical clinic⁸ provided that clinic has been licensed as a "hospital" by the State.

It is readily apparent that Virginia's second-trimester hospitalization requirement is significantly different from those at issue in *City of Akron*, ante, at 13, and *Planned Parenthood Association of Kansas City, Mo., Inc. v. Ashcroft*, ante, at 45. In those cases, the regulations required that "all second-trimester abortions must be performed in general, acute-care facilities." *Ashcroft*, ante, at 5. We found that such a requirement, by preventing the use of the dilatation and evacuation method (D&E) of performing abortions in appropriate non-hospital settings, "imposed a heavy, and unnecessary, burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure." *City of Akron*, ante, at 20. The Court invalidated these laws invalid because they did not reasonably further the state interest in maternal health.

One of the most important factors in our analysis in *City of Akron* was the medical fact that, "at least during the early weeks of the second trimester[,] D&E abortions may be per-

cal clinics that may perform second-trimester abortions. This interpretation is confirmed by several sections in Part II, i. e., §§ 43.6.2, 43.6.3, 43.7.3(c), 43.8.4, 43.8.5, 43.9.5, all of which refer to abortion services. Moreover, the State's counsel at oral argument represented that facilities licensed pursuant to Part II legally may perform second-trimester abortions. Tr. of Oral Arg. 33.

Virginia uses the term "outpatient abortion clinics" to refer specifically to those facilities meeting the minimum standards of Part III of the regulations. See Va. Regs. (Outpatient Hospitals), p. i. Facilities meeting these standards are limited to performing abortions only during the first trimester of pregnancy. *Ibid.* See *id.*, § 62.1.2 ("Any procedure performed to terminate a pregnancy [in an outpatient abortion clinic] shall be performed prior to the end of the first trimester (12th week amenorrhea).").

⁸ We herein usually refer to the outpatient "hospitals" in Virginia that legally may perform second-trimester abortions as "outpatient surgical clinics."

formed as safely in an outpatient clinic as in a full-service hospital." *Ante*, at 19. In contrast, the Virginia statutes and regulations do not require that second-trimester abortions be performed exclusively in full-service hospitals. Under Virginia's regulations, outpatient surgical clinics may qualify for licensing as hospitals in which second-trimester abortions lawfully may be performed. Thus, our decisions in *City of Akron* and *Ashcroft* are not controlling here.

B

Second-trimester abortions may give rise to serious complications,⁹ and certain procedures significantly increase the risks. Although the increasingly common use and relative safety of the D&E method, see *City of Akron*, *ante*, at 17-19 may make the need for particular equipment in and designs of a facility less imperative, the need for reasonable regulations has not been eliminated. D&E, despite its safety early in the second trimester, still may cause complications.¹⁰

The American Public Health Association (APHA), although recognizing "that greater use of the dilatation and evacuation procedure make[s] it possible to perform the vast

⁹ See Cadesky, Ravinsky & Lyons, Dilation and Evacuation: A Preferred Method of Midtrimester Abortion, 129 Am. J. Obstet. Gynecol. 329, 331 (1981), Department of Health and Human Services, Centers for Disease Control, Abortion Surveillance: Annual Summary 1978, at 48 (1980).

¹⁰ Hemorrhaging is a leading cause of death and complications in D&E abortion patients. Other potential complications are uterine perforation and cervical tears, which are significantly increased in comparison to other second-trimester procedures. See ACOG Technical Bulletin No. 56, Methods of Midtrimester Abortion 75 (1979).

A major potential complication for all abortion techniques—infection—normally does not arise until 24 to 72 hours after the procedure has taken place, by which time the woman usually will have been discharged from any facility. See *Ashcroft*, 664 F. 2d 687, 690, n. 6 (CA8 1981), rev'd in part and aff'd in part, *ante*, p. —. Thus the relative safety of the D&E procedure does not alleviate the need for standards designed to prevent infection.

majority of second trimester abortions during or prior to the 16th [w]eek after the last menstrual period," still "[u]rges endorsement of the provision of second trimester abortion in free-standing qualified clinics that meet the state standards required for certification." APHA, *The Right to Second Trimester Abortion* 1, 2 (1979) (emphasis added). The medical profession has not thought the standards need be relaxed merely because the facility performs abortions: "Ambulatory care facilities providing abortion services should meet the same standards of care as those recommended for other surgical procedures performed in the physician's office and outpatient clinic or the free-standing and hospital-based ambulatory setting." American College of Obstetricians and Gynecologists (ACOG), *Standards for Obstetric-Gynecologic Services* 54 (5th ed. 1982) (hereinafter ACOG Standards). See also *id.*, at 52 ("Free-standing or hospital-based ambulatory surgical facilities should be licensed to conform to requirements of state or federal legislation."). Indeed, the medical profession's standards for outpatient surgical facilities are stringent: "Such facilities should maintain the same surgical, anesthetic, and personnel standards as recommended for hospitals." *Ibid.*

In view of its interest, the State necessarily has considerable discretion in determining standards for the licensing of medical facilities, but its discretion does not "permit it to adopt abortion regulations that depart from sound medical practice." *City of Akron, ante*, at 12. "If a State requires licensing or undertakes to regulate the performance of abortions during [the second trimester], the health standards adopted must be 'legitimately related to the objective the State seeks to accomplish.' *Doe*, 410 U. S., at 195." *City of Akron, ante*, at 12. The issue here is whether Virginia's licensing requirements for outpatient surgical clinics performing second-trimester abortions are reasonable means of furthering the State's compelling interest in the woman's health.

C

The Virginia regulations applicable to outpatient surgical clinics performing second-trimester abortions are, with few exceptions, the same regulations applicable to all outpatient surgical clinics in Virginia. These regulations may be grouped for purposes of discussion into three main categories.

The first grouping relates to organization, management, policies, procedures, and staffing. These regulations require personnel and facilities "necessary to meet patient and program needs." Va. Regs. (Outpatient Hospitals) § 40.3; see also § 40.1. They also require a policy and procedures manual,¹¹ § 43.2, an administrative officer, § 40.6, a licensed physician who must supervise clinical services and perform surgical procedures, § 42.1, and a registered nurse to be on duty at all times while the facility is in use, § 42.2. The second category of requirements outlines construction standards for outpatient surgical clinics, but also provides that "deviations from the requirements prescribed herein may be approved if it is determined that the purposes of the minimum requirements have been fulfilled," § 50.2.1. There are also construction requirements that set forth standards for the public areas, clinical areas, laboratory and radiology services,¹² and general building.¹³

¹¹The manual must describe emergency and elective procedures that may be performed at the facility, § 41.2.1; the anesthesia that may be used, § 41.2.2; the criteria and procedures for admissions and discharge, § 41.2.4; written informed consent, § 41.2.4; and procedures for housekeeping and infection control, § 41.2.5.

¹²These services may be provided within the outpatient surgical clinic if the services comply with applicable requirements of the Department of Health's Rules and Regulations for the Licensure of General and Special Hospitals or through a contractual arrangement with nearby facilities. Va. Regs. (Outpatient Hospitals) § 52.3.1.

¹³The regulations contain customary provisions with respect to meeting building codes, zoning ordinances, and the like. See Va. Regs. (Outpa-

The most important group of regulations for our purposes relates to patient care services. Most of these set the requirements for various services that the facility may offer, such as anesthesia,¹⁴ laboratory,¹⁵ and pathology.¹⁶ Some of the requirements relate to sanitation, laundry, and the physical plant. See, *e. g.*, Va. Regs. (Outpatient Hospitals) §§ 43.2, 43.10, 43.11, 43.12.6. There are also guidelines on medical records, § 43.7, pre-operative admission,¹⁷ and post-operative recovery.¹⁸ Finally, the regulations mandate some emergency services and evacuation planning.¹⁹

tient Hospitals) §§ 50.6.1, 50.7.1, 50.8.1, 50.8.4.

¹⁴ See, *e. g.*, Va. Regs. (Outpatient Hospitals) § 43.1.1 (service must be directed by licensed physician); *id.*, § 43.1.2 (physician responsible for anesthesia must be present for administration and recovery).

¹⁵ Each patient admitted must receive "appropriate routine laboratory testing." See Va. Regs. (Outpatient Hospitals) § 43.6.1. Outpatient surgical clinics providing abortion services also must conduct pregnancy testing, hemoglobin or hematocrit determinations, blood and Rh typing, Coomb's testing where woman is Rh-negative, urinalysis for sugar and albumin, culture for gonorrheal infection, § 64.1.3, and, where medically indicated, serologic testing for syphilis and a Papanicolaou smear, § 64.1.4.

¹⁶ Section 43.6.3 requires that all tissue be submitted for a pathology examination, with pathology services for abortion patients meeting the minimum requirements of § 64.2.4 (must be "submitted for histological examination by a pathologist in all cases where gross examination by the attending physician does not confirm presence of fetal parts"). See *Ashcroft, ante*, at —.

¹⁷ Section 43.8.1 provides for a medical history and physical examination before initiating any procedure. Sufficient time to permit review of laboratory tests must be allowed between initial examination and initiation of any procedure. *Id.*, § 43.8.3. In an outpatient surgical clinic providing abortion services, the diagnosis of pregnancy is the responsibility of the performing physician. *Id.*, § 43.8.4.

Section 43.8.5 provides that the facility performing abortions "shall offer each patient *appropriate* counseling and instruction in the abortion procedure and in birth control methods." Virginia does not require that the doctor personally provide this counseling or specify the means by which this counseling is performed. Under this requirement, unlike in *City of Akron*, it is for the woman, in conjunction with her physician, to decide what considerations are relevant to her decision. See *ante*, at 27-28.

¹⁸ Each patient shall be observed for post-operative complications for one

[Footnote 19 is on p. 11]

III

Appellant does not attack these regulations expressly in his jurisdictional statement or in his principal brief. Instead, he challenges Virginia's requirement of hospitalization for second-trimester abortions without alluding to the fact that the statutory term "hospital" is defined to include outpatient surgical clinics that may perform second-trimester abortions. As appellant had not sought a license for his clinic at the time he was indicted, he appears to argue that the Virginia hospitalization requirements are comparable to those we have invalidated in *City of Akron* and *Ashcroft*, and thus invalid.

Appellant's reply brief does criticize the Virginia regulations on various grounds. He argues that even if he had applied for a license, it is uncertain whether it would have been granted; that Virginia courts have had no opportunity to construe the "licensing statutes and regulations;" that Part II of the regulations does not cover an outpatient surgical facility where second trimester abortions are performed, but see n. 8, *supra*; and that medical evidence rebuts the view "that it is

hour under the direct supervision of a nurse trained in resuscitation techniques and other emergency procedures. Va. Regs. (Outpatient Hospitals) §§ 43.9.1, 43.9.2. A licensed physician must be present on the premises until the patient is discharged on his written orders. *Id.*, §§ 43.9.3, 43.9.4. For a discussion of similar standards by various medical organizations, see n. 32, *infra*.

¹⁹See Va. Regs. (Outpatient Hospitals) § 43.4.1 (written evacuation plan); *id.*, § 43.5.1 ("adequate monitoring equipment, suction apparatus, oxygen, and related items necessary for resuscitation and control of hemorrhage and other complications"); *id.*, § 43.5.2 (ambulance service to a licensed general hospital). Section 43.5.3 provides:

"A written agreement shall be executed with a general hospital to ensure that any patient of the outpatient surgical hospital shall receive needed emergency treatment. The agreement shall be with a licensed general hospital capable of providing full surgical, anesthesia, clinical laboratory, and diagnostic radiology service on thirty (30) minutes notice and which has a physician in the hospital and available for emergency service at all times."

safer to perform second trimester abortions in hospitals.” Reply Brief for Appellant 1. Only the last of these arguments is relevant to the validity of these statutes and regulations, and appellant points to no evidence that supports his generalized claim of “safety.” We have noted above that the Virginia requirements are strikingly different from those we invalidated in *City of Akron* and *Ashcroft*. Compliance with the state’s requirements will entail costs, but this can be said of most regulations adopted by governments to protect the health and safety of people. Moreover, ethical physicians are obligated to provide facilities consistent with the standards set by their profession, and appellant has not identified any significant differences between professional standards and the Virginia requirements. We are convinced, at least on the record before us, that the Virginia provisions are reasonably related to and further the State’s compelling interest in protecting the health of the pregnant woman during the second trimester.

The requirements of the first²⁰ and second categories²¹ of regulations discussed in Part II-C above have little relevance to this case. They have not been challenged by appellant be-

²⁰ ACOG’s standards discuss many of Virginia’s concerns about proper management and policies under the appropriate heading of “Quality Assurance.” See ACOG Standards 55 (“Each physician’s office and outpatient clinic should assess whether effective and efficient management of health care has been accomplished.”). Like Virginia’s “narrative” requirement, Va. Regs. (Outpatient Hospitals) §§ 50.1.1, 50.2.1, ACOG’s standards suggest that the “outpatient clinic evaluation of patient care should assess the completeness of medical records, the accuracy of diagnoses, appropriateness of use of laboratory and other services, and outcome of care.” ACOG Standards 55–56. See National Abortion Federation (NAF), National Abortion Federation Standards 11 (1981) (hereinafter NAF Standards) (requiring written descriptions of procedures and policies in each area of care). Cf. Brief of the APHA as *Amicus Curiae* 29, n. 6. (supporting the NAF Standards for non-hospital abortion facilities as constituting “minimum standards”).

ACOG also advises that each ambulatory body should have a “governing body” that has the final authority and responsibility for the appointment of

yond his sweeping condemnation of any requirement that second-trimester abortions—even those during the twenty-second week of pregnancy—be performed in hospitals, however defined and whether outpatient or not. In any event, as appears from the recommendations of ACOG and the American Public Health Association (APHA) set forth in the margin, see nn. 22, 23, and 24, Virginia's requirements, although more detailed with respect to specific facilities,²² equipment,

the medical staff, ACOG Standards 60; cf. Va. Regs. (Outpatient Hospitals) § 40.3, and that "[w]ritten policies describing specific responsibilities of each member of the team are desirable, and should be reviewed and revised periodically," ACOG Standards 60. Cf. NAF Standards 12 (responsibilities of chief administrative officer); Planned Parenthood of Metropolitan Washington, D.C., Inc., 1980 Guidelines for Operation, Maintenance and Evaluation of First Trimester Outpatient Abortion Facilities 1 (hereinafter "Planned Parenthood Guidelines") (duties of administrator).

²² This second category of Virginia regulations is consistent with those set forth by ACOG. ACOG recommends that even physicians' offices provide at least a patient reception room, consultation room, two examining rooms, a utility room, and storage. ACOG Standards 56-58. Cf. Planned Parenthood Guidelines, 1-3 (detailing extensive physical requirements for first-trimester abortion clinics). ACOG's standards for an ambulatory surgical facility are more detailed, providing space for reception, waiting, administrative activities, patient dressing, lockers, preoperative evaluation, physical examination, laboratory testing, preparation of anesthesia, performance of surgical procedures, preparation and sterilization of instruments, storage of equipment, storage of drugs and fluids, postanesthetic recovery, staff activities, and janitorial and utility support. See ACOG Standards 61.

ACOG details the equipment to be found in the various rooms and areas. ACOG Standards 57-58, 61. Cf. APHA Recommended Program Guide for Abortion Services, 70 Am. J. Pub. Health 652, 655 (1980) (hereinafter "APHA Guide") (any abortion facility should have "[a]n operating table, or conventional gynecologic examining table with accessories, located in a room which is adequately lighted and ventilated and meets all other environmental standards for surgical procedures"); Planned Parenthood Guidelines 2. A doctor's examining room should contain instruments for vaginal examinations, supplies for obtaining cultures and smears, and equipment for diagnostic studies and operative procedures. ACOG Standards 57. Cf. Planned Parenthood Guidelines 2. When local anesthesia is used, the

and personnel than the ACOG and APHA standards, are compatible with generally accepted medical standard.

Our concern centers on whether the patient services requirements of the Virginia regulations further the State's interest in the health and safety of the pregnant woman. We think they clearly do. Again, we have compared them to the standards used by ACOG and APHA, and we are impressed with the scrupulousness with which Virginia has drawn regulations reasonably related to its interest in protecting the pregnant woman's health. The sanitation²³ and record-keeping standards²⁴ are typical and not unreasonable in detail.

clinic or doctor's office should have emergency resuscitation equipment, including positive pressure oxygen, intravenous equipment and fluids, suction, and a cardiac monitor. ACOG Standards 57. Ambulatory surgical centers should, in addition to oxygen, suction, and resuscitation equipment, provide for emergency lighting and intercommunications. *Id.*, at 61. Cf. APHA Guide 655 (requiring oxygen, and equipment for artificial ventilation and resuscitation); NAF Standards 9 (requiring all facilities performing second-trimester abortions to have resuscitation bag, oxygen, and defibrillator if general anesthesia is administered); Planned Parenthood Guidelines 2 (even first-trimester abortion clinics should have parental fluids, resuscitation equipment, and oxygen).

²³ ACOG provides that both clinics and ambulatory facilities should meet all state and local building, safety, and fire codes. ACOG Standards 58, 61. Specific plans should be developed to evacuate patients in case of an emergency. *Id.*, at 59, 62. Cf. NAF Standards 8, 11; Planned Parenthood Guidelines 10.

²⁴ Infection can be a serious complication with any abortion procedure. See nn. 11 and 12, *supra*. Significant portions of the Virginia regulations are designed to assure that outpatient surgical clinics take appropriate steps to control infection, including sterile processing, appropriate waste-disposal and laundry practices, isolation of nonpotable water, and protection of the integrity of the operating suite. See Va. Regs. (Outpatient Hospitals) §§ 41.2.5, 43.2.1, 43.2.2, 43.10.1, 43.11, 43.12.3, 43.12.5, 52.2.5, 52.2.6, 52.2.7 & 52.2.13. ACOG recommends that all facilities develop procedures for controlling and disposing of needles, syringes, glass, knife blades, and contaminated waste supplies. ACOG Standards 58, 62. APHA Guide 655; NAF Standards 7 ("Surgical instruments must be sufficient in number to permit individual sterilization of the instruments used for each procedure. . . .").

²⁴ The Virginia record-keeping requirements are similar to those detailed

The laboratory services²⁵ support—and often are essential to—the direct medical services²⁶ performed by the physician²⁷ and nurse.²⁸ The post-operative recovery standards²⁹ also comport with accepted medical practice,³⁰ and the

by ACOG for a physician's office, ACOG Standards 54-55, 59-60, which require at the initial visit a comprehensive data base including information on reason for visit, menstrual history, obstetric history, gynecologic history, sexual history, past medical and surgical history, current medications, allergies, social history, and family history. For ambulatory surgical facilities, ACOG recommends that the patient's record contain sufficient information to justify the preoperative diagnosis and the operative procedure, and should at least contain patient identification data, history and physical examination, provisional diagnosis, diagnostic and therapeutic orders, surgeons' and nurses' notes, laboratory data, operative consent, operative report, anesthesia report, tissue report, medications record, and discharge summary and instructions. *Id.*, at 59. See also *id.*, at 60 ("On the day of surgery a preanesthetic evaluation, including an interval history, medical record review, and a heart and lung examination should be performed by a physician and the findings should be noted in the record."). We have found that such requirements, "if not abused or overdone," impose a legally insignificant burden on the *Roe* right. See *Planned Parenthood of Central Mo. v. Danforth*, 428 U. S. 52, 81 (1976). We do not think Virginia's requirements are excessive. Cf. APHA Guide 655-656 (recommended reporting requirements); Planned Parenthood Guidelines 13 (record-keeping and reporting requirements).

²⁵ The risk of hemorrhage is reduced by requiring an outpatient surgical clinic to make hemoglobin or hematocrit determinations before initiating instillation. See ACOG Standards 59 ("The laboratory data should include hemoglobin or hematocrit, urinalysis, and, in certain selected patients, other studies such as a chest x-ray, electrocardiogram, and electrolytes."). See also APHA Guide 654 ("Appropriate laboratory procedures must include determination of hematocrit and Rh factor in every case. The value of other laboratory procedures will depend upon the population served; may include sickle cell testing; endocervical and anal culture for gonorrhea; urinalysis; serologic testing for syphilis; and, when indicated cytologic screening for cancer."); NAF Standards 7 ("Rh-immune globulin must be explained and administered to Rh-negative patients."); Planned Parenthood Guidelines 8 (requiring lab facilities to be available on premises for pregnancy tests, urine protein and sugar, hematocrit or hemoglobin determination, and Rh typing).

²⁶ See ACOG Standards 59 ("The appropriate records should be completed and laboratory data recorded *prior* to surgery.") (emphasis added).

[Footnotes 27 through 31 are on pp. 16 and 17]

equipment requirements for emergency services are minimal.³¹

We do not suggest that all of the Virginia requirements are necessary for every second-trimester abortion. But a State simply cannot adopt regulations that serve every case with

ACOG also recommends that "[t]he physician should strive to identify pre-existing or concurrent illness, medications, and adverse drug reactions that may have a bearing on the operative procedure or anesthesia. *All records should be reviewed before any surgery is performed.*" *Id.*, at 60 (emphasis added). APHA Guide 654; Planned Parenthood Guidelines 8.

³¹ For example, the ACOG requires careful laboratory work before anesthesia is administered, and even then, it must be given only by or under the supervision of a doctor: "Any ambulatory surgical unit that utilizes general, epidural, or spinal anesthesia should do so under the direction of an anesthesiologist. These anesthetics should be administered by a qualified anesthesiologist, another qualified physician, or a certified nurse-anesthetist under the supervision of an anesthesiologist. When any form of anesthesia is used, trained personnel and proper equipment for cardiopulmonary resuscitation must be available." ACOG Standards 53. Cf. APHA Guide 655; Planned Parenthood Guidelines, *supra*, n. 22, at 10.

³² The ACOG Standards do not specifically require nurses for physicians' offices or for ambulatory surgical facilities, but note: "The efficient operation of an ambulatory surgical facility requires adequate staffing with administrative and professional personnel. The assignment of personnel should be based on the number of patients, patient profiles, type of procedures, and facility design." ACOG Standards 60. Cf. *id.*, at 56 ("Administrative and professional personnel requirements will vary considerably in each physician's office and outpatient clinic depending on the patient load, pattern of practice, and type of facility."); Planned Parenthood Guidelines 7-8 (head laboratory technician); *id.*, at 9 ("It is strongly recommended that three staff persons be present in the procedure room: the operating physician, the physician's assistant and a counselor to assist the patient.").

³³ See n. 19, *supra*.

³⁴ Complications resulting from anesthesia are alleviated by requiring a physician to be present during the recovery period. See ACOG Standards 53 ("The supervising anesthesiologist, or another physician qualified in cardiopulmonary resuscitation, should be present in the ambulatory surgical facility until all surgical patients have been discharged. This physician should oversee the postanesthetic recovery area and should share with the surgeon responsibility for discharging patients or transferring them to the

the same degree of relevance; “[a] State necessarily must have some latitude in adopting regulations of general applicability in this sensitive area.” *City of Akron, ante*, at 16. Although a State’s general licensing regulations must be drawn to further the State’s interests in women’s health for all reasonable periods of time within the second-trimester, a particular requirement “is not unconstitutional simply because it does not correspond perfectly in all cases to the asserted state interest.” *City of Akron, ante*, at 20.

We therefore conclude, at least on the record before us in this case, that Virginia’s regulations concerning second-trimester abortions are reasonably related to and further the

back-up hospital.”); Planned Parenthood Guidelines 11; see also APHA Guide 655 (“[I]t will be necessary to periodically observe the temperature, pulse rate, blood pressure, and the amount of bleeding. In addition, the abdomen should be examined for evidence of intra-abdominal bleeding or injury.”). Less serious complications can be monitored by the registered nurse on duty. See ACOG Standards 53 (“During the recovery period, the patient should be under continuous observation by a qualified member of the health care team. This person should maintain a complete record of the patient’s general condition including vital signs, blood loss, and occurrence of complications.”); NAF Standards 6 (“The recovery area must be supervised by a licensed nurse or physician who is immediately available to the recovery area.”); Planned Parenthood Guidelines 11. The required one-hour recovery period is intended to permit detection of these complications. See APHA Guide 655 (requiring post-operative observations “over a period of two or more hours, depending upon the type of anesthesia used”); Kerenyi, Mandelman & Sherman, *Five Thousand Consecutive Saline Inductions*, 116 Am. J. Obstet. & Gynecol. 593, 597 (1973); ACOG Standards 53; App. 37 (defense expert witness concedes waiting period desirable).

⁸¹The arrangements for emergency transfer to an acute-care, general hospital are clearly reasonable. See APHA Guide 655; ACOG Standards 52 (“There should be a written policy requiring the medical staff to provide for prompt emergency treatment or hospitalization in the event of an unanticipated complication.”); *id.*, at 58, 62; NAF Standards, *supra*, n. 22, at 7; Planned Parenthood Guidelines, *supra*, n. 22, at 10 (“Each facility must have a functioning arrangement for emergency transport to a local accredited hospital.”).

State's compelling interest in "protecting the woman's own health and safety." *Roe*, 410 U. S., at 150.³² As we emphasized in *Roe*, "[t]he State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." *Ibid.* Unlike Akron in *City of Akron* or Missouri in *Ashcroft*, Virginia does not require that the patient be hospitalized as an inpatient or that the abortion be performed in a full-service, acute-care hospital. Rather, the State's requirements—the statutes and the regulations—accommodate accepted medical practice, and leave the method and timing of the abortion precisely where they belong—between the physician and the patient.

IV

We hold that Virginia's requirement that second-trimester abortions be performed in, properly equipped outpatient clinic is constitutional. The judgment of the Supreme Court of Virginia is

Affirmed.

³² Appellant argues that Part III of the regulations, covering first-trimester abortion clinics requires the *same* services and equipment as Part II. In fact, part Part III has detailed regulations that do not appear in Part II. See, e. g., Va. Regs. (Outpatient Hospitals) §§ 63.1.1(b), § 63.3, 64.2.5(a)-(m). Appellant contends that, given these extensive regulations for first-trimester abortion clinics, the only way to require *more* technological support for second-trimester abortions would be to restrict them to acute-care, general hospitals. The only regulations before us, however, relate to second-trimester abortions, and we find those requirements reasonably related to the state's compelling interest.

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SUPREME COURT OF THE UNITED STATES

Nos. 81-1255 AND 81-1623

PLANNED PARENTHOOD ASSOCIATION OF
KANSAS CITY, MISSOURI, INC.,
ET AL., PETITIONERS

81-1255

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF
MISSOURI, ET AL.

JOHN ASHCROFT, ATTORNEY GENERAL OF
MISSOURI, ET AL., PETITIONERS

81-1623

v.

PLANNED PARENTHOOD ASSOCIATION OF
KANSAS CITY, MISSOURI, INC.,
ET AL., PETITIONERS

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

[Decided March —, 1983]

JUSTICE POWELL delivered the opinion of the Court:

These cases, like *City of Akron v. Akron Center for Reproductive Health, Inc.*, ante, p. —, and *Simopoulos v. Virginia*, post, p. —, present questions as to the validity of state statutes regulating the performance of abortions.

I

Planned Parenthood of Kansas City, Missouri, Inc., two physicians who perform abortions, and an abortion clinic ("plaintiffs") filed a complaint in the District Court for the Western District of Missouri challenging, as unconstitutional,

several sections of the Missouri statutes regulating the performance of abortions. The sections relevant here include Mo. Rev. Stat. § 188.025 (Supp. 1982), requiring that abortions after 12 weeks of pregnancy be performed in a hospital;¹ § 188.047, requiring a pathology report for each abortion performed;² § 188.030, requiring the presence of a second physician during abortions performed after viability;³ and § 188.028, requiring minors to secure parental or judicial consent.⁴

¹ Mo. Rev. Stat. § 188.025 provides: "Every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital."

² Mo. Rev. Stat. § 188.047 provides:

"A representative sample of tissue removed at the time of abortion shall be submitted to a board eligible or certified pathologist, who shall file a copy of the tissue report with the state division of health, and who shall provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced and the pathologist's report shall be made a part of the patient's permanent record."

³ Mo. Rev. Stat. § 188.030.3 provides:

"An abortion of a viable unborn child shall be performed or induced only when there is in attendance a physician other than the physician performing or adducing the abortion who shall take control of and provide immediate medical care for a child born as a result of the abortion. During the performance of the abortion, the physician performing it, and subsequent to the abortion, the physician required by this section to be in attendance, shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman."

⁴ Mo. Rev. Stat. § 188.028 provides:

"1. No person shall knowingly perform an abortion upon a pregnant woman under the age of eighteen years unless:

"(1) The attending physician has secured the informed written consent of the minor and one parent or guardian; or

"(2) The minor is emancipated and the attending physician has received the informed written consent of the minor; or

"(3) The minor has been granted the right to self-consent to the abortion by court order pursuant to subsection 2 of this section, and the attending

After hearing testimony from a number of expert witnesses, the District Court invalidated all of these sections except the pathology requirement. 483 F. Supp. 679, 699-701 (1980).⁵ The Court of Appeals for the Eighth Circuit re-

physician has received the informed written consent of the minor; or

"(4) The minor has been granted consent to the abortion by court order, and the court has given its informed written consent in accordance with subsection 2 of this section, and the minor is having the abortion willingly, in compliance with subsection 3 of this section.

"2. The right of a minor to self-consent to an abortion under subdivision (3) of subsection 1 of this section or court consent under subdivision (4) of subsection 1 of this section may be granted by a court pursuant to the following procedures:

"(1) The minor or next friend shall make an application to the juvenile court which shall assist the minor or next friend in preparing the petition and notices required pursuant to this section. The minor or the next friend of the minor shall thereafter file a petition setting forth the initials of the minor; the age of the minor; the names and addresses of each parent, guardian, or, if the minor's parents are deceased and no guardian has been appointed, any other person standing in loco parentis of the minor; that the minor has been fully informed of the risks and consequences of the abortion; that the minor is of sound mind and has sufficient intellectual capacity to consent to the abortion; that, if the court does not grant the minor majority rights for the purpose of consent to the abortion, the court should find that the abortion is in the best interest of the minor and give judicial consent to the abortion; that the court should appoint a guardian ad litem of the child; and if the minor does not have private counsel, that the court should appoint counsel. The petition shall be signed by the minor or the next friend;

"(3) A hearing on the merits of the petition, to be held on the record, shall be held as soon as possible within five days of the filing of the petition. . . . At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect and understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other evidence that the court may find useful in determining whether the minor should be granted majority rights for the purpose of consenting to the abortion or whether the abortion is in the best interests of the minor;

"(4) In the decree, the court shall for good cause:

"(a) Grant the petition for majority rights for the purpose of consenting

[Footnote 5 is on p. 4]

versed the District Court's judgment with respect to § 188.028, thereby upholding the requirement that a minor secure parental or judicial consent to an abortion. It also held that the District Court erred in sustaining § 188.047, the pathology requirement. The District Court's judgment with respect to the second-physician requirement was affirmed, and the case was remanded for further proceedings and findings relating to the second-trimester hospitalization requirement. 655 F. 2d 848, 872-873 (1981). On remand, the District Court affirmed its holding that the second-trimester hospitalization requirement was unconstitutional. The Court of Appeals affirmed this judgment. 664 F. 2d 687, 691 (1981). We granted certiorari. — U. S. — (1982).

The Court today in *City of Akron*, ante, at 8-12, has stated fully the principles that govern judicial review of state statutes regulating abortions, and these need not be repeated here. With these principles in mind, we turn to the statutes at issue.

II

to the abortion; or

"(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

"(c) Deny the petition, setting forth the grounds on which the petition is denied;

"3. If a minor desires an abortion, then she shall be orally informed of and, if possible, sign the written consent required by section 188.039 in the same manner as an adult person. No abortion shall be performed on any minor against her will, except that an abortion may be performed against the will of a minor pursuant to a court order described in subdivision (4) of subsection 1 of this section that the abortion is necessary to preserve the life of the minor."

⁵The District Court also awarded attorney's fees for all hours claimed by the plaintiffs' attorneys. The Court of Appeals affirmed this allocation of fees. See 655 F. 2d 848, 872 (CA8 1981). The petition for certiorari raises the issue whether an award of attorney's fees, made pursuant to 42 U. S. C. § 1988, should be proportioned to reflect the extent to which plaintiffs prevailed.

In *City of Akron*, we invalidated a city ordinance requiring physicians to perform all second-trimester abortions at general or special hospitals accredited by the Joint Commission on Accreditation of Hospitals (JCAH) or by the American Osteopathic Association. *Ante*, at 13. Missouri's hospitalization requirements are similar to those enacted by Akron, as all second-trimester abortions must be performed in general, acute-care facilities.⁶ For the reasons stated in *City of Akron*, we held that such a requirement "unreasonably infringes upon a woman's constitutional right to obtain an abortion." *Ante*, at 20-21. For the same reasons, we affirm the Court of Appeals' judgment that §188.025 is unconstitutional.

III

We turn now to the State's second-physician requirement.

⁶ Missouri does not define the term "hospital" in its statutory provisions regulating abortions. We therefore must assume, as did the courts below, see 483 F. Supp., at 686, n. 10; 664 F. 2d, at 689-690, and nn. 3, 5 and 6, that the term has its common meaning of a general, acute-care facility. Cf. Mo. Rev. Stat. § 188.015(2) (Supp. 1982) (defining "abortion facility" as "a clinic, physician's office, or any other place or facility in which abortions are performed other than a hospital"). Section 197.020.2 (1978), part of Missouri's hospital licensing laws, reads:

"**'Hospital'** means a place devoted primarily to the maintenance and operation of facilities for the diagnosis, treatment or care for not less than twenty-four hours in any week of three or more nonrelated individuals suffering from illness, disease, injury, deformity or other abnormal physical conditions; or a place devoted primarily to provide for not less than twenty-four hours in any week medical . . . care for three or more nonrelated individuals. . . ."

Cf. Mo. Rev. Stat. § 197.200(1) (1978) (defining "ambulatory surgical center" to include facilities "with an organized medical staff of physicians" and "with continuous physician services and registered professional nursing services whenever a patient is in the facility"); 13 Mo. Admin. Code 50-30.010(1)(A) (1977) (same). The regulations for the Department of Social Services establish standards for the construction, physical facilities, and administration of hospitals. *Id.*, 50-20.010 to 50-20.030 (1977). These are not unlike those set by JCAH. See *City of Akron*, *ante*, at 13, and n. 16.

In *Roe v. Wade*, 410 U. S. 113 (1973), the Court recognized that the State has a compelling interest in the life of a viable fetus: "[T]he State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.*, at 164-165. See *Colautti v. Franklin*, 439 U. S. 379, 386-387 (1979); *Beal v. Doe*, 432 U. S. 438, 445-446 (1977). Several of the Missouri statutes undertake such regulation. Post-viability abortions are proscribed except when necessary to preserve the life or the health of the woman. Mo. Rev. Stat. §188.030.1 (Supp. 1982). The State also forbids the use of abortion procedures fatal to the viable fetus unless alternative procedures pose a greater risk to the health of the woman. §188.030.2.

The statutory provision at issue in this case requires the attendance of a second physician at the abortion of a viable fetus. §188.030.3. This section requires that the second physician "take all reasonable steps in keeping with good medical practice . . . to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman." See n. 3, *supra*. It also provides that the second physician "shall take control of and provide immediate medical care for a child born as a result of the abortion."

The lower courts invalidated §188.030.3.⁷ The plaintiffs, respondents here on this issue, urge affirmance on the

⁷The courts below found that there is no possible justification for a second-physician requirement whenever D&E is used since no viable fetus can survive a D&E procedure. 483 F. Supp., at 694; 655 F. 2d, at 865. Accordingly, they found the provision overbroad. As the Court of Appeals noted, however, the choice of D&E after viability is subject to the requirements of §188.030.2. See *id.*, at 865, and n. 28. Thus, D&E is not to be used when the fetus is viable; when other methods are more likely to preserve its life; and when alternative procedures do not pose a greater risk to the woman's life or health. Cf. *id.*, at 865 (some physicians testified they

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grounds that the second-physician requirement distorts the traditional doctor-patient relationship, and is both impractical and costly. They note that Missouri does not require two physicians in attendance for any other medical or surgical procedure, including childbirth or delivery of a premature infant. ~~These are not insubstantial arguments, and we view the issue as a close one.~~

The first physician's primary concern will be the life and health of the woman. Many third-trimester abortions in Missouri will be emergency operations,⁸ as the State only permits these late abortions when they are necessary to preserve the life or the health of the woman. It is not unreasonable for the State to assume that during the operation the first physician's attention and skills will be directed to preserving the woman's ~~condition~~, and not to protecting the actual life of those fetuses who survive the abortion procedure. (health)

would not use D&E in third-trimester); American College of Obstetricians and Gynecologists (ACOG) Technical Bulletin No. 56, Methods of Midtrimester Abortion 4 (1979) (mortality rate for D&E less than or similar to that of instillation abortions up to 20 weeks). There is nothing in the record to indicate that D&E will be the method that poses the least risk to the woman in every situation in which there are compelling medical reasons for performing an abortion after viability. Cf. 655 F. 2d, at 865 (experts disagree whether D&E should ever be used after viability). We therefore cannot assume that all third-trimester abortions will be D&E abortions, or that there will be no live births. Thus, the State's compelling interest in preserving the life of the fetus when there is a live birth justifies the State in requiring a second physician at every third-trimester abortion.

⁸There is no clearly expressed exception on the face of the statute for the performance of an abortion of a viable fetus without the second physician in attendance. There may be emergency situations where, for example, the woman's health may be endangered by delay. Section § 188.030.3 is qualified, at least in part, by the phrase "provided that it does not pose an increased risk to the life or health of the woman." This clause reasonably could be construed to apply to such a situation. Cf. *H.L. v. Matheson*, 450 U. S. 398, 407, n. 14 (1981) (rejecting argument that Utah statute might apply to individuals with emergency health care needs).

Viable fetuses will be in immediate and grave danger because of their premature birth. A second physician, in situations where Missouri permits third-trimester abortions, may be of assistance to the woman's physician in preserving the health and life of the child.

By giving immediate medical attention to a fetus that is delivered alive, the second physician will assure that the State's interests are protected more fully than the first physician alone would be able to do. And given the compelling interest that the State has in preserving life, we cannot say that the Missouri requirement of a second physician in those unusual circumstances where Missouri permits a third-trimester abortion is unconstitutional. Preserving the life of a viable fetus that is aborted may not often be possible,⁹ but the State legitimately may choose to provide safeguards for the comparatively few instances of live birth that occur. We believe the second-physician requirement[^] furthers the State's compelling interest in protecting the lives of viable fetuses, and we reverse the judgment of the Court of Appeals holding that § 188.030.3 is unconstitutional.

(rationally)
^

IV

Section 188.047 requires a pathology report for every abortion performed. Even in the early weeks of pregnancy, however, "[c]ertain regulations that have no significant impact on the woman's exercise of her right to decide to have an abortion may be permissible where justified by important state health objectives." *City of Akron*, at 11. See

⁹ See ACOG Technical Bulletin No. 56, *supra* n. 7, at 4 (as high as 7% live-birth rate for intrauterine instillation of uterotonic agents); Stroh & Hinman, Reported Live Births Following Induced Abortion: Two and One-Half Years' Experience in Upstate New York, 126 Am. J. Obstet. Gynecol. 83, 83-84 (1976) (26 live births following saline induced-abortions; 9 following hysterotomy; 1 following oxytocin-induced abortion) (one survival out of 38 live births); 4 Record 728 (50-62% mortality rate for

fetuses 26 and 27 weeks); *id.*, at 729 (25-92% mortality rate for fetuses 28 and 29 weeks); *id.*, at 837 (50% mortality rate at 34 weeks).

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Planned Parenthood of Central Mo. v. Danforth, 428 U. S. 52, 80–81 (1976). The question is whether § 188.047 unconstitutionally burdens a woman's abortion decision. We hold that it does not.

In regulating hospital services within the State, Missouri requires that "[a]ll tissue surgically removed, with the exception of such tissue as tonsils, adenoids, hernial sacs and prepuces, shall be examined by a pathologist, either on the premises or by arrangement outside of the hospital." 13 Mo. Admin. Code 50–20.030(3)(A)7 (1977). Although Missouri apparently does not require pathology reports in all procedures, this does not mean that such a requirement is invalid simply because it touches on the woman's abortion right during the first weeks of pregnancy. Rather, the specific issue here is whether § 188.047, which on its face and in effect is reasonably related to generally accepted medical standards and maternal health,¹⁰ "further[s] important health-related

¹⁰ A pathological examination is designed to assist in the detection of fatal ectopic pregnancies, hydatridiforme moles or other precancerous growths, and a variety of other problems that can only be discovered through a pathological examination. The District Court noted that several medical experts testified that pathology should be done in every case of abortion. 483 F. Supp., at 700, n. 49. Moreover, the ACOG standards for abortion services state that for all surgical services performed on an ambulatory outpatient basis: "Tissue removed *should* be submitted to a pathologist for an examination. . . . In the situation of elective termination of pregnancy, the attending physician should record a description of the gross products. Unless definite embryonic or fetal parts can be identified, the products of elective interruptions of pregnancy *must* be submitted to a pathologist for gross and microscopic examination." ACOG, Standards for Obstetric-Gynecologic Services 52 (5th ed. 1982) (emphasis added). The standards of the National Abortion Federation (NAF), whose members include the institutional plaintiffs in this case, itself provides: "*All tissue must be examined grossly at the time of the abortion procedure by a physician or trained assistant and the results recorded in the chart. In the absence of visible fetal parts or placenta upon gross examination, obtained tissue may be examined under a low power microscope If this*

State concerns," *City of Akron, ante*, at 12, without interfering with the woman's decision to have an abortion.

As the Court of Appeals recognized, pathology examinations are clearly "useful and even necessary in some cases," because "abnormalities in the tissue may warn of serious, possibly fatal disorders." 655 F. 2d, at 870. Examining tissue removed during an abortion provides a State with an opportunity to further its interest in promoting the health of its citizens. Additionally, questions about the long-range complications of abortions and their effect on subsequent pregnancies remain. See App. 72-73 (testimony of Dr. Willard Cates, Jr.); Levin, et al., Association of Induced Abortion with Subsequent Pregnancy Loss, 243 J. A. M. A. 2495, 2499 (1980). Recorded pathology reports, in concert with abortion complication reports, provide a statistical basis for studying those complications.¹¹ Cf. *Danforth*, 428 U. S., at 81.

In light of these factors, we think the small additional cost¹²

examination is inconclusive, the tissue should be sent to the nearest suitable pathology laboratory for microscopic examination." NAF, National Abortion Federation Standards 6 (1981) (emphasis in original) (compliance with standards obligatory for NAF member facilities to remain in good standing). See Brief of the American Public Health Association as *Amicus Curiae* in Nos. 81-185, 81-746, 81-1172, at 29, n. 6 (supporting the NAF standards for non-hospital abortion facilities as constituting "minimum standards"). Cf. Planned Parenthood of Metropolitan Washington, D. C., Inc., 1980 Guidelines for Operation, Maintenance and Evaluation of First Trimester Outpatient Abortion Facilities 10 ("Gross examination must be performed on all specimens. Microscopic tissue analysis must be done for all cases when immediate gross evaluation is inadequate or does not confirm a normal gestation.").

¹¹ Section 188.047 requires that a copy of the report be sent to the State's division of health.

¹² The estimated cost of compliance for plaintiff Reproductive Health Services was \$19.40 per abortion performed. 483 F. Supp., at 700, n. 48. There was testimony in the District Court that the additional cost of pathology would range from \$10.00 to \$40.00. See *ibid.*

of a tissue examination¹³ does not significantly burden a pregnant woman's abortion decision. In *Danforth*, this Court unanimously upheld Missouri's recordkeeping requirement as "useful to the State's interest in protecting the health of its female citizens, and [as] a resource that is relevant to decisions involving medical experience and judgment," 428 U. S., at 81.¹⁴ We view the requirement for a pathology report as comparable and as a relatively insignificant burden. Accordingly, we reverse the judgment of the Court of Appeals on this point.

V

As we noted in *City of Akron*, the relevant legal standards with respect to parental consent requirements are not in dispute. See *ante*, at 21; *Bellotti v. Baird*, 443 U. S. 622, 640-642, 643-644 (1979) (plurality opinion) (*Bellotti II*); *id.*, at 656-657 (WHITE, J., dissenting).¹⁵ A State's interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial. It is clear, however, that "the State must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her

*Plaintiffs also note that § 188.047 does not specify whether the pathologist must make a microscopic examination. State regulations, however, state: "All reports shall contain the findings of a gross examination. If fetal parts or placenta are not identified, then an accompanying microscopic tissue report must also be filed with the Division of Health." 13 Mo. Admin. Code 50-151.030(1) (1981).

¹⁴The *Danforth* Court also noted that "[t]he added requirements for confidentiality, with the sole exception for public health officers, and for retention for seven years, a period not unreasonable in length, assist and persuade us in our determination of the constitutional limits." 428 U. S., at 81. Missouri extends the identical safeguards found reassuring in *Danforth* to the pathology reports at issue here. See Mo. Rev. Stat. §§ 188.055.2, 188.060 (Supp. 1982).

¹⁵ Rider C

best interests.”¹⁶ *City of Akron, ante*, at 21-22.¹⁷ The issue here is one purely of statutory construction: whether Missouri provides a judicial alternative that is consistent with these established legal standards.¹⁸¹⁹

The Missouri statute, § 188.028.2,²⁰ in relevant part, provides:

¹⁶ “The plurality in *Bellotti II* also required that the alternative to parental consent must “assure” that the resolution of this issue “will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained.” *Id.*, at 644. Confidentiality here is assured by the statutory requirement that allows the minor to use her initials on the petition. Mo. Rev. Stat. § 188.028.2(1) (Supp. 1982). As to expedition of appeals, § 188.028.2(6) provides in relevant part:

“The notice of intent to appeal shall be given within twenty-four hours from the date of issuance of the order. The record on appeal shall be completed and the appeal shall be perfected within five days from the filing of notice to appeal. Because time may be of the essence regarding the performance of the abortion, the supreme court of this state shall, by court rule, provide for expedited appellate review of cases appealed under this section.”

We believe this section provides the framework for a constitutionally sufficient means of expediting judicial proceedings. Immediately after the effective date of this statutory enactment, the District Court enjoined enforcement. No unemancipated pregnant minor has been required to comply with this section. Thus, to this point in time, there has been no need for the state supreme court to promulgate rules concerning appellate review. There is no reason to believe that Missouri will not expedite any appeal consistent with the mandate in our prior opinions.

¹⁷ “Cf. *H.L. v. Matheson*, 450 U. S., at 406-407, and n. 14, 411 (upholding a parental notification requirement but not extending the holding to mature or emancipated minors or to immature minors showing such notification detrimental to their best interests). The lower courts found that § 188.028’s notice requirement was unconstitutional. 655 F. 2d, at 873; 483 F. Supp., at 701. The State has not sought review of that judgment here. Thus, in the posture in which it appears before this Court for review, § 188.028 contains no requirement for parental notification.

¹⁸ “The Missouri statute also exempts “emancipated” women under the age of 18 both from the requirement of parental consent and from the alternative requirement of a judicial proceeding. Plaintiffs argue that the word “emancipated” in this context is void for vagueness, but we disagree. Cf. *H.L. v. Matheson, supra*, at 407 (using word to describe a minor). Al-

“(4) In the decree, the court shall for good cause:

“(a) Grant the petition for majority rights for the purpose of consenting to the abortion; or

“(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

“(c) Deny the petition, setting forth the grounds on which the petition is denied[.]”

20

On its face, § 188.028.2(4) authorizes juvenile courts¹⁹ to choose among any of the alternatives outlined in the section. The Court of Appeals concluded that a denial of the petition permitted in subsection (c) “would initially require the court to find that the minor was not emancipated and was not mature enough to make her own decision and that an abortion was not in her best interests.” 655 F. 2d, at 858. Plaintiffs contend that this interpretation is unreasonable. We do not agree.

though the question whether a minor is emancipated turns upon the facts and circumstances of each individual case, the Missouri courts have adopted general rules to guide that determination, and the term is one of general usage and understanding in the Missouri common law. See *Black v. Cole*, 626 S. W. 2d 397, 398 (Mo. App. 1981) (quoting 67 C. J. S. Parent and Child § 86, at 811 (1950)); *In re the Marriage of Heddy*, 535 S. W. 2d 276, 279 (Mo. App. 1976) (same); *Wurth v. Wurth*, 313 S. W. 2d 161, 164 (Mo. App. 1958) (same), rev'd on other grounds, 322 S. W. 2d 745 (Mo. 1959).

¹⁹ See n. 4, *supra*. This Court in *Danforth* held unconstitutional Missouri's parental consent requirement for all unmarried minors under the age of 18. 428 U. S., at 75. In response to our decision, Missouri enacted the section challenged here. This new statute became effective shortly before our decision in *Bellotti II*.

²⁰ We have indicated in prior opinions that a minor should have access to an “independent decisionmaker.” *H.L. v. Matheson*, *supra*, at 420 (Powell, J., concurring). Missouri has provided for a judicial decisionmaker. We therefore need not consider whether a qualified and independent non-judicial decisionmaker would be appropriate. Cf. *Bellotti II*, 443 U.S., at 643, n. 22.

Where fairly possible, courts should construe a statute to avoid a danger of unconstitutionality. The Court of Appeals was aware, if the statute provides discretion to deny permission to a minor for *any* "good cause," that arguably it would violate the principles that this Court has set forth. *Ibid.* It recognized, however, that before exercising any option, the juvenile court must receive evidence on "the emotional development, maturity, intellect and understanding of the minor." Mo. Rev. Stat. § 188.028.2(3) (Supp. 1982). The court then reached the logical conclusion that "findings and the ultimate denial of the petition must be supported by a showing of 'good cause.'" 655 F. 2d, at 858. The Court of Appeals reasonably found that a court could not deny a petition "for good cause" unless it first found—after having received the required evidence—that the minor was not mature enough to make her own decision. See *Bellotti II*, 443 U. S., at 643-644, 647-648 (plurality opinion). We conclude that the Court of Appeals correctly interpreted the statute and that § 188.028, as interpreted, avoids any constitutional infirmities.²¹

VI

The judgment of the Court of Appeals, insofar as it invali-

²¹ Plaintiffs also argue that, in light of the ambiguity of § 188.028.2(4), as evidenced by the differing interpretations placed upon it, the appropriate course of judicial restraint is abstention. This Court has found such an approach appropriate. See *Bellotti v. Baird*, 428 U. S. 132, 146-147 (1976) (*Bellotti I*). Plaintiffs did not, however, argue in the Court of Appeals that the court should abstain, and Missouri has no certification procedure whereby this Court can refer questions of state statutory construction to the state supreme court. See 655 F. 2d, at 861, n. 20; 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4248, at 525, n. 29 (1978 and Supp. 1982). Such a procedure "greatly simplifie[d]" our analysis in *Bellotti I*, *supra*, at 151. Moreover, where, as here, a statute is susceptible to a fair construction that obviates the need to have the state courts render the saving construction, there is no reason for federal courts to abstain.

dated Missouri's second-trimester hospitalization requirement and upheld the State's parental consent provision, is affirmed. The judgment invalidating the requirement of a pathology report for all abortions and the requirement that a second physician attend the abortion of any viable fetus is reversed. We vacate the judgment upholding an award of attorney's fees for all hours expended by plaintiffs' attorneys and remand for proceedings consistent with *Hensley v. Eckhart*, — U. S. — (1983).

(and judicial)

It is so ordered.

Changes: 1, 6-17

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

LJP

From: Justice Powell

JUN 5 1983

Circulated: _____

Recirculated: _____

2nd DRAFT

Not circulated
in this form.

SUPREME COURT OF THE UNITED STATES

See

Nos. 81-1255 AND 81-1623

editing.

PLANNED PARENTHOOD ASSOCIATION OF
KANSAS CITY, MISSOURI, INC.,
ET AL., PETITIONERS

81-1255

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF
MISSOURI, ET AL.

JOHN ASHCROFT, ATTORNEY GENERAL OF
MISSOURI, ET AL., PETITIONERS

81-1623

v.

PLANNED PARENTHOOD ASSOCIATION OF
KANSAS CITY, MISSOURI, INC.,
ET AL., PETITIONERS

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

[June —, 1983]

JUSTICE POWELL delivered the opinion of the Court:

These cases, like *City of Akron v. Akron Center for Reproductive Health, Inc.*, ante, p. —, and *Simopoulos v. Virginia*, post, p. —, present questions as to the validity of state statutes regulating the performance of abortions.

I

Planned Parenthood of Kansas City, Missouri, Inc., two physicians who perform abortions, and an abortion clinic ("plaintiffs") filed a complaint in the District Court for the Western District of Missouri challenging, as unconstitutional,

several sections of the Missouri statutes regulating the performance of abortions. The sections relevant here include Mo. Rev. Stat. § 188.025 (Supp. 1982), requiring that abortions after 12 weeks of pregnancy be performed in a hospital;¹ § 188.047, requiring a pathology report for each abortion performed;² § 188.030, requiring the presence of a second physician during abortions performed after viability;³ and § 188.028, requiring minors to secure parental or judicial consent.⁴

¹ Mo. Rev. Stat. § 188.025 provides: "Every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital."

² Mo. Rev. Stat. § 188.047 provides:

"A representative sample of tissue removed at the time of abortion shall be submitted to a board eligible or certified pathologist, who shall file a copy of the tissue report with the state division of health, and who shall provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced and the pathologist's report shall be made a part of the patient's permanent record."

³ Mo. Rev. Stat. § 188.030.3 provides:

"An abortion of a viable unborn child shall be performed or induced only when there is in attendance a physician other than the physician performing or adducing the abortion who shall take control of and provide immediate medical care for a child born as a result of the abortion. During the performance of the abortion, the physician performing it, and subsequent to the abortion, the physician required by this section to be in attendance, shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman."

⁴ Mo. Rev. Stat. § 188.028 provides:

"1. No person shall knowingly perform an abortion upon a pregnant woman under the age of eighteen years unless:

"(1) The attending physician has secured the informed written consent of the minor and one parent or guardian; or

"(2) The minor is emancipated and the attending physician has received the informed written consent of the minor; or

"(3) The minor has been granted the right to self-consent to the abortion by court order pursuant to subsection 2 of this section, and the attending

After hearing testimony from a number of expert witnesses, the District Court invalidated all of these sections except the pathology requirement. 483 F. Supp. 679, 699-701 (1980).⁵ The Court of Appeals for the Eighth Circuit re-

physician has received the informed written consent of the minor; or

"(4) The minor has been granted consent to the abortion by court order, and the court has given its informed written consent in accordance with subsection 2 of this section, and the minor is having the abortion willingly, in compliance with subsection 3 of this section.

"2. The right of a minor to self-consent to an abortion under subdivision (3) of subsection 1 of this section or court consent under subdivision (4) of subsection 1 of this section may be granted by a court pursuant to the following procedures:

"(1) The minor or next friend shall make an application to the juvenile court which shall assist the minor or next friend in preparing the petition and notices required pursuant to this section. The minor or the next friend of the minor shall thereafter file a petition setting forth the initials of the minor; the age of the minor; the names and addresses of each parent, guardian, or, if the minor's parents are deceased and no guardian has been appointed, any other person standing in loco parentis of the minor; that the minor has been fully informed of the risks and consequences of the abortion; that the minor is of sound mind and has sufficient intellectual capacity to consent to the abortion; that, if the court does not grant the minor majority rights for the purpose of consent to the abortion, the court should find that the abortion is in the best interest of the minor and give judicial consent to the abortion; that the court should appoint a guardian ad litem of the child; and if the minor does not have private counsel, that the court should appoint counsel. The petition shall be signed by the minor or the next friend;

"(3) A hearing on the merits of the petition, to be held on the record, shall be held as soon as possible within five days of the filing of the petition. . . . At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect and understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other evidence that the court may find useful in determining whether the minor should be granted majority rights for the purpose of consenting to the abortion or whether the abortion is in the best interests of the minor;

"(4) In the decree, the court shall for good cause:

"(a) Grant the petition for majority rights for the purpose of consenting

[Footnote 5 is on p. 4]

versed the District Court's judgment with respect to § 188.028, thereby upholding the requirement that a minor secure parental or judicial consent to an abortion. It also held that the District Court erred in sustaining § 188.047, the pathology requirement. The District Court's judgment with respect to the second-physician requirement was affirmed, and the case was remanded for further proceedings and findings relating to the second-trimester hospitalization requirement. 655 F. 2d 848, 872-873 (1981). On remand, the District Court affirmed its holding that the second-trimester hospitalization requirement was unconstitutional. The Court of Appeals affirmed this judgment. 664 F. 2d 687, 691 (1981). We granted certiorari. — U. S. — (1982).

The Court today in *City of Akron*, ante, at 8-12, has stated fully the principles that govern judicial review of state statutes regulating abortions, and these need not be repeated here. With these principles in mind, we turn to the statutes at issue.

II

In *City of Akron*, we invalidated a city ordinance requiring

to the abortion; or

"(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

"(c) Deny the petition, setting forth the grounds on which the petition is denied;

"3. If a minor desires an abortion, then she shall be orally informed of and, if possible, sign the written consent required by section 188.039 in the same manner as an adult person. No abortion shall be performed on any minor against her will, except that an abortion may be performed against the will of a minor pursuant to a court order described in subdivision (4) of subsection 1 of this section that the abortion is necessary to preserve the life of the minor."

⁵The District Court also awarded attorney's fees for all hours claimed by the plaintiffs' attorneys. The Court of Appeals affirmed this allocation of fees. See 655 F. 2d 848, 872 (CA8 1981). The petition for certiorari raises the issue whether an award of attorney's fees, made pursuant to 42 U. S. C. § 1988, should be proportioned to reflect the extent to which plaintiffs prevailed.

physicians to perform all second-trimester abortions at general or special hospitals accredited by the Joint Commission on Accreditation of Hospitals (JCAH) or by the American Osteopathic Association. *Ante*, at 13. Missouri's hospitalization requirements are similar to those enacted by Akron, as all second-trimester abortions must be performed in general, acute-care facilities.⁶ For the reasons stated in *City of Akron*, we held that such a requirement "unreasonably infringes upon a woman's constitutional right to obtain an abortion." *Ante*, at 20-21. For the same reasons, we affirm the Court of Appeals' judgment that §188.025 is unconstitutional.

III

We turn now to the State's second-physician requirement.

⁶ Missouri does not define the term "hospital" in its statutory provisions regulating abortions. We therefore must assume, as did the courts below, see 483 F. Supp., at 686, n. 10; 664 F. 2d, at 689-690, and nn. 3, 5 and 6, that the term has its common meaning of a general, acute-care facility. Cf. Mo. Rev. Stat. § 188.015(2) (Supp. 1982) (defining "abortion facility" as "a clinic, physician's office, or any other place or facility in which abortions are performed other than a hospital"). Section 197.020.2 (1978), part of Missouri's hospital licensing laws, reads:

"**'Hospital'** means a place devoted primarily to the maintenance and operation of facilities for the diagnosis, treatment or care for not less than twenty-four hours in any week of three or more nonrelated individuals suffering from illness, disease, injury, deformity or other abnormal physical conditions; or a place devoted primarily to provide for not less than twenty-four hours in any week medical . . . care for three or more nonrelated individuals. . . ."

Cf. Mo. Rev. Stat. § 197.200(1) (1978) (defining "ambulatory surgical center" to include facilities "with an organized medical staff of physicians" and "with continuous physician services and registered professional nursing services whenever a patient is in the facility"); 13 Mo. Admin. Code 50-30.010(1)(A) (1977) (same). The regulations for the Department of Social Services establish standards for the construction, physical facilities, and administration of hospitals. *Id.*, 50-20.010 to 50-20.030 (1977). These are not unlike those set by JCAH. See *City of Akron*, *ante*, at 13, and n. 16.

In *Roe v. Wade*, 410 U. S. 113 (1973), the Court recognized that the State has a compelling interest in the life of a viable fetus: "[T]he State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.*, at 164-165. See *Colautti v. Franklin*, 439 U. S. 379, 386-387 (1979); *Beal v. Doe*, 432 U. S. 438, 445-446 (1977). Several of the Missouri statutes undertake such regulation. Post-viability abortions are proscribed except when necessary to preserve the life or the health of the woman. Mo. Rev. Stat. §188.030.1 (Supp. 1982). The State also forbids the use of abortion procedures fatal to the viable fetus unless alternative procedures pose a greater risk to the health of the woman. §188.030.2.

The statutory provision at issue in this case requires the attendance of a second physician at the abortion of a viable fetus. §188.030.3. This section requires that the second physician "take all reasonable steps in keeping with good medical practice . . . to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman." See n. 3, *supra*. It also provides that the second physician "shall take control of and provide immediate medical care for a child born as a result of the abortion."

The lower courts invalidated §188.030.3.⁷ The plaintiffs, respondents here on this issue, urge affirmance on the

⁷The courts below found, and JUSTICE BLACKMUN's dissenting opinion agrees, *post*, at 6-7, that there is no possible justification for a second-physician requirement whenever D&E is used because no viable fetus can survive a D&E procedure. 483 F. Supp., at 694; 655 F. 2d, at 865. Accordingly, for them, §188.030.3 is overbroad. There is agreement that a fetus generally cannot survive a D&E abortion. But as the Court of Appeals noted, the choice of this procedure after viability is subject to the requirements of §188.030.2. See *id.*, at 865, and n. 28. Nevertheless, the courts below, in conclusory language, found that D&E is the "method of choice for

And

This reasoning rests on two assumptions. First, a fetus cannot survive a D&E abortion, and second, D&E is the method of choice in the third trimester.

There is general agreement as to the first proposition, but ~~not~~ as to the second. Indeed, almost all of the authorities disagree with JUSTICE BLACKMUN's critical assumption

grounds that the second-physician requirement distorts the traditional doctor-patient relationship, and is both impractical and costly. They note that Missouri does not require two physicians in attendance for any other medical or surgical procedure, including childbirth or delivery of a premature infant.

even after viability is possible. "655 F.2d, at 865.

some women who need post-viability abortions." *Post*, at 6. No scholarly writing supporting this view is cited by those courts or by the dissent. Reliance apparently is placed solely on the testimony of Dr. Robert Crist, a physician from Kansas. His testimony, if nothing else, is remarkable in its candor. He is a member of the National Abortion Federation, "an organization of abortion providers and people interested in the pro-choice movement." 2 Record 415-416. He supported the use of D&E on 28-week pregnancies, well into the third trimester. In some circumstances, he considered it a better procedure than other methods. See 2 Record 427-428. His disinterest in protecting fetal life is evidenced by his agreement "that the abortion patient has a right not only to be rid of the growth, called a fetus in her body, but also has a right to a dead fetus." *Id.*, at 431. He also agreed that he "[n]ever ha[s] any intention of trying to protect the fetus, if it can be saved," *id.*, and finally that "as a general principle" "[t]here should not be a live fetus," *id.*, at 435. Moreover, contrary to every other view, he thought a fetus could survive a D&E abortion. *Id.*, at 433-434. None of the other physicians who testified at the trial, those called both by the plaintiffs and defendants, considered that *any* use of D&E after viability was indicated. See 1 Record 21 (limiting use of D&E to under 18 weeks); 2 Record 381, 410-413 (Dr. Robert Kretzschmar) (D&E up to 17 weeks; would never perform D&E after 26 weeks); 4 Record 787 (almost "inconceivable" to use D&E after viability); 7 Record 52 (D&E safest up to 18 weeks); *id.*, at 110 (doctor not performing D&E past 20 weeks); *id.*, at 111 (risks of doing outpatient D&E equivalent to childbirth at 24 weeks); 8 Record 33, 78-81 (Dr. Willard Cates) (16 weeks latest D&E performed). Apparently Dr. Crist practiced only in Kansas, 2 Record 334, 368, 428, a state having no statutes comparable to § 188.030.1 and § 188.030.2. It is not clear whether he was operating under or familiar with the limitations imposed by Missouri law. Nor did he explain the circumstances when there were "contraindications" against the use of any of the procedures that could preserve viability, or whether his conclusory opinion was limited to emergency situations. Indeed, there is no record evidence that D&E ever will be the method that poses the least risk to the woman in those rare situations where there are compelling medical reasons

to whom the District Court referred in a footnote. 183 F. Supp., at 694, n. 25.

This testimony provides strong support for this holding.

(See also)

Dr. Crist's

(deposition of)

omission

The first physician's primary concern will be the life and health of the woman. Many third-trimester abortions in Missouri will be emergency operations,⁸ as the State only permits these late abortions when they are necessary to preserve the life or the health of the woman. It is not unreason-

for performing an abortion after viability. If there were such instances, they hardly would justify invalidating § 188.030.3.

In addition to citing Dr. Crist in ^(b) footnote, the District Court cited— with no elaboration—Dr. Schmidt. His testimony, reflecting no agreement with Dr. Crist, is enlightening.

"Q. Is there any reason that you can give us for the attendance of a second physician for an abortion on a viable fetus by method of D&E.

"A. No.

"Q. There is no possibility of survival, is there?

"A. No. Mr. Susman, can I add to that just a moment?

"Q. Certainly.

"A. To get that in focus, to me this is not a practical point. I simply do not believe that the question of viability comes up when D&E is an elected method of abortion. Because, again, we are talking about well along in second trimester, not early trimester.

"Q. Doctor, there has been prior testimony of D&E being performed at those stages when contraindication exists for the other alternatives.

"A. Well, okay. There very well may be, but *I personally cannot conceive that as a significant practical point.* It may be important legally, but from a medical standpoint, that doesn't bother me.

4 Record 836-837 (emphasis added). Given that Dr. Crist's discordant testimony is wholly unsupported, the State's compelling interest in protecting a viable fetus justifies the second-physician requirement even though there may be the rare case when a physician may think honestly that D&E is required for the mother's health. Legislation need not accommodate every conceivable contingency.

⁸There is no clearly expressed exception on the face of the statute for the performance of an abortion of a viable fetus without the second physician in attendance. There may be emergency situations where, for example, the woman's health may be endangered by delay. Section § 188.030.3 is qualified, at least in part, by the phrase "provided that it does not pose an increased risk to the life or health of the woman." This clause reasonably could be construed to apply to such a situation. Cf. *H.L. v. Matheson*, 450 U. S. 398, 407, n. 14 (1981) (rejecting argument that Utah statute might apply to individuals with emergency health care needs).

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able for the State to assume that during the operation the first physician's attention and skills will be directed to preserving the woman's health, and not to protecting the actual life of those fetuses who survive the abortion procedure. Viable fetuses will be in immediate and grave danger because of their premature birth. A second physician, in situations where Missouri permits third-trimester abortions, may be of assistance to the woman's physician in preserving the health and life of the child.

By giving immediate medical attention to a fetus that is delivered alive, the second physician will assure that the State's interests are protected more fully than the first physician alone would be able to do. And given the compelling interest that the State has in preserving life, we cannot say that the Missouri requirement of a second physician in those unusual circumstances where Missouri permits a third-trimester abortion is unconstitutional. Preserving the life of a viable fetus that is aborted may not often be possible,⁹ but the State legitimately may choose to provide safeguards for the comparatively few instances of live birth that occur. We believe the second-physician requirement rationally furthers the State's compelling interest in protecting the lives of viable fetuses, and we reverse the judgment of the Court of Appeals holding that § 188.030.3 is unconstitutional.

IV

In regulating hospital services within the State, Missouri

⁹ See ACOG Technical Bulletin No. 56, *supra* n. 7, at 4 (as high as 7% live-birth rate for intrauterine instillation of uterotonic agents); Stroh & Hinman, Reported Live Births Following Induced Abortion: Two and One-Half Years' Experience in Upstate New York, 126 Am. J. Obstet. Gynecol. 83, 83-84 (1976) (26 live births following saline induced-abortions; 9 following hysterotomy; 1 following oxytocin-induced abortion) (one survival out of 38 live births); 4 Record 728 (50-62% mortality rate for fetuses 26 and 27 weeks); *id.*, at 729 (25-92% mortality rate for fetuses 28 and 29 weeks); *id.*, at 837 (50% mortality rate at 34 weeks).

requires that “[a]ll tissue surgically removed with the exception of such tissue as tonsils, adenoids, hernial sacs and prepuces, shall be examined by a pathologist, either on the premises or by arrangement outside of the hospital.” 13 Mo. Admin. Code 50-20.030(3)(A)7 (1977). With respect to abortions, whether performed in hospitals or in some other facility, § 188.047 requires the pathologist to “file a copy of the tissue report with the State Division of Health. . . .” See n. 2, *supra*. The pathologist also is required to “provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced.” Thus, Missouri appears to require that tissue following abortions, as well as from almost all other surgery performed in hospitals, must be submitted to a pathologist, not merely to a pathological examination by the performing doctor. The narrow question before us is whether the State lawfully also may require the tissue removed following an abortion performed in clinics as well as in hospitals to be submitted to a pathologist. We believe that it can.

On its face and in effect, § 188.047 is reasonably related to generally accepted medical standards and “further[s] important health-related State concerns.” *City of Akron, ante*, at 12. As the Court of Appeals recognized, pathology examinations are clearly “useful and even necessary in some cases,” because “abnormalities in the tissue may warn of serious, possibly fatal disorders.” 655 F. 2d, at 870.¹⁰ As a rule, it is

¹⁰ A pathological examination is designed to assist in the detection of fatal ectopic pregnancies, hydatridiform moles or other precancerous growths, and a variety of other problems that can be discovered only through a pathological examination. The general medical utility of pathological examinations is clear. See, e. g., American College of Obstetricians and Gynecologists (ACOG), *Standards for Obstetric-Gynecologic Services* 52 (5th ed. 1982); National Abortion Federation (NAF), *National Abortion Federation Standards* 6 (1981) (compliance with standards obligatory for NAF member facilities to remain in good standing); Brief of the American Public Health Association as *Amicus Curiae* in Nos. 81-185,

good medical practice to submit *all* tissue to the examination of a pathologist.¹¹ This is particularly important following abortion, because questions remain as to the long-range complications and their effect on subsequent pregnancies. See App. 72-73 (testimony of Dr. Willard Cates, Jr.); Levin, et al., Association of Induced Abortion with Subsequent Pregnancy Loss, 243 J. A.M.A. 2495, 2499 (1980). Recorded pathology reports, in concert with abortion complication reports, provide a statistical basis for studying those complications. Cf. *Planned Parenthood of Central Mo. v. Danforth*, 428 U. S. 52, 81 (1976).

Plaintiffs argue that the physician performing the abortion is as qualified as a pathologist to make the examination. This argument disregards the fact that Missouri requires a pathologist—not the performing physician—to examine tissue after almost every type of surgery. Although this requirement is in a provision relating to surgical procedures in hospitals, many of the same procedures included within the

81-746, 81-1172, at 29, n. 6 (supporting the NAF standards for non-hospital abortion facilities as constituting "minimum standards").

¹¹ ACOG's standards at the time of the District Court's trial recommended that a "tissue or operative review committee" should examine "all tissue removed at obstetric-gynecologic operations." ACOG, Standards for Obstetric-Gynecologic Services 13 (4th ed. 1974). The current ACOG standards also state as a general rule that, for all surgical services performed on an ambulatory basis, "[t]issue removed should be submitted to a pathologist for an examination." ACOG, *supra*, at 52 (5th ed. 1982). The dissent, however, relies on the recent modification of these standards as they apply to abortions. ACOG now provides an "exception to the practice" of mandatory examination by a pathologist and makes such examination for abortion tissue permissive. *Ibid.* Not surprisingly, this change in policy was controversial within the College. See 4 Record 799-800. ACOG found that "[n]o consensus exists regarding routine microscopic examination of aspirated tissue in every case," though it recognized—on the basis of inquiries made in 29 institutions—that in a majority of them a microscopic examination is performed in all cases. ACOG, Report of Committee on Gynecologic Practice, Item #6.2.1 (June 27-28, 1980).

Missouri statute customarily are performed also in outpatient clinics. No reason has been suggested why the prudence required in a hospital should not be equally appropriate in such a clinic. Indeed, there may be good reason to impose stricter standards in this respect on clinics performing abortions than on hospitals.¹² As the testimony in the District Court indicates, medical opinion is not ~~unanimous~~ on this question. See 3 Record 623; 4 Record 749-750, 798-800, 845-847; n. 2, *supra*. ~~But~~ there is substantial support for Missouri's requirement. In this case, for example, Dr. Bernard Nathanson, a widely experienced abortion practitioner, testified that he requires a pathologist examination after each of the 60,000 abortions performed under his direction at the New York Center for Reproductive and Sexual Health. He considers it "absolutely necessary to obtain a pathologist's report on each and every specimen of tissue removed for abortion or for that matter from any other surgical procedure which involved the removal of tissue from the human body."

¹² The professional views that the plaintiffs find to support their position do not disclose whether consideration was given to the fact that not all abortion clinics, particularly inadequately regulated clinics, conform to ethical or generally accepted medical standards. See *Bellotti v. Baird*, 443 U. S. 622, 641, n. 21 (1979) (*Bellotti II*) (minors may resort to "incompetent or unethical" abortion clinics); *Planned Parenthood of Central Mo. v. Danforth*, 428 U. S. 52, 91, n. 2 (1976) (Stewart, J., concurring). The Sun-Times of Chicago, in a series of special reports, disclosed widespread questionable practices in abortion clinics in Chicago, including the failure to obtain proper pathology reports. See "The Abortion Profiteers," Chicago Sun-Times 25-26 (Special Reprint 1978). It is clear, therefore, that a State reasonably could conclude that a pathology requirement is necessary in abortion clinics as well as in general hospitals.

In suggesting that we make from a "comfortable perspective" the judgment that a State constitutionally can require the additional cost of a pathology examination, the dissent suggests that we disregard the interests of the "woman on welfare or the unemployed teenager." *Post*, at 4. But these women may be those most likely to seek the least expensive clinic available. As the standards of medical practice in such clinics may not be the highest, a State may conclude reasonably that a pathologist's examination of tissue is particularly important.

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App. 143-144. See also App. 146-147 (testimony of Dr. Keitges); 5 Record 798-799 (testimony of Dr. Schmidt).¹³

In weighing the balance between protection of a woman's health and the comparatively small additional cost of a pathologist's examination, we cannot say that the Constitution requires that a State subordinate its interest in health to minimize to this extent the cost of abortions. Even in the early weeks of pregnancy, "[c]ertain regulations that have no significant impact on the woman's exercise of her right to decide to have an abortion may be permissible where justified by important state health objectives." *City of Akron, ante*, at 11. See *Danforth*, 428 U. S., at 80-81. In light of the substantial benefits that a pathologist's examination can have, we think the cost of a tissue examination does not significantly burden a pregnant woman's abortion decision. The estimated cost of compliance for plaintiff Reproductive Health Services was \$19.40 per abortion performed. 483 F. Supp., at 700, n. 48. In *Danforth*, this Court unanimously upheld Missouri's recordkeeping requirement as "useful to the State's interest in protecting the health of its female citizens, and [as] a resource that is relevant to decisions involving medical experience and judgment," 428 U. S., at 81.¹⁴ We

¹³ The dissent appears to suggest that § 188.047 is constitutionally infirm because it does not require microscopic examination, *post*, at 4, but that misses the point of the regulation. The need is for someone other than the performing clinic to make an independent medical judgment on the tissue. See n. 12, *supra*; 4 Record 750 (Dr. Pierre Keitges, a pathologist). It is reasonable for the State to assume that an independent pathologist is more likely to perform a microscopic examination than the performing doctor. See H. Cove, *Surgical Pathology of the Endometrium* 28 (1981) ("To the pathologist, abortions of any sort are evaluated grossly *and* microscopically for the primary purpose of establishing a diagnosis of intrauterine pregnancy.") (emphasis added).

¹⁴ The *Danforth* Court also noted that "[t]he added requirements for confidentiality, with the sole exception for public health officers, and for retention for seven years, a period not unreasonable in length, assist and persuade us in our determination of the constitutional limits." 428 U. S., at 81. Missouri extends the identical safeguards found reassuring in

view the requirement for a pathology report as comparable and as a relatively insignificant burden. Accordingly, we reverse the judgment of the Court of Appeals on this issue.

V

As we noted in *City of Akron*, the relevant legal standards with respect to parental consent requirements are not in dispute. See *ante*, at 21; *Bellotti v. Baird*, 443 U. S. 622, 640–642, 643–644 (1979) (plurality opinion) (*Bellotti II*); *id.*, at 656–657 (WHITE, J., dissenting).¹⁵ A State's interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial. It is clear, however, that "the State must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests."¹⁶ *City of Akron*, *ante*, at 21–22.¹⁷ The issue

Danforth to the pathology reports at issue here. See Mo. Rev. Stat. §§ 188.055.2, 188.060 (Supp. 1982).

¹⁵ The dissenters apparently believe that the issue here is an open one, and adhere to the views that they expressed in *Bellotti II*. *Post*, at 10–11. But those views have never been adopted by a majority of this Court, while a majority have expressed quite differing views. See *H.L. v. Matheson*, 450 U. S. 398 (1981); *Bellotti II*, 443 U. S. 622 (plurality opinion).

¹⁶ The plurality in *Bellotti II* also required that the alternative to parental consent must "assure" that the resolution of this issue "will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." *Id.*, at 644. Confidentiality here is assured by the statutory requirement that allows the minor to use her initials on the petition. Mo. Rev. Stat. § 188.028.2(1) (Supp. 1982). As to expedition of appeals, § 188.028.2(6) provides in relevant part:

"The notice of intent to appeal shall be given within twenty-four hours from the date of issuance of the order. The record on appeal shall be completed and the appeal shall be perfected within five days from the filing of notice

[Footnote 17 is on p. 15]

here is one purely of statutory construction: whether Missouri provides a judicial alternative that is consistent with these established legal standards.¹⁸

The Missouri statute, §188.028.2,¹⁹ in relevant part, provides:

to appeal. Because time may be of the essence regarding the performance of the abortion, the supreme court of this state shall, by court rule, provide for expedited appellate review of cases appealed under this section."

We believe this section provides the framework for a constitutionally sufficient means of expediting judicial proceedings. Immediately after the effective date of this statutory enactment, the District Court enjoined enforcement. No unemancipated pregnant minor has been required to comply with this section. Thus, to this point in time, there has been no need for the state supreme court to promulgate rules concerning appellate review. There is no reason to believe that Missouri will not expedite any

¹⁷ Cf. *H.L. v. Matheson*, 450 U. S., at 406-407, and n. 14, 411 (upholding a parental notification requirement but not extending the holding to mature or emancipated minors or to immature minors showing such notification detrimental to their best interests). The lower courts found that § 188.028's notice requirement was unconstitutional. 655 F. 2d, at 873; 483 F. Supp., at 701. The State has not sought review of that judgment here. Thus, in the posture in which it appears before this Court for review, § 188.028 contains no requirement for parental notification.

¹⁸ The Missouri statute also exempts "emancipated" women under the age of 18 both from the requirement of parental consent and from the alternative requirement of a judicial proceeding. Plaintiffs argue that the word "emancipated" in this context is void for vagueness, but we disagree. Cf. *H.L. v. Matheson*, *supra*, at 407 (using word to describe a minor). Although the question whether a minor is emancipated turns upon the facts and circumstances of each individual case, the Missouri courts have adopted general rules to guide that determination, and the term is one of general usage and understanding in the Missouri common law. See *Black v. Cole*, 626 S. W. 2d 397, 398 (Mo. App. 1981) (quoting 67 C. J. S. Parent and Child § 86, at 811 (1950)); *In re the Marriage of Heddy*, 535 S. W. 2d 276, 279 (Mo. App. 1976) (same); *Wurth v. Wurth*, 313 S. W. 2d 161, 164 (Mo. App. 1958) (same), *rev'd* on other grounds, 322 S. W. 2d 745 (Mo. 1959).

¹⁹ See n. 4, *supra*. This Court in *Danforth* held unconstitutional Missouri's parental consent requirement for all unmarried minors under the age of

"(4) In the decree, the court shall for good cause:

"(a) Grant the petition for majority rights for the purpose of consenting to the abortion; or

"(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

"(c) Deny the petition, setting forth the grounds on which the petition is denied[.]"

On its face, § 188.028.2(4) authorizes juvenile courts²⁰ to choose among any of the alternatives outlined in the section. The Court of Appeals concluded that a denial of the petition permitted in subsection (c) "would initially require the court to find that the minor was not emancipated and was not mature enough to make her own decision and that an abortion was not in her best interests." 655 F. 2d, at 858. Plaintiffs contend that this interpretation is unreasonable. We do not agree.

Where fairly possible, courts should construe a statute to avoid a danger of unconstitutionality. The Court of Appeals was aware, if the statute provides discretion to deny permission to a minor for *any* "good cause," that arguably it would violate the principles that this Court has set forth. *Ibid.* It recognized, however, that before exercising any option, the juvenile court must receive evidence on "the emotional development, maturity, intellect and understanding of the minor." Mo. Rev. Stat. § 188.028.2(3) (Supp. 1982). The court then reached the logical conclusion that "findings and the ultimate

18. 428 U. S., at 75. In response to our decision, Missouri enacted the section challenged here. This new statute became effective shortly before our decision in *Bellotti II*.

²⁰ We have indicated in prior opinions that a minor should have access to an "independent decisionmaker." *H.L. v. Matheson, supra*, at 420 (POWELL, J., concurring). Missouri has provided for a judicial decisionmaker. We therefore need not consider whether a qualified and independent non-judicial decisionmaker would be appropriate. *Cf. Bellotti II*, 443 U.S., at 643, n. 22.

denial of the petition must be supported by a showing of 'good cause.'" 655 F. 2d, at 858. The Court of Appeals reasonably found that a court could not deny a petition "for good cause" unless it first found—after having received the required evidence—that the minor was not mature enough to make her own decision. See *Bellotti II*, 443 U. S., at 643-644, 647-648 (plurality opinion). We conclude that the Court of Appeals correctly interpreted the statute and that § 188.028, as interpreted, avoids any constitutional infirmities.²¹

VI

The judgment of the Court of Appeals, insofar as it invalidated Missouri's second-trimester hospitalization requirement and upheld the State's parental and judicial consent provision, is affirmed. The judgment invalidating the requirement of a pathology report for all abortions and the requirement that a second physician attend the abortion of any viable fetus is reversed. We vacate the judgment upholding an award of attorney's fees for all hours expended by plaintiffs' attorneys and remand for proceedings consistent with *Hensley v. Eckerhart*, — U. S. — (1983).

It is so ordered.

²¹ Plaintiffs also argue that, in light of the ambiguity of § 188.028.2(4), as evidenced by the differing interpretations placed upon it, the appropriate course of judicial restraint is abstention. This Court has found such an approach appropriate. See *Bellotti v. Baird*, 428 U. S. 132, 146-147 (1976) (*Bellotti I*). Plaintiffs did not, however, argue in the Court of Appeals that the court should abstain, and Missouri has no certification procedure whereby this Court can refer questions of state statutory construction to the state supreme court. See 655 F. 2d, at 861, n. 20; 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4248, at 525, n. 29 (1978 and Supp. 1982). Such a procedure "greatly simplifie[d]" our analysis in *Bellotti I*, *supra*, at 151. Moreover, where, as here, a statute is susceptible to a fair construction that obviates the need to have the state courts render the saving construction, there is no reason for federal courts to abstain.

RIDER A

Although he conceded that the attendance of a second physician for a D&E abortion on a viable fetus was not necessary, he thought the point mostly was theoretical, because he "simply [did] not believe that the question of viability comes up when D&E is an elected method of abortion." 4 Record 836. When reminded of Dr. Crist's earlier testimony, he conceded the remote possibility of third-trimester D&E abortions, but stated: "I personally cannot conceive that as a significant practical point. It may be important legally, but [not] from a medical standpoint...." Id.

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

From: **Justice Powell**

Circulated: 6/6/83

Recirculated: _____

JUN 5 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 81-1255 AND 81-1623

PLANNED PARENTHOOD ASSOCIATION OF
KANSAS CITY, MISSOURI, INC.,
ET AL., PETITIONERS

81-1255

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF
MISSOURI, ET AL.

JOHN ASHCROFT, ATTORNEY GENERAL OF
MISSOURI, ET AL., PETITIONERS

81-1623

v.

PLANNED PARENTHOOD ASSOCIATION OF
KANSAS CITY, MISSOURI, INC.,
ET AL., PETITIONERS

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

[June —, 1983]

JUSTICE POWELL delivered the opinion of the Court:

These cases, like *City of Akron v. Akron Center for Reproductive Health, Inc.*, ante, p. —, and *Simopoulos v. Virginia*, post, p. —, present questions as to the validity of state statutes regulating the performance of abortions.

I

Planned Parenthood of Kansas City, Missouri, Inc., two physicians who perform abortions, and an abortion clinic ("plaintiffs") filed a complaint in the District Court for the Western District of Missouri challenging, as unconstitutional,

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Justice Powell delivered
opinion of the
Court on Parts I
& II, and
announced
the judgment
of Court on
the other
issues

several sections of the Missouri statutes regulating the performance of abortions. The sections relevant here include Mo. Rev. Stat. § 188.025 (Supp. 1982), requiring that abortions after 12 weeks of pregnancy be performed in a hospital;¹ § 188.047, requiring a pathology report for each abortion performed;² § 188.030, requiring the presence of a second physician during abortions performed after viability;³ and § 188.028, requiring minors to secure parental or judicial consent.⁴

¹ Mo. Rev. Stat. § 188.025 provides: "Every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital."

² Mo. Rev. Stat. § 188.047 provides:

"A representative sample of tissue removed at the time of abortion shall be submitted to a board eligible or certified pathologist, who shall file a copy of the tissue report with the state division of health, and who shall provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced and the pathologist's report shall be made a part of the patient's permanent record."

³ Mo. Rev. Stat. § 188.030.3 provides:

"An abortion of a viable unborn child shall be performed or induced only when there is in attendance a physician other than the physician performing or adducing the abortion who shall take control of and provide immediate medical care for a child born as a result of the abortion. During the performance of the abortion, the physician performing it, and subsequent to the abortion, the physician required by this section to be in attendance, shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman."

⁴ Mo. Rev. Stat. § 188.028 provides:

"1. No person shall knowingly perform an abortion upon a pregnant woman under the age of eighteen years unless:

"(1) The attending physician has secured the informed written consent of the minor and one parent or guardian; or

"(2) The minor is emancipated and the attending physician has received the informed written consent of the minor; or

"(3) The minor has been granted the right to self-consent to the abortion by court order pursuant to subsection 2 of this section, and the attending

After hearing testimony from a number of expert witnesses, the District Court invalidated all of these sections except the pathology requirement. 483 F. Supp. 679, 699-701 (1980).⁵ The Court of Appeals for the Eighth Circuit re-

physician has received the informed written consent of the minor; or

"(4) The minor has been granted consent to the abortion by court order, and the court has given its informed written consent in accordance with subsection 2 of this section, and the minor is having the abortion willingly, in compliance with subsection 3 of this section.

"2. The right of a minor to self-consent to an abortion under subdivision (3) of subsection 1 of this section or court consent under subdivision (4) of subsection 1 of this section may be granted by a court pursuant to the following procedures:

"(1) The minor or next friend shall make an application to the juvenile court which shall assist the minor or next friend in preparing the petition and notices required pursuant to this section. The minor or the next friend of the minor shall thereafter file a petition setting forth the initials of the minor; the age of the minor; the names and addresses of each parent, guardian, or, if the minor's parents are deceased and no guardian has been appointed, any other person standing in loco parentis of the minor; that the minor has been fully informed of the risks and consequences of the abortion; that the minor is of sound mind and has sufficient intellectual capacity to consent to the abortion; that, if the court does not grant the minor majority rights for the purpose of consent to the abortion, the court should find that the abortion is in the best interest of the minor and give judicial consent to the abortion; that the court should appoint a guardian ad litem of the child; and if the minor does not have private counsel, that the court should appoint counsel. The petition shall be signed by the minor or the next friend;

"(3) A hearing on the merits of the petition, to be held on the record, shall be held as soon as possible within five days of the filing of the petition. . . . At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect and understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other evidence that the court may find useful in determining whether the minor should be granted majority rights for the purpose of consenting to the abortion or whether the abortion is in the best interests of the minor;

"(4) In the decree, the court shall for good cause:

"(a) Grant the petition for majority rights for the purpose of consenting

[Footnote 5 is on p. 4]

versed the District Court's judgment with respect to § 188.028, thereby upholding the requirement that a minor secure parental or judicial consent to an abortion. It also held that the District Court erred in sustaining § 188.047, the pathology requirement. The District Court's judgment with respect to the second-physician requirement was affirmed, and the case was remanded for further proceedings and findings relating to the second-trimester hospitalization requirement. 655 F. 2d 848, 872-873 (1981). On remand, the District Court affirmed its holding that the second-trimester hospitalization requirement was unconstitutional. The Court of Appeals affirmed this judgment. 664 F. 2d 687, 691 (1981). We granted certiorari. — U. S. — (1982).

The Court today in *City of Akron*, ante, at 8-12, has stated fully the principles that govern judicial review of state statutes regulating abortions, and these need not be repeated here. With these principles in mind, we turn to the statutes at issue.

II

In *City of Akron*, we invalidated a city ordinance requiring

to the abortion; or

"(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

"(c) Deny the petition, setting forth the grounds on which the petition is denied;

"3. If a minor desires an abortion, then she shall be orally informed of and, if possible, sign the written consent required by section 188.039 in the same manner as an adult person. No abortion shall be performed on any minor against her will, except that an abortion may be performed against the will of a minor pursuant to a court order described in subdivision (4) of subsection 1 of this section that the abortion is necessary to preserve the life of the minor."

⁵The District Court also awarded attorney's fees for all hours claimed by the plaintiffs' attorneys. The Court of Appeals affirmed this allocation of fees. See 655 F. 2d 848, 872 (CA8 1981). The petition for certiorari raises the issue whether an award of attorney's fees, made pursuant to 42 U. S. C. § 1988, should be proportioned to reflect the extent to which plaintiffs prevailed.

physicians to perform all second-trimester abortions at general or special hospitals accredited by the Joint Commission on Accreditation of Hospitals (JCAH) or by the American Osteopathic Association. *Ante*, at 13. Missouri's hospitalization requirements are similar to those enacted by Akron, as all second-trimester abortions must be performed in general, acute-care facilities.⁶ For the reasons stated in *City of Akron*, we held that such a requirement "unreasonably infringes upon a woman's constitutional right to obtain an abortion." *Ante*, at 20-21. For the same reasons, we affirm the Court of Appeals' judgment that §188.025 is unconstitutional.

III

We turn now to the State's second-physician requirement.

⁶ Missouri does not define the term "hospital" in its statutory provisions regulating abortions. We therefore must assume, as did the courts below, see 483 F. Supp., at 686, n. 10; 664 F. 2d, at 689-690, and nn. 3, 5 and 6, that the term has its common meaning of a general, acute-care facility. Cf. Mo. Rev. Stat. § 188.015(2) (Supp. 1982) (defining "abortion facility" as "a clinic, physician's office, or any other place or facility in which abortions are performed other than a hospital"). Section 197.020.2 (1978), part of Missouri's hospital licensing laws, reads:

"**'Hospital'** means a place devoted primarily to the maintenance and operation of facilities for the diagnosis, treatment or care for not less than twenty-four hours in any week of three or more nonrelated individuals suffering from illness, disease, injury, deformity or other abnormal physical conditions; or a place devoted primarily to provide for not less than twenty-four hours in any week medical . . . care for three or more nonrelated individuals. . . ."

Cf. Mo. Rev. Stat. § 197.200(1) (1978) (defining "ambulatory surgical center" to include facilities "with an organized medical staff of physicians" and "with continuous physician services and registered professional nursing services whenever a patient is in the facility"); 13 Mo. Admin. Code 50-30.010(1)(A) (1977) (same). The regulations for the Department of Social Services establish standards for the construction, physical facilities, and administration of hospitals. *Id.*, 50-20.010 to 50-20.030 (1977). These are not unlike those set by JCAH. See *City of Akron*, *ante*, at 13, and n. 16.

In *Roe v. Wade*, 410 U. S. 113 (1973), the Court recognized that the State has a compelling interest in the life of a viable fetus: "[T]he State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.*, at 164-165. See *Colautti v. Franklin*, 439 U. S. 379, 386-387 (1979); *Beal v. Doe*, 432 U. S. 438, 445-446 (1977). Several of the Missouri statutes undertake such regulation. Post-viability abortions are proscribed except when necessary to preserve the life or the health of the woman. Mo. Rev. Stat. §188.030.1 (Supp. 1982). The State also forbids the use of abortion procedures fatal to the viable fetus unless alternative procedures pose a greater risk to the health of the woman. §188.030.2.

The statutory provision at issue in this case requires the attendance of a second physician at the abortion of a viable fetus. §188.030.3. This section requires that the second physician "take all reasonable steps in keeping with good medical practice . . . to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman." See n. 3, *supra*. It also provides that the second physician "shall take control of and provide immediate medical care for a child born as a result of the abortion."

The lower courts invalidated §188.030.3.⁷ The plaintiffs, respondents here on this issue, urge affirmance on the

⁷The courts below found, and JUSTICE BLACKMUN's dissenting opinion agrees, *post*, at 6-7, that there is no possible justification for a second-physician requirement whenever D&E is used because no viable fetus can survive a D&E procedure. 483 F. Supp., at 694; 655 F. 2d, at 865. Accordingly, for them, §188.030.3 is overbroad. This reasoning rests on two assumptions. First, a fetus cannot survive a D&E abortion, and second, D&E is the method of choice in the third trimester. There is general agreement as to the first proposition, but not as to the second. Indeed, almost all of the authorities disagree with JUSTICE BLACKMUN's critical as-

grounds that the second-physician requirement distorts the traditional doctor-patient relationship, and is both impractical and costly. They note that Missouri does not require two physicians in attendance for any other medical or surgical procedure, including childbirth or delivery of a premature infant.

sumption, and as the Court of Appeals noted, the choice of this procedure after viability is subject to the requirements of § 188.030.2. See *id.*, at 865, and n. 28. Nevertheless, the courts below, in conclusory language, found that D&E is the “method of choice even after viability is possible.” 655 F. 2d, at 865. No scholarly writing supporting this view is cited by those courts or by the dissent. Reliance apparently is placed solely on the testimony of Dr. Robert Crist, a physician from Kansas, to whom the District Court referred in a footnote. 483 F. Supp., at 694, n. 25. This testimony provides slim support for this holding. Dr. Crist’s testimony, if nothing else, is remarkable in its candor. He is a member of the National Abortion Federation, “an organization of abortion providers and people interested in the pro-choice movement.” 2 Record 415–416. He supported the use of D&E on 28-week pregnancies, well into the third trimester. In some circumstances, he considered it a better procedure than other methods. See 2 Record 427–428. His disinterest in protecting fetal life is evidenced by his agreement “that the abortion patient has a right not only to be rid of the growth, called a fetus in her body, but also has a right to a dead fetus.” *Id.*, at 431. He also agreed that he “[n]ever ha[s] any intention of trying to protect the fetus, if it can be saved,” *id.*, and finally that “as a general principle” “[t]here should not be a live fetus,” *id.*, at 435. Moreover, contrary to every other view, he thought a fetus could survive a D&E abortion. *Id.*, at 433–434. None of the other physicians who testified at the trial, those called both by the plaintiffs and defendants, considered that *any* use of D&E after viability was indicated. See 1 Record 21 (limiting use of D&E to under 18 weeks); 2 Record 381, 410–413 (Dr. Robert Kretzschmar) (D&E up to 17 weeks; would never perform D&E after 26 weeks); 4 Record 787 (almost “inconceivable” to use D&E after viability); 7 Record 52 (D&E safest up to 18 weeks); *id.*, at 110 (doctor not performing D&E past 20 weeks); *id.*, at 111 (risks of doing outpatient D&E equivalent to childbirth at 24 weeks). See also 8 Record 33, 78–81 (deposition of Dr. Willard Cates) (16 weeks latest D&E performed). Apparently Dr. Crist practiced only in Kansas, 2 Record 334, 368, 428, a state having no statutes comparable to § 188.030.1 and § 188.030.2. It is not clear whether he was operating under or familiar with the limitations imposed

The first physician's primary concern will be the life and health of the woman. Many third-trimester abortions in Missouri will be emergency operations,⁸ as the State only permits these late abortions when they are necessary to preserve the life or the health of the woman. It is not unreasonable for the State to assume that during the operation the

by Missouri law. Nor did he explain the circumstances when there were "contraindications" against the use of any of the procedures that could preserve viability, or whether his conclusory opinion was limited to emergency situations. Indeed, there is no record evidence that D&E ever will be the method that poses the least risk to the woman in those rare situations where there are compelling medical reasons for performing an abortion after viability. If there were such instances, they hardly would justify invalidating § 188.030.3.

In addition to citing Dr. Crist in its footnote, the District Court cited—with no elaboration—Dr. Schmidt. His testimony, reflecting no agreement with Dr. Crist, is enlightening.

Although he conceded that the attendance of a second physician for a D&E abortion on a viable fetus was not necessary, he thought the point mostly was theoretical, because he "simply [did] not believe that the question of viability comes up when D&E is an elected method of abortion." 4 Record 836. When reminded of Dr. Crist's earlier testimony, he conceded the remote possibility of third-trimester D&E abortions, but stated: "I personally cannot conceive that as a significant practical point. It may be important legally, but [not] from a medical standpoint. . . ." *Ibid.* Given that Dr. Crist's discordant testimony is wholly unsupported, the State's compelling interest in protecting a viable fetus justifies the second-physician requirement even though there may be the rare case when a physician may think honestly that D&E is required for the mother's health. Legislation need not accommodate every conceivable contingency.

⁸ There is no clearly expressed exception on the face of the statute for the performance of an abortion of a viable fetus without the second physician in attendance. There may be emergency situations where, for example, the woman's health may be endangered by delay. Section § 188.030.3 is qualified, at least in part, by the phrase "provided that it does not pose an increased risk to the life or health of the woman." This clause reasonably could be construed to apply to such a situation. Cf. *H.L. v. Matheson*, 450 U. S. 398, 407, n. 14 (1981) (rejecting argument that Utah statute might apply to individuals with emergency health care needs).

first physician's attention and skills will be directed to preserving the woman's health, and not to protecting the actual life of those fetuses who survive the abortion procedure. Viable fetuses will be in immediate and grave danger because of their premature birth. A second physician, in situations where Missouri permits third-trimester abortions, may be of assistance to the woman's physician in preserving the health and life of the child.

By giving immediate medical attention to a fetus that is delivered alive, the second physician will assure that the State's interests are protected more fully than the first physician alone would be able to do. And given the compelling interest that the State has in preserving life, we cannot say that the Missouri requirement of a second physician in those unusual circumstances where Missouri permits a third-trimester abortion is unconstitutional. Preserving the life of a viable fetus that is aborted may not often be possible,⁹ but the State legitimately may choose to provide safeguards for the comparatively few instances of live birth that occur. We believe the second-physician requirement rationally furthers the State's compelling interest in protecting the lives of viable fetuses, and we reverse the judgment of the Court of Appeals holding that § 188.030.3 is unconstitutional.

IV

In regulating hospital services within the State, Missouri requires that "[a]ll tissue surgically removed with the excep-

⁹See ACOG Technical Bulletin No. 56, *supra* n. 7, at 4 (as high as 7% live-birth rate for intrauterine instillation of uterotonic agents); Stroh & Hinman, Reported Live Births Following Induced Abortion: Two and One-Half Years' Experience in Upstate New York, 126 Am. J. Obstet. Gynecol. 83, 83-84 (1976) (26 live births following saline induced-abortions; 9 following hysterotomy; 1 following oxytocin-induced abortion) (one survival out of 38 live births); 4 Record 728 (50-62% mortality rate for fetuses 26 and 27 weeks); *id.*, at 729 (25-92% mortality rate for fetuses 28 and 29 weeks); *id.*, at 837 (50% mortality rate at 34 weeks).

tion of such tissue as tonsils, adenoids, hernial sacs and prepuces, shall be examined by a pathologist, either on the premises or by arrangement outside of the hospital.” 13 Mo. Admin. Code 50-20.030(3)(A)7 (1977). With respect to abortions, whether performed in hospitals or in some other facility, § 188.047 requires the pathologist to “file a copy of the tissue report with the State Division of Health. . . .” See n. 2, *supra*. The pathologist also is required to “provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced.” Thus, Missouri appears to require that tissue following abortions, as well as from almost all other surgery performed in hospitals, must be submitted to a pathologist, not merely to a pathological examination by the performing doctor. The narrow question before us is whether the State lawfully also may require the tissue removed following an abortion performed in clinics as well as in hospitals to be submitted to a pathologist. We believe that it can.

On its face and in effect, § 188.047 is reasonably related to generally accepted medical standards and “further[s] important health-related State concerns.” *City of Akron*, *ante*, at 12. As the Court of Appeals recognized, pathology examinations are clearly “useful and even necessary in some cases,” because “abnormalities in the tissue may warn of serious, possibly fatal disorders.” 655 F. 2d, at 870.¹⁰ As a rule, it is

¹⁰ A pathological examination is designed to assist in the detection of fatal ectopic pregnancies, hydatridaforme moles or other precancerous growths, and a variety of other problems that can be discovered only through a pathological examination. The general medical utility of pathological examinations is clear. See, *e. g.*, American College of Obstetricians and Gynecologists (ACOG), Standards for Obstetric-Gynecologic Services 52 (5th ed. 1982); National Abortion Federation (NAF), National Abortion Federation Standards 6 (1981) (compliance with standards obligatory for NAF member facilities to remain in good standing); Brief of the American Public Health Association as *Amicus Curiae* in Nos. 81-185, 81-746, 81-1172, at 29, n. 6 (supporting the NAF standards for non-hospi-

good medical practice to submit *all* tissue to the examination of a pathologist.¹¹ This is particularly important following abortion, because questions remain as to the long-range complications and their effect on subsequent pregnancies. See App. 72-73 (testimony of Dr. Willard Cates, Jr.); Levin, et al., Association of Induced Abortion with Subsequent Pregnancy Loss, 243 J. A.M.A. 2495, 2499 (1980). Recorded pathology reports, in concert with abortion complication reports, provide a statistical basis for studying those complications. Cf. *Planned Parenthood of Central Mo. v. Danforth*, 428 U. S. 52, 81 (1976).

Plaintiffs argue that the physician performing the abortion is as qualified as a pathologist to make the examination. This argument disregards the fact that Missouri requires a pathologist—not the performing physician—to examine tissue after almost every type of surgery. Although this requirement is in a provision relating to surgical procedures in hospitals, many of the same procedures included within the Missouri statute customarily are performed also in outpatient

tal abortion facilities as constituting “minimum standards”).

¹¹ ACOG’s standards at the time of the District Court’s trial recommended that a “tissue or operative review committee” should examine “all tissue removed at obstetric-gynecologic operations.” ACOG, Standards for Obstetric-Gynecologic Services 13 (4th ed. 1974). The current ACOG standards also state as a general rule that, for all surgical services performed on an ambulatory basis, “[t]issue removed should be submitted to a pathologist for an examination.” ACOG, *supra*, at 52 (5th ed. 1982). The dissent, however, relies on the recent modification of these standards as they apply to abortions. ACOG now provides an “exception to the practice” of mandatory examination by a pathologist and makes such examination for abortion tissue permissive. *Ibid.* Not surprisingly, this change in policy was controversial within the College. See 4 Record 799-800. ACOG found that “[n]o consensus exists regarding routine microscopic examination of aspirated tissue in every case,” though it recognized—on the basis of inquiries made in 29 institutions—that in a majority of them a microscopic examination is performed in all cases. ACOG, Report of Committee on Gynecologic Practice, Item #6.2.1 (June 27-28, 1980).

clinics. No reason has been suggested why the prudence required in a hospital should not be equally appropriate in such a clinic. Indeed, there may be good reason to impose stricter standards in this respect on clinics performing abortions than on hospitals.¹² As the testimony in the District Court indicates, medical opinion differs widely on this question. See 3 Record 623; 4 Record 749-750, 798-800, 845-847; n. 2, *supra*. There is substantial support for Missouri's requirement. In this case, for example, Dr. Bernard Nathanson, a widely experienced abortion practitioner, testified that he requires a pathologist examination after each of the 60,000 abortions performed under his direction at the New York Center for Reproductive and Sexual Health. He considers it "absolutely necessary to obtain a pathologist's report on each and every specimen of tissue removed for abortion or for that matter from any other surgical procedure which involved the removal of tissue from the human body." App. 143-144. See also App. 146-147 (testimony of Dr.

¹² The professional views that the plaintiffs find to support their position do not disclose whether consideration was given to the fact that not all abortion clinics, particularly inadequately regulated clinics, conform to ethical or generally accepted medical standards. See *Bellotti v. Baird*, 443 U. S. 622, 641, n. 21 (1979) (*Bellotti II*) (minors may resort to "incompetent or unethical" abortion clinics); *Planned Parenthood of Central Mo. v. Danforth*, 428 U. S. 52, 91, n. 2 (1976) (Stewart, J., concurring). The Sun-Times of Chicago, in a series of special reports, disclosed widespread questionable practices in abortion clinics in Chicago, including the failure to obtain proper pathology reports. See "The Abortion Profiteers," Chicago Sun-Times 25-26 (Special Reprint 1978). It is clear, therefore, that a State reasonably could conclude that a pathology requirement is necessary in abortion clinics as well as in general hospitals.

In suggesting that we make from a "comfortable perspective" the judgment that a State constitutionally can require the additional cost of a pathology examination, the dissent suggests that we disregard the interests of the "woman on welfare or the unemployed teenager." *Post*, at 4. But these women may be those most likely to seek the least expensive clinic available. As the standards of medical practice in such clinics may not be the highest, a State may conclude reasonably that a pathologist's examination of tissue is particularly important for their protection.

Keitges); 5 Record 798-799 (testimony of Dr. Schmidt).¹³

In weighing the balance between protection of a woman's health and the comparatively small additional cost of a pathologist's examination, we cannot say that the Constitution requires that a State subordinate its interest in health to minimize to this extent the cost of abortions. Even in the early weeks of pregnancy, "[c]ertain regulations that have no significant impact on the woman's exercise of her right to decide to have an abortion may be permissible where justified by important state health objectives." *City of Akron, ante*, at 11. See *Danforth*, 428 U. S., at 80-81. In light of the substantial benefits that a pathologist's examination can have, we think the cost of a tissue examination does not significantly burden a pregnant woman's abortion decision. The estimated cost of compliance for plaintiff Reproductive Health Services was \$19.40 per abortion performed. 483 F. Supp., at 700, n. 48. In *Danforth*, this Court unanimously upheld Missouri's recordkeeping requirement as "useful to the State's interest in protecting the health of its female citizens, and [as] a resource that is relevant to decisions involving medical experience and judgment," 428 U. S., at 81.¹⁴ We

¹³ The dissent appears to suggest that § 188.047 is constitutionally infirm because it does not require microscopic examination, *post*, at 4, but that misses the point of the regulation. The need is for someone other than the performing clinic to make an independent medical judgment on the tissue. See n. 12, *supra*; 4 Record 750 (Dr. Pierre Keitges, a pathologist). It is reasonable for the State to assume that an independent pathologist is more likely to perform a microscopic examination than the performing doctor. See H. Cove, *Surgical Pathology of the Endometrium* 28 (1981) ("To the pathologist, abortions of any sort are evaluated grossly *and* microscopically for the primary purpose of establishing a diagnosis of intrauterine pregnancy.") (emphasis added).

¹⁴ The *Danforth* Court also noted that "[t]he added requirements for confidentiality, with the sole exception for public health officers, and for retention for seven years, a period not unreasonable in length, assist and persuade us in our determination of the constitutional limits." 428 U. S., at 81. Missouri extends the identical safeguards found reassuring in *Danforth* to the pathology reports at issue here. See Mo. Rev. Stat.

view the requirement for a pathology report as comparable and as a relatively insignificant burden. Accordingly, we reverse the judgment of the Court of Appeals on this issue.

V

As we noted in *City of Akron*, the relevant legal standards with respect to parental consent requirements are not in dispute. See *ante*, at 21; *Bellotti v. Baird*, 443 U. S. 622, 640-642, 643-644 (1979) (plurality opinion) (*Bellotti II*); *id.*, at 656-657 (WHITE, J., dissenting).¹⁵ A State's interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial. It is clear, however, that "the State must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests."¹⁶ *City of Akron, ante*, at 21-22.¹⁷ The issue

§§ 188.055.2, 188.060 (Supp. 1982).

¹⁵ The dissenters apparently believe that the issue here is an open one, and adhere to the views they expressed in *Bellotti II*. *Post*, at 10-11. But those views have never been adopted by a majority of this Court, while a majority have expressed quite differing views. See *H.L. v. Matheson*, 450 U. S. 398 (1981); *Bellotti II*, 443 U. S. 622 (plurality opinion).

¹⁶ The plurality in *Bellotti II* also required that the alternative to parental consent must "assure" that the resolution of this issue "will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." *Id.*, at 644. Confidentiality here is assured by the statutory requirement that allows the minor to use her initials on the petition. Mo. Rev. Stat. § 188.028.2(1) (Supp. 1982). As to expedition of appeals, § 188.028.2(6) provides in relevant part:

"The notice of intent to appeal shall be given within twenty-four hours from the date of issuance of the order. The record on appeal shall be completed and the appeal shall be perfected within five days from the filing of notice to appeal. Because time may be of the essence regarding the performance of the abortion, the supreme court of this state shall, by court rule, provide for expedited appellate review of cases appealed under this section."

[Footnote 17 is on p. 15]

here is one purely of statutory construction: whether Missouri provides a judicial alternative that is consistent with these established legal standards.¹⁸

The Missouri statute, §188.028.2,¹⁹ in relevant part, provides:

We believe this section provides the framework for a constitutionally sufficient means of expediting judicial proceedings. Immediately after the effective date of this statutory enactment, the District Court enjoined enforcement. No unemancipated pregnant minor has been required to comply with this section. Thus, to this point in time, there has been no need for the state supreme court to promulgate rules concerning appellate review. There is no reason to believe that Missouri will not expedite any

¹⁷ Cf. *H.L. v. Matheson*, 450 U. S., at 406-407, and n. 14, 411 (upholding a parental notification requirement but not extending the holding to mature or emancipated minors or to immature minors showing such notification detrimental to their best interests). The lower courts found that § 188.028's notice requirement was unconstitutional. 655 F. 2d, at 873; 483 F. Supp., at 701. The State has not sought review of that judgment here. Thus, in the posture in which it appears before this Court for review, § 188.028 contains no requirement for parental notification.

¹⁸ The Missouri statute also exempts "emancipated" women under the age of 18 both from the requirement of parental consent and from the alternative requirement of a judicial proceeding. Plaintiffs argue that the word "emancipated" in this context is void for vagueness, but we disagree. Cf. *H.L. v. Matheson*, *supra*, at 407 (using word to describe a minor). Although the question whether a minor is emancipated turns upon the facts and circumstances of each individual case, the Missouri courts have adopted general rules to guide that determination, and the term is one of general usage and understanding in the Missouri common law. See *Black v. Cole*, 626 S. W. 2d 397, 398 (Mo. App. 1981) (quoting 67 C. J. S. Parent and Child § 86, at 811 (1950)); *In re the Marriage of Heddy*, 535 S. W. 2d 276, 279 (Mo. App. 1976) (same); *Wurth v. Wurth*, 313 S. W. 2d 161, 164 (Mo. App. 1958) (same), *rev'd on other grounds*, 322 S. W. 2d 745 (Mo. 1959).

¹⁹ See n. 4, *supra*. This Court in *Danforth* held unconstitutional Missouri's parental consent requirement for all unmarried minors under the age of 18. 428 U. S., at 75. In response to our decision, Missouri enacted the section challenged here. This new statute became effective shortly before our decision in *Bellotti II*.

"(4) In the decree, the court shall for good cause:

"(a) Grant the petition for majority rights for the purpose of consenting to the abortion; or

"(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

"(c) Deny the petition, setting forth the grounds on which the petition is denied[.]"

On its face, § 188.028.2(4) authorizes juvenile courts²⁰ to choose among any of the alternatives outlined in the section. The Court of Appeals concluded that a denial of the petition permitted in subsection (c) "would initially require the court to find that the minor was not emancipated and was not mature enough to make her own decision and that an abortion was not in her best interests." 655 F. 2d, at 858. Plaintiffs contend that this interpretation is unreasonable. We do not agree.

Where fairly possible, courts should construe a statute to avoid a danger of unconstitutionality. The Court of Appeals was aware, if the statute provides discretion to deny permission to a minor for *any* "good cause," that arguably it would violate the principles that this Court has set forth. *Ibid.* It recognized, however, that before exercising any option, the juvenile court must receive evidence on "the emotional development, maturity, intellect and understanding of the minor." Mo. Rev. Stat. § 188.028.2(3) (Supp. 1982). The court then reached the logical conclusion that "findings and the ultimate denial of the petition must be supported by a showing of 'good cause.'" 655 F. 2d, at 858. The Court of Appeals reason-

²⁰ We have indicated in prior opinions that a minor should have access to an "independent decisionmaker." *H.L. v. Matheson, supra*, at 420 (PowELL, J., concurring). Missouri has provided for a judicial decisionmaker. We therefore need not consider whether a qualified and independent non-judicial decisionmaker would be appropriate. *Cf. Bellotti II*, 443 U.S., at 643, n. 22.

ably found that a court could not deny a petition “for good cause” unless it first found—after having received the required evidence—that the minor was not mature enough to make her own decision. See *Bellotti II*, 443 U. S., at 643–644, 647–648 (plurality opinion). We conclude that the Court of Appeals correctly interpreted the statute and that § 188.028, as interpreted, avoids any constitutional infirmities.²¹

VI

The judgment of the Court of Appeals, insofar as it invalidated Missouri’s second-trimester hospitalization requirement and upheld the State’s parental and judicial consent provision, is affirmed. The judgment invalidating the requirement of a pathology report for all abortions and the requirement that a second physician attend the abortion of any viable fetus is reversed. We vacate the judgment upholding an award of attorney’s fees for all hours expended by plaintiffs’ attorneys and remand for proceedings consistent with *Hensley v. Eckerhart*, — U. S. — (1983).

It is so ordered.

²¹ Plaintiffs also argue that, in light of the ambiguity of § 188.028.2(4), as evidenced by the differing interpretations placed upon it, the appropriate course of judicial restraint is abstention. This Court has found such an approach appropriate. See *Bellotti v. Baird*, 428 U. S. 132, 146–147 (1976) (*Bellotti I*). Plaintiffs did not, however, argue in the Court of Appeals that the court should abstain, and Missouri has no certification procedure whereby this Court can refer questions of state statutory construction to the state supreme court. See 655 F. 2d, at 861, n. 20; 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4248, at 525, n. 29 (1978 and Supp. 1982). Such a procedure “greatly simplifie[d]” our analysis in *Bellotti I*, *supra*, at 151. Moreover, where, as here, a statute is susceptible to a fair construction that obviates the need to have the state courts render the saving construction, there is no reason for federal courts to abstain.

JUN 7 1983

Changes: 1, 4, 6-17

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

From: Justice Powell

Circulated: _____

Recirculated: **JUN 7 1983** _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 81-1255 AND 81-1623

81-1255
PLANNED PARENTHOOD ASSOCIATION OF
KANSAS CITY, MISSOURI, INC.,
ET AL., PETITIONERS
v.
JOHN ASHCROFT, ATTORNEY GENERAL OF
MISSOURI, ET AL.

81-1623
JOHN ASHCROFT, ATTORNEY GENERAL OF
MISSOURI, ET AL., PETITIONERS
v.
PLANNED PARENTHOOD ASSOCIATION OF
KANSAS CITY, MISSOURI, INC.,
ET AL., PETITIONERS

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

[June —, 1983]

JUSTICE POWELL delivered the opinion of the Court with respect to Parts I, II, and VI, and an opinion with respect to Parts III, IV, and V, in which THE CHIEF JUSTICE joins.

These cases, like *City of Akron v. Akron Center for Reproductive Health, Inc.*, ante, p. —, and *Simopoulos v. Virginia*, post, p. —, present questions as to the validity of state statutes regulating the performance of abortions.

I

Planned Parenthood of Kansas City, Missouri, Inc., two physicians who perform abortions, and an abortion clinic

("plaintiffs") filed a complaint in the District Court for the Western District of Missouri challenging, as unconstitutional, several sections of the Missouri statutes regulating the performance of abortions. The sections relevant here include Mo. Rev. Stat. § 188.025 (Supp. 1982), requiring that abortions after 12 weeks of pregnancy be performed in a hospital;¹ § 188.047, requiring a pathology report for each abortion performed;² § 188.030, requiring the presence of a second physician during abortions performed after viability;³ and § 188.028, requiring minors to secure parental or judicial consent.⁴

¹ Mo. Rev. Stat. § 188.025 provides: "Every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital."

² Mo. Rev. Stat. § 188.047 provides:

"A representative sample of tissue removed at the time of abortion shall be submitted to a board eligible or certified pathologist, who shall file a copy of the tissue report with the state division of health, and who shall provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced and the pathologist's report shall be made a part of the patient's permanent record."

³ Mo. Rev. Stat. § 188.030.3 provides:

"An abortion of a viable unborn child shall be performed or induced only when there is in attendance a physician other than the physician performing or adducing the abortion who shall take control of and provide immediate medical care for a child born as a result of the abortion. During the performance of the abortion, the physician performing it, and subsequent to the abortion, the physician required by this section to be in attendance, shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman."

⁴ Mo. Rev. Stat. § 188.028 provides:

"1. No person shall knowingly perform an abortion upon a pregnant woman under the age of eighteen years unless:

"(1) The attending physician has secured the informed written consent of the minor and one parent or guardian; or

"(2) The minor is emancipated and the attending physician has received the informed written consent of the minor; or

After hearing testimony from a number of expert witnesses, the District Court invalidated all of these sections except the pathology requirement. 483 F. Supp. 679, 699-701 (1980).⁵ The Court of Appeals for the Eighth Circuit re-

"(3) The minor has been granted the right to self-consent to the abortion by court order pursuant to subsection 2 of this section, and the attending physician has received the informed written consent of the minor; or

"(4) The minor has been granted consent to the abortion by court order, and the court has given its informed written consent in accordance with subsection 2 of this section, and the minor is having the abortion willingly, in compliance with subsection 3 of this section.

"2. The right of a minor to self-consent to an abortion under subdivision (3) of subsection 1 of this section or court consent under subdivision (4) of subsection 1 of this section may be granted by a court pursuant to the following procedures:

"(1) The minor or next friend shall make an application to the juvenile court which shall assist the minor or next friend in preparing the petition and notices required pursuant to this section. The minor or the next friend of the minor shall thereafter file a petition setting forth the initials of the minor; the age of the minor; the names and addresses of each parent, guardian, or, if the minor's parents are deceased and no guardian has been appointed, any other person standing in loco parentis of the minor; that the minor has been fully informed of the risks and consequences of the abortion; that the minor is of sound mind and has sufficient intellectual capacity to consent to the abortion; that, if the court does not grant the minor majority rights for the purpose of consent to the abortion, the court should find that the abortion is in the best interest of the minor and give judicial consent to the abortion; that the court should appoint a guardian ad litem of the child; and if the minor does not have private counsel, that the court should appoint counsel. The petition shall be signed by the minor or the next friend;

"(3) A hearing on the merits of the petition, to be held on the record, shall be held as soon as possible within five days of the filing of the petition. . . . At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect and understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other evidence that the court may find useful in determining whether the minor should be granted majority rights for the purpose of consenting to the abortion or whether the abortion is in the best interests of the minor;

[Footnote 5 is on p. 4]

versed the District Court's judgment with respect to § 188.028, thereby upholding the requirement that a minor secure parental or judicial consent to an abortion. It also held that the District Court erred in sustaining § 188.047, the pathology requirement. The District Court's judgment with respect to the second-physician requirement was affirmed, and the case was remanded for further proceedings and findings relating to the second-trimester hospitalization requirement. 655 F. 2d 848, 872-873 (1981). On remand, the District Court affirmed its holding that the second-trimester hospitalization requirement was unconstitutional. The Court of Appeals affirmed this judgment. 664 F. 2d 687, 691 (1981). We granted certiorari. 456 U. S. 988 (1982).

The Court today in *City of Akron, ante*, at 8-12, has stated fully the principles that govern judicial review of state statutes regulating abortions, and these need not be repeated here. With these principles in mind, we turn to the statutes at issue.

"(4) In the decree, the court shall for good cause:

"(a) Grant the petition for majority rights for the purpose of consenting to the abortion; or

"(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

"(c) Deny the petition, setting forth the grounds on which the petition is denied;

"3. If a minor desires an abortion, then she shall be orally informed of and, if possible, sign the written consent required by section 188.039 in the same manner as an adult person. No abortion shall be performed on any minor against her will, except that an abortion may be performed against the will of a minor pursuant to a court order described in subdivision (4) of subsection 1 of this section that the abortion is necessary to preserve the life of the minor."

⁵The District Court also awarded attorney's fees for all hours claimed by the plaintiffs' attorneys. The Court of Appeals affirmed this allocation of fees. See 655 F. 2d 848, 872 (CA8 1981). The petition for certiorari raises the issue whether an award of attorney's fees, made pursuant to 42 U. S. C. § 1988, should be proportioned to reflect the extent to which plaintiffs prevailed.

II

In *City of Akron*, we invalidated a city ordinance requiring physicians to perform all second-trimester abortions at general or special hospitals accredited by the Joint Commission on Accreditation of Hospitals (JCAH) or by the American Osteopathic Association. *Ante*, at 13. Missouri's hospitalization requirements are similar to those enacted by Akron, as all second-trimester abortions must be performed in general, acute-care facilities.⁶ For the reasons stated in *City of Akron*, we held that such a requirement "unreasonably infringes upon a woman's constitutional right to obtain an abortion." *Ante*, at 20-21. For the same reasons, we affirm the Court of Appeals' judgment that §188.025 is unconstitutional.

⁶ Missouri does not define the term "hospital" in its statutory provisions regulating abortions. We therefore must assume, as did the courts below, see 483 F. Supp., at 686, n. 10; 664 F. 2d, at 689-690, and nn. 3, 5 and 6, that the term has its common meaning of a general, acute-care facility. Cf. Mo. Rev. Stat. § 188.015(2) (Supp. 1982) (defining "abortion facility" as "a clinic, physician's office, or any other place or facility in which abortions are performed other than a hospital"). Section 197.020.2 (1978), part of Missouri's hospital licensing laws, reads:

"**'Hospital'** means a place devoted primarily to the maintenance and operation of facilities for the diagnosis, treatment or care for not less than twenty-four hours in any week of three or more nonrelated individuals suffering from illness, disease, injury, deformity or other abnormal physical conditions; or a place devoted primarily to provide for not less than twenty-four hours in any week medical . . . care for three or more nonrelated individuals. . . ."

Cf. Mo. Rev. Stat. § 197.200(1) (1978) (defining "ambulatory surgical center" to include facilities "with an organized medical staff of physicians" and "with continuous physician services and registered professional nursing services whenever a patient is in the facility"); 13 Mo. Admin. Code 50-30.010(1)(A) (1977) (same). The regulations for the Department of Social Services establish standards for the construction, physical facilities, and administration of hospitals. *Id.*, 50-20.010 to 50-20.030 (1977). These are not unlike those set by JCAH. See *City of Akron*, *ante*, at 13, and n. 16.

III

We turn now to the State's second-physician requirement. In *Roe v. Wade*, 410 U. S. 113 (1973), the Court recognized that the State has a compelling interest in the life of a viable fetus: "[T]he State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.*, at 164-165. See *Colautti v. Franklin*, 439 U. S. 379, 386-387 (1979); *Beal v. Doe*, 432 U. S. 438, 445-446 (1977). Several of the Missouri statutes undertake such regulation. Post-viability abortions are proscribed except when necessary to preserve the life or the health of the woman. Mo. Rev. Stat. §188.030.1 (Supp. 1982). The State also forbids the use of abortion procedures fatal to the viable fetus unless alternative procedures pose a greater risk to the health of the woman. §188.030.2.

The statutory provision at issue in this case requires the attendance of a second physician at the abortion of a viable fetus. §188.030.3. This section requires that the second physician "take all reasonable steps in keeping with good medical practice . . . to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman." See n. 3, *supra*. It also provides that the second physician "shall take control of, and provide immediate medical care for a child born as a result of the abortion."

The lower courts invalidated §188.030.3.⁷ The plaintiffs, respondents here on this issue, urge affirmance on the

⁷ The courts below found, and JUSTICE BLACKMUN's dissenting opinion agrees, *post*, at 6-7, that there is no possible justification for a second-physician requirement whenever D&E is used because no viable fetus can survive a D&E procedure. 483 F. Supp., at 694; 655 F. 2d, at 865. Accordingly, for them, §188.030.3 is overbroad. This reasoning rests on two assumptions. First, a fetus cannot survive a D&E abortion, and second,

grounds that the second-physician requirement distorts the traditional doctor-patient relationship, and is both impractical and costly. They note that Missouri does not require two physicians in attendance for any other medical or surgical procedure, including childbirth or delivery of a premature infant.

D&E is the method of choice in the third trimester. There is general agreement as to the first proposition, but not as to the second. Indeed, almost all of the authorities disagree with JUSTICE BLACKMUN's critical assumption, and as the Court of Appeals noted, the choice of this procedure after viability is subject to the requirements of § 188.030.2. See *id.*, at 865, and n. 28. Nevertheless, the courts below, in conclusory language, found that D&E is the "method of choice even after viability is possible." 655 F. 2d, at 865. No scholarly writing supporting this view is cited by those courts or by the dissent. Reliance apparently is placed solely on the testimony of Dr. Robert Crist, a physician from Kansas, to whom the District Court referred in a footnote. 483 F. Supp., at 694, n. 25. This testimony provides slim support for this holding. Dr. Crist's testimony, if nothing else, is remarkable in its candor. He is a member of the National Abortion Federation, "an organization of abortion providers and people interested in the pro-choice movement." 2 Record 415-416. He supported the use of D&E on 28-week pregnancies, well into the third trimester. In some circumstances, he considered it a better procedure than other methods. See 2 Record 427-428. His disinterest in protecting fetal life is evidenced by his agreement "that the abortion patient has a right not only to be rid of the growth, called a fetus in her body, but also has a right to a dead fetus." *Id.*, at 431. He also agreed that he "[n]ever ha[s] any intention of trying to protect the fetus, if it can be saved," *id.*, and finally that "as a general principle" "[t]here should not be a live fetus," *id.*, at 435. Moreover, contrary to every other view, he thought a fetus could survive a D&E abortion. *Id.*, at 433-434. None of the other physicians who testified at the trial, those called both by the plaintiffs and defendants, considered that *any* use of D&E after viability was indicated. See 1 Record 21 (limiting use of D&E to under 18 weeks); 2 Record 381, 410-413 (Dr. Robert Kretzschmar) (D&E up to 17 weeks; would never perform D&E after 26 weeks); 4 Record 787 (almost "inconceivable" to use D&E after viability); 7 Record 52 (D&E safest up to 18 weeks); *id.*, at 110 (doctor not performing D&E past 20 weeks); *id.*, at 111 (risks of doing outpatient D&E equivalent to childbirth at 24 weeks). See also 8 Record 33, 78-81 (deposition of Dr. Willard Cates) (16 weeks latest D&E performed). Apparently

The first physician's primary concern will be the life and health of the woman. Many third-trimester abortions in Missouri will be emergency operations,⁸ as the State permits these late abortions only when they are necessary to preserve the life or the health of the woman. It is not unreason-

Dr. Crist practiced only in Kansas, 2 Record 334, 368, 428, a state having no statutes comparable to § 188.030.1 and § 188.030.2. It is not clear whether he was operating under or familiar with the limitations imposed by Missouri law. Nor did he explain the circumstances when there were "contraindications" against the use of any of the procedures that could preserve viability, or whether his conclusory opinion was limited to emergency situations. Indeed, there is no record evidence that D&E ever will be the method that poses the least risk to the woman in those rare situations where there are compelling medical reasons for performing an abortion after viability. If there were such instances, they hardly would justify invalidating § 188.030.3.

In addition to citing Dr. Crist in its footnote, the District Court cited—with no elaboration—Dr. Schmidt. His testimony, reflecting no agreement with Dr. Crist, is enlightening. Although he conceded that the attendance of a second physician for a D&E abortion on a viable fetus was not necessary, he considered the point mostly theoretical, because he "simply [did] not believe that the question of viability comes up when D&E is an elected method of abortion." 4 Record 836. When reminded of Dr. Crist's earlier testimony, he conceded the remote possibility of third-trimester D&E abortions, but stated: "I personally cannot conceive that as a significant practical point. It may be important legally, but [not] from a medical standpoint. . . ." *Ibid.* Given that Dr. Crist's discordant testimony is wholly unsupported, the State's compelling interest in protecting a viable fetus justifies the second-physician requirement even though there may be the rare case when a physician may think honestly that D&E is required for the mother's health. Legislation need not accommodate every conceivable contingency.

⁸There is no clearly expressed exception on the face of the statute for the performance of an abortion of a viable fetus without the second physician in attendance. There may be emergency situations where, for example, the woman's health may be endangered by delay. Section § 188.030.3 is qualified, at least in part, by the phrase "provided that it does not pose an increased risk to the life or health of the woman." This clause reasonably could be construed to apply to such a situation. Cf. *H.L. v. Matheson*, 450 U. S. 398, 407, n. 14 (1981) (rejecting argument that Utah statute might apply to individuals with emergency health care needs).

able for the State to assume that during the operation the first physician's attention and skills will be directed to preserving the woman's health, and not to protecting the actual life of those fetuses who survive the abortion procedure. Viable fetuses will be in immediate and grave danger because of their premature birth. A second physician, in situations where Missouri permits third-trimester abortions, may be of assistance to the woman's physician in preserving the health and life of the child.

By giving immediate medical attention to a fetus that is delivered alive, the second physician will assure that the State's interests are protected more fully than the first physician alone would be able to do. And given the compelling interest that the State has in preserving life, we cannot say that the Missouri requirement of a second physician in those unusual circumstances where Missouri permits a third-trimester abortion is unconstitutional. Preserving the life of a viable fetus that is aborted may not often be possible,⁹ but the State legitimately may choose to provide safeguards for the comparatively few instances of live birth that occur. We believe the second-physician requirement reasonably furthers the State's compelling interest in protecting the lives of viable fetuses, and we reverse the judgment of the Court of Appeals holding that § 188.030.3 is unconstitutional.

IV

In regulating hospital services within the State, Missouri

⁹ See ACOG Technical Bulletin No. 56, *supra* n. 7, at 4 (as high as 7% live-birth rate for intrauterine instillation of uterotonic agents); Stroh & Hinman, Reported Live Births Following Induced Abortion: Two and One-Half Years' Experience in Upstate New York, 126 Am. J. Obstet. Gynecol. 83, 83-84 (1976) (26 live births following saline induced-abortions; 9 following hysterotomy; 1 following oxytocin-induced abortion) (one survival out of 38 live births); 4 Record 728 (50-62% mortality rate for fetuses 26 and 27 weeks); *id.*, at 729 (25-92% mortality rate for fetuses 28 and 29 weeks); *id.*, at 837 (50% mortality rate at 34 weeks).

requires that “[a]ll tissue surgically removed with the exception of such tissue as tonsils, adenoids, hernial sacs and prepuces, shall be examined by a pathologist, either on the premises or by arrangement outside of the hospital.” 13 Mo. Admin. Code 50-20.030(3)(A)7 (1977). With respect to abortions, whether performed in hospitals or in some other facility, § 188.047 requires the pathologist to “file a copy of the tissue report with the State Division of Health. . . .” See n. 2, *supra*. The pathologist also is required to “provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced.” Thus, Missouri appears to require that tissue following abortions, as well as from almost all other surgery performed in hospitals, must be submitted to a pathologist, not merely examined by the performing doctor. The narrow question before us is whether the State lawfully also may require the tissue removed following abortions performed in clinics as well as in hospitals to be submitted to a pathologist.

On its face and in effect, § 188.047 is reasonably related to generally accepted medical standards and “further[s] important health-related State concerns.” *City of Akron*, *ante*, at 12. As the Court of Appeals recognized, pathology examinations are clearly “useful and even necessary in some cases,” because “abnormalities in the tissue may warn of serious, possibly fatal disorders.” 655 F. 2d, at 870.¹⁰ As a rule, it is

¹⁰ A pathological examination is designed to assist in the detection of fatal ectopic pregnancies, hydatritiforme moles or other precancerous growths, and a variety of other problems that can be discovered only through a pathological examination. The general medical utility of pathological examinations is clear. See, e. g., American College of Obstetricians and Gynecologists (ACOG), Standards for Obstetric-Gynecologic Services 52 (5th ed. 1982); National Abortion Federation (NAF), National Abortion Federation Standards 6 (1981) (compliance with standards obligatory for NAF member facilities to remain in good standing); Brief of the American Public Health Association as *Amicus Curiae* in Nos. 81-185, 81-746, 81-1172, at 29, n. 6 (supporting the NAF standards for non-hospi-

accepted medical practice to submit *all* tissue to the examination of a pathologist.¹¹ This is particularly important following abortion, because questions remain as to the long-range complications and their effect on subsequent pregnancies. See App. 72-73 (testimony of Dr. Willard Cates, Jr.); Levin, et al., Association of Induced Abortion with Subsequent Pregnancy Loss, 243 J. A.M.A. 2495, 2499 (1980). Recorded pathology reports, in concert with abortion complication reports, provide a statistical basis for studying those complications. Cf. *Planned Parenthood of Central Mo. v. Danforth*, 428 U. S. 52, 81 (1976).

Plaintiffs argue that the physician performing the abortion is as qualified as a pathologist to make the examination. This argument disregards the fact that Missouri requires a pathologist—not the performing physician—to examine tissue after almost every type of surgery. Although this requirement is in a provision relating to surgical procedures in hospitals, many of the same procedures included within the Missouri statute customarily are performed also in outpatient

tal abortion facilities as constituting “minimum standards”).

¹¹ ACOG's standards at the time of the District Court's trial recommended that a “tissue or operative review committee” should examine “all tissue removed at obstetric-gynecologic operations.” ACOG, Standards for Obstetric-Gynecologic Services 13 (4th ed. 1974). The current ACOG standards also state as a general rule that, for all surgical services performed on an ambulatory basis, “[t]issue removed should be submitted to a pathologist for an examination.” ACOG, *supra*, at 52 (5th ed. 1982). The dissent, however, relies on the recent modification of these standards as they apply to abortions. ACOG now provides an “exception to the practice” of mandatory examination by a pathologist and makes such examination for abortion tissue permissive. *Ibid.* Not surprisingly, this change in policy was controversial within the College. See 4 Record 799-800. ACOG found that “[n]o consensus exists regarding routine microscopic examination of aspirated tissue in every case,” though it recognized—on the basis of inquiries made in 29 institutions—that in a majority of them a microscopic examination is performed in all cases. ACOG, Report of Committee on Gynecologic Practice, Item #6.2.1 (June 27-28, 1980).

clinics. No reason has been suggested why the prudence required in a hospital should not be equally appropriate in such a clinic. Indeed, there may be good reason to impose stricter standards in this respect on clinics performing abortions than on hospitals.¹² As the testimony in the District Court indicates, medical opinion differs widely on this question. See 3 Record 623; 4 Record 749-750, 798-800, 845-847; n. 2, *supra*. There is substantial support for Missouri's requirement. In this case, for example, Dr. Bernard Nathanson, a widely experienced abortion practitioner, testified that he requires a pathologist examination after each of the 60,000 abortions performed under his direction at the New York Center for Reproductive and Sexual Health. He considers it "absolutely necessary to obtain a pathologist's report on each and every specimen of tissue removed for abortion or for that matter from any other surgical procedure which involved the removal of tissue from the human body." App. 143-144. See also App. 146-147 (testimony of Dr.

¹² The professional views that the plaintiffs find to support their position do not disclose whether consideration was given to the fact that not all abortion clinics, particularly inadequately regulated clinics, conform to ethical or generally accepted medical standards. See *Bellotti v. Baird*, 443 U. S. 622, 641, n. 21 (1979) (*Bellotti II*) (minors may resort to "incompetent or unethical" abortion clinics); *Planned Parenthood of Central Mo. v. Danforth*, 428 U. S. 52, 91, n. 2 (1976) (Stewart, J., concurring). The Sun-Times of Chicago, in a series of special reports, disclosed widespread questionable practices in abortion clinics in Chicago, including the failure to obtain proper pathology reports. See "The Abortion Profiteers," Chicago Sun-Times 25-26 (Special Reprint 1978). It is clear, therefore, that a State reasonably could conclude that a pathology requirement is necessary in abortion clinics as well as in general hospitals.

In suggesting that we make from a "comfortable perspective" the judgment that a State constitutionally can require the additional cost of a pathology examination, the dissent suggests that we disregard the interests of the "woman on welfare or the unemployed teenager." *Post*, at 4. But these women may be those most likely to seek the least expensive clinic available. As the standards of medical practice in such clinics may not be the highest, a State may conclude reasonably that a pathologist's examination of tissue is particularly important for their protection.

Keitges); 5 Record 798-799 (testimony of Dr. Schmidt).¹³

In weighing the balance between protection of a woman's health and the comparatively small additional cost of a pathologist's examination, we cannot say that the Constitution requires that a State subordinate its interest in health to minimize to this extent the cost of abortions. Even in the early weeks of pregnancy, "[c]ertain regulations that have no significant impact on the woman's exercise of her right to decide to have an abortion may be permissible where justified by important state health objectives." *City of Akron, ante*, at 11. See *Danforth*, 428 U. S., at 80-81. We think the cost of a tissue examination does not significantly burden a pregnant woman's abortion decision. The estimated cost of compliance for plaintiff Reproductive Health Services was \$19.40 per abortion performed, 483 F. Supp., at 700, n. 48, and in light of the substantial benefit's that a pathologist's examination can have, this small cost clearly is justified. In *Danforth*, this Court unanimously upheld Missouri's recordkeeping requirement as "useful to the State's interest in protecting the health of its female citizens, and [as] a resource that is relevant to decisions involving medical experience and judgment," 428 U. S., at 81.¹⁴ We view the re-

¹³The dissent appears to suggest that § 188.047 is constitutionally infirm because it does not require microscopic examination, *post*, at 4, but that misses the point of the regulation. The need is for someone other than the performing clinic to make an independent medical judgment on the tissue. See n. 12, *supra*; 4 Record 750 (Dr. Pierre Keitges, a pathologist). It is reasonable for the State to assume that an independent pathologist is more likely to perform a microscopic examination than the performing doctor. See H. Cove, *Surgical Pathology of the Endometrium* 28 (1981) ("To the pathologist, abortions of any sort are evaluated grossly *and* microscopically for the primary purpose of establishing a diagnosis of intrauterine pregnancy.") (emphasis added).

¹⁴The *Danforth* Court also noted that "[t]he added requirements for confidentiality, with the sole exception for public health officers, and for retention for seven years, a period not unreasonable in length, assist and persuade us in our determination of the constitutional limits." 428 U. S., at 81. Missouri extends the identical safeguards found reassuring in

quirement for a pathology report as comparable and as a relatively insignificant burden. Accordingly, we reverse the judgment of the Court of Appeals on this issue.

V

As we noted in *City of Akron*, the relevant legal standards with respect to parental consent requirements are not in dispute. See *ante*, at 21; *Bellotti v. Baird*, 443 U. S. 622, 640-642, 643-644 (1979) (plurality opinion) (*Bellotti II*); *id.*, at 656-657 (WHITE, J., dissenting).¹⁵ A State's interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial. It is clear, however, that "the State must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests."¹⁶ *City of Akron*, *ante*, at 21-22.¹⁷ The issue

Danforth to the pathology reports at issue here. See Mo. Rev. Stat. §§ 188.055.2, 188.060 (Supp. 1982).

¹⁵ The dissenters apparently believe that the issue here is an open one, and adhere to the views they expressed in *Bellotti II*. *Post*, at 10-11. But those views have never been adopted by a majority of this Court, while a majority have expressed quite differing views. See *H.L. v. Matheson*, 450 U. S. 398 (1981); *Bellotti II*, 443 U. S. 622 (plurality opinion); *id.*, at 656-657 (WHITE, J., dissenting).

¹⁶ The plurality in *Bellotti II* also required that the alternative to parental consent must "assure" that the resolution of this issue "will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." *Id.*, at 644. Confidentiality here is assured by the statutory requirement that allows the minor to use her initials on the petition. Mo. Rev. Stat. § 188.028.2(1) (Supp. 1982). As to expedition of appeals, § 188.028.2(6) provides in relevant part:

"The notice of intent to appeal shall be given within twenty-four hours from the date of issuance of the order. The record on appeal shall be completed and the appeal shall be perfected within five days from the filing of notice to appeal. Because time may be of the essence regarding the performance of the abortion, the supreme court of this state shall, by court rule, provide

here is one purely of statutory construction: whether Missouri provides a judicial alternative that is consistent with these established legal standards.¹⁸

The Missouri statute, § 188.028.2,¹⁹ in relevant part, provides:

for expedited appellate review of cases appealed under this section.”

We believe this section provides the framework for a constitutionally sufficient means of expediting judicial proceedings. Immediately after the effective date of this statutory enactment, the District Court enjoined enforcement. No unemancipated pregnant minor has been required to comply with this section. Thus, to this point in time, there has been no need for the state supreme court to promulgate rules concerning appellate review. There is no reason to believe that Missouri will not expedite any appeal consistent with the mandate in our prior opinions.

¹⁷ Cf. *H.L. v. Matheson*, 450 U. S., at 406-407, and n. 14, 411 (upholding a parental notification requirement but not extending the holding to mature or emancipated minors or to immature minors showing such notification detrimental to their best interests). The lower courts found that § 188.028's notice requirement was unconstitutional. 655 F. 2d, at 873; 483 F. Supp., at 701. The State has not sought review of that judgment here. Thus, in the posture in which it appears before this Court for review, § 188.028 contains no requirement for parental notification.

¹⁸ The Missouri statute also exempts “emancipated” women under the age of 18 both from the requirement of parental consent and from the alternative requirement of a judicial proceeding. Plaintiffs argue that the word “emancipated” in this context is void for vagueness, but we disagree. Cf. *H.L. v. Matheson*, *supra*, at 407 (using word to describe a minor). Although the question whether a minor is emancipated turns upon the facts and circumstances of each individual case, the Missouri courts have adopted general rules to guide that determination, and the term is one of general usage and understanding in the Missouri common law. See *Black v. Cole*, 626 S. W. 2d 397, 398 (Mo. App. 1981) (quoting 67 C. J. S. Parent and Child § 86, at 811 (1950)); *In re the Marriage of Heddy*, 535 S. W. 2d 276, 279 (Mo. App. 1976) (same); *Wurth v. Wurth*, 313 S. W. 2d 161, 164 (Mo. App. 1958) (same), *rev'd on other grounds*, 322 S. W. 2d 745 (Mo. 1959).

¹⁹ See n. 4, *supra*. This Court in *Danforth* held unconstitutional Missouri's parental consent requirement for all unmarried minors under the age of 18. 428 U. S., at 75. In response to our decision, Missouri enacted the

“(4) In the decree, the court shall for good cause:

“(a) Grant the petition for majority rights for the purpose of consenting to the abortion; or

“(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

“(c) Deny the petition, setting forth the grounds on which the petition is denied[.]”

On its face, § 188.028.2(4) authorizes juvenile courts²⁰ to choose among any of the alternatives outlined in the section. The Court of Appeals concluded that a denial of the petition permitted in subsection (c) “would initially require the court to find that the minor was not emancipated and was not mature enough to make her own decision and that an abortion was not in her best interests.” 655 F. 2d, at 858. Plaintiffs contend that this interpretation is unreasonable. We do not agree.

Where fairly possible, courts should construe a statute to avoid a danger of unconstitutionality. The Court of Appeals was aware, if the statute provides discretion to deny permission to a minor for *any* “good cause,” that arguably it would violate the principles that this Court has set forth. *Ibid.* It recognized, however, that before exercising any option, the juvenile court must receive evidence on “the emotional development, maturity, intellect and understanding of the minor.” Mo. Rev. Stat. § 188.028.2(3) (Supp. 1982). The court then reached the logical conclusion that “findings and the ultimate

section challenged here. This new statute became effective shortly before our decision in *Bellotti II*.

²⁰ We have indicated in prior opinions that a minor should have access to an “independent decisionmaker.” *H.L. v. Matheson, supra*, at 420 (POWELL, J., concurring). Missouri has provided for a judicial decisionmaker. We therefore need not consider whether a qualified and independent non-judicial decisionmaker would be appropriate. *Cf. Bellotti II*, 443 U.S., at 643, n. 22.

denial of the petition must be supported by a showing of 'good cause.'" 655 F. 2d, at 858. The Court of Appeals reasonably found that a court could not deny a petition "for good cause" unless it first found—after having received the required evidence—that the minor was not mature enough to make her own decision. See *Bellotti II*, 443 U. S., at 643-644, 647-648 (plurality opinion). We conclude that the Court of Appeals correctly interpreted the statute and that § 188.028, as interpreted, avoids any constitutional infirmities.²¹

VI

The judgment of the Court of Appeals, insofar as it invalidated Missouri's second-trimester hospitalization requirement and upheld the State's parental and judicial consent provision, is affirmed. The judgment invalidating the requirement of a pathology report for all abortions and the requirement that a second physician attend the abortion of any viable fetus is reversed. We vacate the judgment upholding an award of attorney's fees for all hours expended by plaintiffs' attorneys and remand for proceedings consistent with *Hensley v. Eckerhart*, — U. S. — (1983).

It is so ordered.

²¹ Plaintiffs also argue that, in light of the ambiguity of § 188.028.2(4), as evidenced by the differing interpretations placed upon it, the appropriate course of judicial restraint is abstention. This Court has found such an approach appropriate. See *Bellotti v. Baird*, 428 U. S. 132, 146-147 (1976) (*Bellotti I*). Plaintiffs did not, however, argue in the Court of Appeals that the court should abstain, and Missouri has no certification procedure whereby this Court can refer questions of state statutory construction to the state supreme court. See 655 F. 2d, at 861, n. 20; 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4248, at 525, n. 29 (1978 and Supp. 1982). Such a procedure "greatly simplifie[d]" our analysis in *Bellotti I*, *supra*, at 151. Moreover, where, as here, a statute is susceptible to a fair construction that obviates the need to have the state courts render the saving construction, there is no reason for federal courts to abstain.

JUN 9 1983

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

Change: p. 8

From: Justice Powell

Circulated: _____

Recirculated: JUN 10 1983

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 81-1255 AND 81-1623

PLANNED PARENTHOOD ASSOCIATION OF
KANSAS CITY, MISSOURI, INC.,
ET AL., PETITIONERS

81-1255

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF
MISSOURI, ET AL.

JOHN ASHCROFT, ATTORNEY GENERAL OF
MISSOURI, ET AL., PETITIONERS

81-1623

v.

PLANNED PARENTHOOD ASSOCIATION OF
KANSAS CITY, MISSOURI, INC.,
ET AL., PETITIONERS

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

[June —, 1983]

JUSTICE POWELL delivered the opinion of the Court with respect to Parts I, II, and VI, and an opinion with respect to Parts III, IV, and V, in which THE CHIEF JUSTICE joins.

These cases, like *City of Akron v. Akron Center for Reproductive Health, Inc.*, ante, p. —, and *Simopoulos v. Virginia*, post, p. —, present questions as to the validity of state statutes regulating the performance of abortions.

I

Planned Parenthood of Kansas City, Missouri, Inc., two physicians who perform abortions, and an abortion clinic

("plaintiffs") filed a complaint in the District Court for the Western District of Missouri challenging, as unconstitutional, several sections of the Missouri statutes regulating the performance of abortions. The sections relevant here include Mo. Rev. Stat. § 188.025 (Supp. 1982), requiring that abortions after 12 weeks of pregnancy be performed in a hospital;¹ § 188.047, requiring a pathology report for each abortion performed;² § 188.030, requiring the presence of a second physician during abortions performed after viability;³ and § 188.028, requiring minors to secure parental or judicial consent.⁴

¹ Mo. Rev. Stat. § 188.025 provides: "Every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital."

² Mo. Rev. Stat. § 188.047 provides:

"A representative sample of tissue removed at the time of abortion shall be submitted to a board eligible or certified pathologist, who shall file a copy of the tissue report with the state division of health, and who shall provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced and the pathologist's report shall be made a part of the patient's permanent record."

³ Mo. Rev. Stat. § 188.030.3 provides:

"An abortion of a viable unborn child shall be performed or induced only when there is in attendance a physician other than the physician performing or adducing the abortion who shall take control of and provide immediate medical care for a child born as a result of the abortion. During the performance of the abortion, the physician performing it, and subsequent to the abortion, the physician required by this section to be in attendance, shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman."

⁴ Mo. Rev. Stat. § 188.028 provides:

"1. No person shall knowingly perform an abortion upon a pregnant woman under the age of eighteen years unless:

"(1) The attending physician has secured the informed written consent of the minor and one parent or guardian; or

"(2) The minor is emancipated and the attending physician has received the informed written consent of the minor; or

After hearing testimony from a number of expert witnesses, the District Court invalidated all of these sections except the pathology requirement. 483 F. Supp. 679, 699-701 (1980).⁵ The Court of Appeals for the Eighth Circuit re-

"(3) The minor has been granted the right to self-consent to the abortion by court order pursuant to subsection 2 of this section, and the attending physician has received the informed written consent of the minor; or

"(4) The minor has been granted consent to the abortion by court order, and the court has given its informed written consent in accordance with subsection 2 of this section, and the minor is having the abortion willingly, in compliance with subsection 3 of this section.

"2. The right of a minor to self-consent to an abortion under subdivision (3) of subsection 1 of this section or court consent under subdivision (4) of subsection 1 of this section may be granted by a court pursuant to the following procedures:

"(1) The minor or next friend shall make an application to the juvenile court which shall assist the minor or next friend in preparing the petition and notices required pursuant to this section. The minor or the next friend of the minor shall thereafter file a petition setting forth the initials of the minor; the age of the minor; the names and addresses of each parent, guardian, or, if the minor's parents are deceased and no guardian has been appointed, any other person standing in loco parentis of the minor; that the minor has been fully informed of the risks and consequences of the abortion; that the minor is of sound mind and has sufficient intellectual capacity to consent to the abortion; that, if the court does not grant the minor majority rights for the purpose of consent to the abortion, the court should find that the abortion is in the best interest of the minor and give judicial consent to the abortion; that the court should appoint a guardian ad litem of the child; and if the minor does not have private counsel, that the court should appoint counsel. The petition shall be signed by the minor or the next friend;

"(3) A hearing on the merits of the petition, to be held on the record, shall be held as soon as possible within five days of the filing of the petition. . . . At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect and understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other evidence that the court may find useful in determining whether the minor should be granted majority rights for the purpose of consenting to the abortion or whether the abortion is in the best interests of the minor;

[Footnote 5 is on p. 4]

versed the District Court's judgment with respect to § 188.028, thereby upholding the requirement that a minor secure parental or judicial consent to an abortion. It also held that the District Court erred in sustaining § 188.047, the pathology requirement. The District Court's judgment with respect to the second-physician requirement was affirmed, and the case was remanded for further proceedings and findings relating to the second-trimester hospitalization requirement. 655 F. 2d 848, 872-873 (1981). On remand, the District Court affirmed its holding that the second-trimester hospitalization requirement was unconstitutional. The Court of Appeals affirmed this judgment. 664 F. 2d 687, 691 (1981). We granted certiorari. 456 U. S. 988 (1982).

The Court today in *City of Akron, ante*, at 8-12, has stated fully the principles that govern judicial review of state statutes regulating abortions, and these need not be repeated here. With these principles in mind, we turn to the statutes at issue.

"(4) In the decree, the court shall for good cause:

"(a) Grant the petition for majority rights for the purpose of consenting to the abortion; or

"(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

"(c) Deny the petition, setting forth the grounds on which the petition is denied;

"3. If a minor desires an abortion, then she shall be orally informed of and, if possible, sign the written consent required by section 188.039 in the same manner as an adult person. No abortion shall be performed on any minor against her will, except that an abortion may be performed against the will of a minor pursuant to a court order described in subdivision (4) of subsection 1 of this section that the abortion is necessary to preserve the life of the minor."

⁵The District Court also awarded attorney's fees for all hours claimed by the plaintiffs' attorneys. The Court of Appeals affirmed this allocation of fees. See 655 F. 2d 848, 872 (CA8 1981). The petition for certiorari raises the issue whether an award of attorney's fees, made pursuant to 42 U. S. C. § 1988, should be proportioned to reflect the extent to which plaintiffs prevailed.

II

In *City of Akron*, we invalidated a city ordinance requiring physicians to perform all second-trimester abortions at general or special hospitals accredited by the Joint Commission on Accreditation of Hospitals (JCAH) or by the American Osteopathic Association. *Ante*, at 13. Missouri's hospitalization requirements are similar to those enacted by Akron, as all second-trimester abortions must be performed in general, acute-care facilities.⁶ For the reasons stated in *City of Akron*, we held that such a requirement "unreasonably infringes upon a woman's constitutional right to obtain an abortion." *Ante*, at 20-21. For the same reasons, we affirm the Court of Appeals' judgment that §188.025 is unconstitutional.

⁶ Missouri does not define the term "hospital" in its statutory provisions regulating abortions. We therefore must assume, as did the courts below, see 483 F. Supp., at 686, n. 10; 664 F. 2d, at 689-690, and nn. 3, 5 and 6, that the term has its common meaning of a general, acute-care facility. Cf. Mo. Rev. Stat. § 188.015(2) (Supp. 1982) (defining "abortion facility" as "a clinic, physician's office, or any other place or facility in which abortions are performed other than a hospital"). Section 197.020.2 (1978), part of Missouri's hospital licensing laws, reads:

"**'Hospital'** means a place devoted primarily to the maintenance and operation of facilities for the diagnosis, treatment or care for not less than twenty-four hours in any week of three or more nonrelated individuals suffering from illness, disease, injury, deformity or other abnormal physical conditions; or a place devoted primarily to provide for not less than twenty-four hours in any week medical . . . care for three or more nonrelated individuals. . . ."

Cf. Mo. Rev. Stat. § 197.200(1) (1978) (defining "ambulatory surgical center" to include facilities "with an organized medical staff of physicians" and "with continuous physician services and registered professional nursing services whenever a patient is in the facility"); 13 Mo. Admin. Code 50-30.010(1)(A) (1977) (same). The regulations for the Department of Social Services establish standards for the construction, physical facilities, and administration of hospitals. *Id.*, 50-20.010 to 50-20.030 (1977). These are not unlike those set by JCAH. See *City of Akron*, *ante*, at 13, and n. 16.

III

We turn now to the State's second-physician requirement. In *Roe v. Wade*, 410 U. S. 113 (1973), the Court recognized that the State has a compelling interest in the life of a viable fetus: "[T]he State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.*, at 164-165. See *Colautti v. Franklin*, 439 U. S. 379, 386-387 (1979); *Beal v. Doe*, 432 U. S. 438, 445-446 (1977). Several of the Missouri statutes undertake such regulation. Post-viability abortions are proscribed except when necessary to preserve the life or the health of the woman. Mo. Rev. Stat. §188.030.1 (Supp. 1982). The State also forbids the use of abortion procedures fatal to the viable fetus unless alternative procedures pose a greater risk to the health of the woman. §188.030.2.

The statutory provision at issue in this case requires the attendance of a second physician at the abortion of a viable fetus. §188.030.3. This section requires that the second physician "take all reasonable steps in keeping with good medical practice . . . to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman." See n. 3, *supra*. It also provides that the second physician "shall take control of and provide immediate medical care for a child born as a result of the abortion."

The lower courts invalidated §188.030.3.⁷ The plaintiffs, respondents here on this issue, urge affirmance on the

⁷The courts below found, and JUSTICE BLACKMUN's dissenting opinion agrees, *post*, at 6-7, that there is no possible justification for a second-physician requirement whenever D&E is used because no viable fetus can survive a D&E procedure. 483 F. Supp., at 694; 655 F. 2d, at 865. Accordingly, for them, §188.030.3 is overbroad. This reasoning rests on two assumptions. First, a fetus cannot survive a D&E abortion, and second,

grounds that the second-physician requirement distorts the traditional doctor-patient relationship, and is both impractical and costly. They note that Missouri does not require two physicians in attendance for any other medical or surgical procedure, including childbirth or delivery of a premature infant.

D&E is the method of choice in the third trimester. There is general agreement as to the first proposition, but not as to the second. Indeed, almost all of the authorities disagree with JUSTICE BLACKMUN's critical assumption, and as the Court of Appeals noted, the choice of this procedure after viability is subject to the requirements of § 188.030.2. See *id.*, at 865, and n. 28. Nevertheless, the courts below, in conclusory language, found that D&E is the "method of choice even after viability is possible." 655 F. 2d, at 865. No scholarly writing supporting this view is cited by those courts or by the dissent. Reliance apparently is placed solely on the testimony of Dr. Robert Crist, a physician from Kansas, to whom the District Court referred in a footnote. 483 F. Supp., at 694, n. 25. This testimony provides slim support for this holding. Dr. Crist's testimony, if nothing else, is remarkable in its candor. He is a member of the National Abortion Federation, "an organization of abortion providers and people interested in the pro-choice movement." 2 Record 415-416. He supported the use of D&E on 28-week pregnancies, well into the third trimester. In some circumstances, he considered it a better procedure than other methods. See 2 Record 427-428. His disinterest in protecting fetal life is evidenced by his agreement "that the abortion patient has a right not only to be rid of the growth, called a fetus in her body, but also has a right to a dead fetus." *Id.*, at 431. He also agreed that he "[n]ever ha[s] any intention of trying to protect the fetus, if it can be saved," *id.*, and finally that "as a general principle" "[t]here should not be a live fetus," *id.*, at 435. Moreover, contrary to every other view, he thought a fetus could survive a D&E abortion. *Id.*, at 433-434. None of the other physicians who testified at the trial, those called both by the plaintiffs and defendants, considered that *any* use of D&E after viability was indicated. See 1 Record 21 (limiting use of D&E to under 18 weeks); 2 Record 381, 410-413 (Dr. Robert Kretzschmar) (D&E up to 17 weeks; would never perform D&E after 26 weeks); 4 Record 787 (almost "inconceivable" to use D&E after viability); 7 Record 52 (D&E safest up to 18 weeks); *id.*, at 110 (doctor not performing D&E past 20 weeks); *id.*, at 111 (risks of doing outpatient D&E equivalent to childbirth at 24 weeks). See also 8 Record 33, 78-81 (deposition of Dr. Willard Cates) (16 weeks latest D&E performed). Apparently

The first physician's primary concern will be the life and health of the woman. Many third-trimester abortions in Missouri will be emergency operations,⁸ as the State permits these late abortions only when they are necessary to preserve the life or the health of the woman. It is not unreason-

Dr. Crist performed abortions only in Kansas, 2 Record 334, 368, 428, a state having no statutes comparable to § 188.030.1 and § 188.030.2. It is not clear whether he was operating under or familiar with the limitations imposed by Missouri law. Nor did he explain the circumstances when there were "contraindications" against the use of any of the procedures that could preserve viability, or whether his conclusory opinion was limited to emergency situations. Indeed, there is no record evidence that D&E ever will be the method that poses the least risk to the woman in those rare situations where there are compelling medical reasons for performing an abortion after viability. If there were such instances, they hardly would justify invalidating § 188.030.3.

In addition to citing Dr. Crist in its footnote, the District Court cited—with no elaboration—Dr. Schmidt. His testimony, reflecting no agreement with Dr. Crist, is enlightening. Although he conceded that the attendance of a second physician for a D&E abortion on a viable fetus was not necessary, he considered the point mostly theoretical, because he "simply [did] not believe that the question of viability comes up when D&E is an elected method of abortion." 4 Record 836. When reminded of Dr. Crist's earlier testimony, he conceded the remote possibility of third-trimester D&E abortions, but stated: "I personally cannot conceive that as a significant practical point. It may be important legally, but [not] from a medical standpoint. . . ." *Ibid.* Given that Dr. Crist's discordant testimony is wholly unsupported, the State's compelling interest in protecting a viable fetus justifies the second-physician requirement even though there may be the rare case when a physician may think honestly that D&E is required for the mother's health. Legislation need not accommodate every conceivable contingency.

⁸There is no clearly expressed exception on the face of the statute for the performance of an abortion of a viable fetus without the second physician in attendance. There may be emergency situations where, for example, the woman's health may be endangered by delay. Section § 188.030.3 is qualified, at least in part, by the phrase "provided that it does not pose an increased risk to the life or health of the woman." This clause reasonably could be construed to apply to such a situation. *Cf. H.L. v. Matheson*, 450 U. S. 398, 407, n. 14 (1981) (rejecting argument that Utah statute might apply to individuals with emergency health care needs).

able for the State to assume that during the operation the first physician's attention and skills will be directed to preserving the woman's health, and not to protecting the actual life of those fetuses who survive the abortion procedure. Viable fetuses will be in immediate and grave danger because of their premature birth. A second physician, in situations where Missouri permits third-trimester abortions, may be of assistance to the woman's physician in preserving the health and life of the child.

By giving immediate medical attention to a fetus that is delivered alive, the second physician will assure that the State's interests are protected more fully than the first physician alone would be able to do. And given the compelling interest that the State has in preserving life, we cannot say that the Missouri requirement of a second physician in those unusual circumstances where Missouri permits a third-trimester abortion is unconstitutional. Preserving the life of a viable fetus that is aborted may not often be possible,⁹ but the State legitimately may choose to provide safeguards for the comparatively few instances of live birth that occur. We believe the second-physician requirement reasonably furthers the State's compelling interest in protecting the lives of viable fetuses, and we reverse the judgment of the Court of Appeals holding that § 188.030.3 is unconstitutional.

IV

In regulating hospital services within the State, Missouri

⁹See ACOG Technical Bulletin No. 56, *supra* n. 7, at 4 (as high as 7% live-birth rate for intrauterine instillation of uterotonic agents); Stroh & Hinman, Reported Live Births Following Induced Abortion: Two and One-Half Years' Experience in Upstate New York, 126 Am. J. Obstet. Gynecol. 83, 83-84 (1976) (26 live births following saline induced-abortions; 9 following hysterotomy; 1 following oxytocin-induced abortion) (one survival out of 38 live births); 4 Record 728 (50-62% mortality rate for fetuses 26 and 27 weeks); *id.*, at 729 (25-92% mortality rate for fetuses 28 and 29 weeks); *id.*, at 837 (50% mortality rate at 34 weeks).

requires that “[a]ll tissue surgically removed with the exception of such tissue as tonsils, adenoids, hernial sacs and prepuces, shall be examined by a pathologist, either on the premises or by arrangement outside of the hospital.” 13 Mo. Admin. Code 50-20.030(3)(A)7 (1977). With respect to abortions, whether performed in hospitals or in some other facility, § 188.047 requires the pathologist to “file a copy of the tissue report with the State Division of Health. . . .” See n. 2, *supra*. The pathologist also is required to “provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced.” Thus, Missouri appears to require that tissue following abortions, as well as from almost all other surgery performed in hospitals, must be submitted to a pathologist, not merely examined by the performing doctor. The narrow question before us is whether the State lawfully also may require the tissue removed following abortions performed in clinics as well as in hospitals to be submitted to a pathologist.

On its face and in effect, § 188.047 is reasonably related to generally accepted medical standards and “further[s] important health-related State concerns.” *City of Akron*, *ante*, at 12. As the Court of Appeals recognized, pathology examinations are clearly “useful and even necessary in some cases,” because “abnormalities in the tissue may warn of serious, possibly fatal disorders.” 655 F. 2d, at 870.¹⁰ As a rule, it is

¹⁰ A pathological examination is designed to assist in the detection of fatal ectopic pregnancies, hydatritiforme moles or other precancerous growths, and a variety of other problems that can be discovered only through a pathological examination. The general medical utility of pathological examinations is clear. See, *e. g.*, American College of Obstetricians and Gynecologists (ACOG), *Standards for Obstetric-Gynecologic Services* 52 (5th ed. 1982); National Abortion Federation (NAF), *National Abortion Federation Standards* 6 (1981) (compliance with standards obligatory for NAF member facilities to remain in good standing); Brief of the American Public Health Association as *Amicus Curiae* in Nos. 81-185, 81-746, 81-1172, at 29, n. 6 (supporting the NAF standards for non-hospi-

accepted medical practice to submit *all* tissue to the examination of a pathologist.¹¹ This is particularly important following abortion, because questions remain as to the long-range complications and their effect on subsequent pregnancies. See App. 72-73 (testimony of Dr. Willard Cates, Jr.); Levin, et al., Association of Induced Abortion with Subsequent Pregnancy Loss, 243 J. A.M.A. 2495, 2499 (1980). Recorded pathology reports, in concert with abortion complication reports, provide a statistical basis for studying those complications. Cf. *Planned Parenthood of Central Mo. v. Danforth*, 428 U. S. 52, 81 (1976).

Plaintiffs argue that the physician performing the abortion is as qualified as a pathologist to make the examination. This argument disregards the fact that Missouri requires a pathologist—not the performing physician—to examine tissue after almost every type of surgery. Although this requirement is in a provision relating to surgical procedures in hospitals, many of the same procedures included within the Missouri statute customarily are performed also in outpatient

tal abortion facilities as constituting “minimum standards”).

¹¹ ACOG’s standards at the time of the District Court’s trial recommended that a “tissue or operative review committee” should examine “all tissue removed at obstetric-gynecologic operations.” ACOG, Standards for Obstetric-Gynecologic Services 13 (4th ed. 1974). The current ACOG standards also state as a general rule that, for all surgical services performed on an ambulatory basis, “[t]issue removed should be submitted to a pathologist for an examination.” ACOG, *supra*, at 52 (5th ed. 1982). The dissent, however, relies on the recent modification of these standards as they apply to abortions. ACOG now provides an “exception to the practice” of mandatory examination by a pathologist and makes such examination for abortion tissue permissive. *Ibid.* Not surprisingly, this change in policy was controversial within the College. See 4 Record 799-800. ACOG found that “[n]o consensus exists regarding routine microscopic examination of aspirated tissue in every case,” though it recognized—on the basis of inquiries made in 29 institutions—that in a majority of them a microscopic examination is performed in all cases. ACOG, Report of Committee on Gynecologic Practice, Item #6.2.1 (June 27-28, 1980).

clinics. No reason has been suggested why the prudence required in a hospital should not be equally appropriate in such a clinic. Indeed, there may be good reason to impose stricter standards in this respect on clinics performing abortions than on hospitals.¹² As the testimony in the District Court indicates, medical opinion differs widely on this question. See 3 Record 623; 4 Record 749-750, 798-800, 845-847; n. 2, *supra*. There is substantial support for Missouri's requirement. In this case, for example, Dr. Bernard Nathanson, a widely experienced abortion practitioner, testified that he requires a pathologist examination after each of the 60,000 abortions performed under his direction at the New York Center for Reproductive and Sexual Health. He considers it "absolutely necessary to obtain a pathologist's report on each and every specimen of tissue removed for abortion or for that matter from any other surgical procedure which involved the removal of tissue from the human body." App. 143-144. See also App. 146-147 (testimony of Dr.

¹² The professional views that the plaintiffs find to support their position do not disclose whether consideration was given to the fact that not all abortion clinics, particularly inadequately regulated clinics, conform to ethical or generally accepted medical standards. See *Bellotti v. Baird*, 443 U. S. 622, 641, n. 21 (1979) (*Bellotti II*) (minors may resort to "incompetent or unethical" abortion clinics); *Planned Parenthood of Central Mo. v. Danforth*, 428 U. S. 52, 91, n. 2 (1976) (Stewart, J., concurring). The Sun-Times of Chicago, in a series of special reports, disclosed widespread questionable practices in abortion clinics in Chicago, including the failure to obtain proper pathology reports. See "The Abortion Profiteers," Chicago Sun-Times 25-26 (Special Reprint 1978). It is clear, therefore, that a State reasonably could conclude that a pathology requirement is necessary in abortion clinics as well as in general hospitals.

In suggesting that we make from a "comfortable perspective" the judgment that a State constitutionally can require the additional cost of a pathology examination, the dissent suggests that we disregard the interests of the "woman on welfare or the unemployed teenager." *Post*, at 4. But these women may be those most likely to seek the least expensive clinic available. As the standards of medical practice in such clinics may not be the highest, a State may conclude reasonably that a pathologist's examination of tissue is particularly important for their protection.

Keitges); 5 Record 798–799 (testimony of Dr. Schmidt).¹³

In weighing the balance between protection of a woman's health and the comparatively small additional cost of a pathologist's examination, we cannot say that the Constitution requires that a State subordinate its interest in health to minimize to this extent the cost of abortions. Even in the early weeks of pregnancy, "[c]ertain regulations that have no significant impact on the woman's exercise of her right to decide to have an abortion may be permissible where justified by important state health objectives." *City of Akron, ante*, at 11. See *Danforth*, 428 U. S., at 80–81. We think the cost of a tissue examination does not significantly burden a pregnant woman's abortion decision. The estimated cost of compliance for plaintiff Reproductive Health Services was \$19.40 per abortion performed, 483 F. Supp., at 700, n. 48, and in light of the substantial benefit's that a pathologist's examination can have, this small cost clearly is justified. In *Danforth*, this Court unanimously upheld Missouri's recordkeeping requirement as "useful to the State's interest in protecting the health of its female citizens, and [as] a resource that is relevant to decisions involving medical experience and judgment," 428 U. S., at 81.¹⁴ We view the re-

¹³ The dissent appears to suggest that § 188.047 is constitutionally infirm because it does not require microscopic examination, *post*, at 4, but that misses the point of the regulation. The need is for someone other than the performing clinic to make an independent medical judgment on the tissue. See n. 12, *supra*; 4 Record 750 (Dr. Pierre Keitges, a pathologist). It is reasonable for the State to assume that an independent pathologist is more likely to perform a microscopic examination than the performing doctor. See H. Cove, *Surgical Pathology of the Endometrium* 28 (1981) ("To the pathologist, abortions of any sort are evaluated grossly and microscopically for the primary purpose of establishing a diagnosis of intrauterine pregnancy.") (emphasis added).

¹⁴ The *Danforth* Court also noted that "[t]he added requirements for confidentiality, with the sole exception for public health officers, and for retention for seven years, a period not unreasonable in length, assist and persuade us in our determination of the constitutional limits." 428 U. S., at 81. Missouri extends the identical safeguards found reassuring in

quirement for a pathology report as comparable and as a relatively insignificant burden. Accordingly, we reverse the judgment of the Court of Appeals on this issue.

V

As we noted in *City of Akron*, the relevant legal standards with respect to parental consent requirements are not in dispute. See *ante*, at 21; *Bellotti v. Baird*, 443 U. S. 622, 640-642, 643-644 (1979) (plurality opinion) (*Bellotti II*); *id.*, at 656-657 (WHITE, J., dissenting).¹⁵ A State's interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial. It is clear, however, that "the State must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests."¹⁶ *City of Akron*, *ante*, at 21-22.¹⁷ The issue

Danforth to the pathology reports at issue here. See Mo. Rev. Stat. §§ 188.055.2, 188.060 (Supp. 1982).

¹⁵ The dissenters apparently believe that the issue here is an open one, and adhere to the views they expressed in *Bellotti II*. *Post*, at 10-11. But those views have never been adopted by a majority of this Court, while a majority have expressed quite differing views. See *H.L. v. Matheson*, 450 U. S. 398 (1981); *Bellotti II*, 443 U. S. 622 (plurality opinion); *id.*, at 656-657 (WHITE, J., dissenting).

¹⁶ The plurality in *Bellotti II* also required that the alternative to parental consent must "assure" that the resolution of this issue "will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." *Id.*, at 644. Confidentiality here is assured by the statutory requirement that allows the minor to use her initials on the petition. Mo. Rev. Stat. § 188.028.2(1) (Supp. 1982). As to expedition of appeals, § 188.028.2(6) provides in relevant part:

"The notice of intent to appeal shall be given within twenty-four hours from the date of issuance of the order. The record on appeal shall be completed and the appeal shall be perfected within five days from the filing of notice to appeal. Because time may be of the essence regarding the performance of the abortion, the supreme court of this state shall, by court rule, provide

here is one purely of statutory construction: whether Missouri provides a judicial alternative that is consistent with these established legal standards.¹⁸

The Missouri statute, § 188.028.2,¹⁹ in relevant part, provides:

for expedited appellate review of cases appealed under this section.”

We believe this section provides the framework for a constitutionally sufficient means of expediting judicial proceedings. Immediately after the effective date of this statutory enactment, the District Court enjoined enforcement. No unemancipated pregnant minor has been required to comply with this section. Thus, to this point in time, there has been no need for the state supreme court to promulgate rules concerning appellate review. There is no reason to believe that Missouri will not expedite any appeal consistent with the mandate in our prior opinions.

¹⁷ Cf. *H.L. v. Matheson*, 450 U. S., at 406–407, and n. 14, 411 (upholding a parental notification requirement but not extending the holding to mature or emancipated minors or to immature minors showing such notification detrimental to their best interests). The lower courts found that § 188.028’s notice requirement was unconstitutional. 655 F. 2d, at 873; 483 F. Supp., at 701. The State has not sought review of that judgment here. Thus, in the posture in which it appears before this Court for review, § 188.028 contains no requirement for parental notification.

¹⁸ The Missouri statute also exempts “emancipated” women under the age of 18 both from the requirement of parental consent and from the alternative requirement of a judicial proceeding. Plaintiffs argue that the word “emancipated” in this context is void for vagueness, but we disagree. Cf. *H.L. v. Matheson*, *supra*, at 407 (using word to describe a minor). Although the question whether a minor is emancipated turns upon the facts and circumstances of each individual case, the Missouri courts have adopted general rules to guide that determination, and the term is one of general usage and understanding in the Missouri common law. See *Black v. Cole*, 626 S. W. 2d 397, 398 (Mo. App. 1981) (quoting 67 C. J. S. Parent and Child § 86, at 811 (1950)); *In re the Marriage of Heddy*, 535 S. W. 2d 276, 279 (Mo. App. 1976) (same); *Wurth v. Wurth*, 313 S. W. 2d 161, 164 (Mo. App. 1958) (same), *rev’d on other grounds*, 322 S. W. 2d 745 (Mo. 1959).

¹⁹ See n. 4, *supra*. This Court in *Danforth* held unconstitutional Missouri’s parental consent requirement for all unmarried minors under the age of 18. 428 U. S., at 75. In response to our decision, Missouri enacted the

“(4) In the decree, the court shall for good cause:

“(a) Grant the petition for majority rights for the purpose of consenting to the abortion; or

“(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

“(c) Deny the petition, setting forth the grounds on which the petition is denied[.]”

On its face, § 188.028.2(4) authorizes juvenile courts²⁰ to choose among any of the alternatives outlined in the section. The Court of Appeals concluded that a denial of the petition permitted in subsection (c) “would initially require the court to find that the minor was not emancipated and was not mature enough to make her own decision and that an abortion was not in her best interests.” 655 F. 2d, at 858. Plaintiffs contend that this interpretation is unreasonable. We do not agree.

Where fairly possible, courts should construe a statute to avoid a danger of unconstitutionality. The Court of Appeals was aware, if the statute provides discretion to deny permission to a minor for *any* “good cause,” that arguably it would violate the principles that this Court has set forth. *Ibid.* It recognized, however, that before exercising any option, the juvenile court must receive evidence on “the emotional development, maturity, intellect and understanding of the minor.” Mo. Rev. Stat. § 188.028.2(3) (Supp. 1982). The court then reached the logical conclusion that “findings and the ultimate

section challenged here. This new statute became effective shortly before our decision in *Bellotti II*.

²⁰ We have indicated in prior opinions that a minor should have access to an “independent decisionmaker.” *H.L. v. Matheson, supra*, at 420 (POWELL, J., concurring). Missouri has provided for a judicial decisionmaker. We therefore need not consider whether a qualified and independent non-judicial decisionmaker would be appropriate. *Cf. Bellotti II*, 443 U.S., at 643, n. 22.

denial of the petition must be supported by a showing of 'good cause.'" 655 F. 2d, at 858. The Court of Appeals reasonably found that a court could not deny a petition "for good cause" unless it first found—after having received the required evidence—that the minor was not mature enough to make her own decision. See *Bellotti II*, 443 U. S., at 643-644, 647-648 (plurality opinion). We conclude that the Court of Appeals correctly interpreted the statute and that § 188.028, as interpreted, avoids any constitutional infirmities.²¹

VI

The judgment of the Court of Appeals, insofar as it invalidated Missouri's second-trimester hospitalization requirement and upheld the State's parental and judicial consent provision, is affirmed. The judgment invalidating the requirement of a pathology report for all abortions and the requirement that a second physician attend the abortion of any viable fetus is reversed. We vacate the judgment upholding an award of attorney's fees for all hours expended by plaintiffs' attorneys and remand for proceedings consistent with *Hensley v. Eckerhart*, — U. S. — (1983).

It is so ordered.

²¹ Plaintiffs also argue that, in light of the ambiguity of § 188.028.2(4), as evidenced by the differing interpretations placed upon it, the appropriate course of judicial restraint is abstention. This Court has found such an approach appropriate. See *Bellotti v. Baird*, 428 U. S. 132, 146-147 (1976) (*Bellotti I*). Plaintiffs did not, however, argue in the Court of Appeals that the court should abstain, and Missouri has no certification procedure whereby this Court can refer questions of state statutory construction to the state supreme court. See 655 F. 2d, at 861, n. 20; 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4248, at 525, n. 29 (1978 and Supp. 1982). Such a procedure "greatly simplif[ie]d" our analysis in *Bellotti I*, *supra*, at 151. Moreover, where, as here, a statute is susceptible to a fair construction that obviates the need to have the state courts render the saving construction, there is no reason for federal courts to abstain.

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

From: **Justice Blackmun**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 81-1255 AND 81-1623

PLANNED PARENTHOOD ASSOCIATION OF
KANSAS CITY, MISSOURI, INC.,
ET AL., PETITIONERS

81-1255

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF
MISSOURI, ET AL.

JOHN ASHCROFT, ATTORNEY GENERAL OF
MISSOURI, ET AL., PETITIONERS

81-1623

v.

PLANNED PARENTHOOD ASSOCIATION OF
KANSAS CITY, MISSOURI, INC., ET AL.

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

[May —, 1983]

JUSTICE BLACKMUN, concurring in part and dissenting in
part.

The Court's decision today in *Akron v. Akron Center for Reproductive Health, Inc.*, ante, invalidates the city of Akron's hospitalization requirement and a host of other provisions that infringe on a woman's decision to terminate her pregnancy through abortion. I agree with the Court that Missouri's hospitalization requirement is invalid under the *Akron* analysis, and I join Parts I and II of the Court's opinion in the present cases. I do not agree, however, that the remaining Missouri statutes challenged in these cases satisfy

the constitutional standards set forth in *Akron* and the Court's prior decisions.

I

Missouri law provides that whenever an abortion is performed, a tissue sample must be submitted to a "board eligible or certified pathologist" for a report. Mo. Rev. Stat. § 188.047 (1983). This requirement applies to first trimester abortions as well as to those performed later in pregnancy. Our past decisions establish that the performance of abortions during the first trimester must be left "free of interference by the State." *Akron, ante*, at 12, quoting *Roe v. Wade*, 410 U. S. 113, 163 (1973). As we have noted in *Akron*, this does not mean that every regulation touching upon first-trimester abortions is constitutionally impermissible. But to pass constitutional muster, regulations affecting first-trimester abortions must "have no significant impact on the woman's exercise of her right" and must be "justified by important state health objectives." *Akron, ante*, at 11; see *ante*, at 8.

Missouri's requirement of a pathologist's report is not justified by important health objectives. Although pathology examinations may be "useful and even necessary in some cases," *ante*, at 10, Missouri requires more than a pathology examination and a pathology report; it demands that the examination be performed and the report prepared by a "board eligible or certified pathologist" rather than by the attending physician. Contrary to the Court's assertion, *ante*, at 9, this requirement of a report by a pathologist is not in accord with "generally accepted medical standards." The routine and accepted medical practice is for the attending physician to perform a gross (visual) examination of any tissue removed during an abortion. Only if the physician detects abnormalities is there a need to send a tissue sample to a pathologist. The American College of Obstetricians and Gynecologists (ACOG) does not recommend an examination by a pathologist in every case:

"In the situation of elective termination of pregnancy, the attending physician should record a description of the gross products. Unless definite embryonic or fetal parts can be identified, the products of elective interruptions of pregnancy must be submitted to a pathologist for gross and microscopic examination.

" . . . Aspirated tissue should be examined to ensure the presence of villi or fetal parts prior to the patient's release from the facility. If villi or fetal parts are not identified with certainty, the tissue specimen must be sent for further pathologic examination. . . ." ACOG, Standards for Obstetric-Gynecologic Services 52, 54 (1982).¹

Nor does the National Abortion Federation believe that such an examination is necessary:

"All tissue must be examined grossly at the time of the abortion procedure by a physician or trained assistant and the results recorded in the chart. In the absence of visible fetal parts or placenta upon gross examination, obtained tissue may be examined under a low power microscope for the detection of villi. If this examination is inconclusive, the tissue should be sent to the nearest suitable pathology laboratory for microscopic examination." National Abortion Federation Standards 6 (1981) (emphasis deleted).

The Court fails to distinguish between the medical practice

¹ See also ACOG, Standards for Obstetric-Gynecologic Services 66 (1982):

"Tissue removed should be submitted to a pathologist for examination. . . . An exception to the practice may be in elective terminations of pregnancy in which definitive embryonic or fetal parts can be identified. In such instances, the physician should record a description of the gross products. Unless definite embryonic or fetal parts can be identified, the products of elective interruptions of pregnancy must be submitted to a pathologist for gross and microscopic examination."

of performing a "tissue examination," *ante*, at 11, and Missouri's requirement that this examination be performed by a pathologist. As the Court of Appeals pointed out, there was expert testimony at trial that a nonpathologist physician is as capable of performing an adequate gross examination as is a pathologist, and that the "abnormalities which are of concern" are readily detectable by a physician. 655 F. 2d 848, 871, n. 37 (CA8 1981); see App. 135.² While a pathologist may be better able to perform a microscopic examination, Missouri law does not require a microscopic examination unless "fetal parts or placenta are not identified." 13 Mo. Admin. Code § 50-151.030(1) (1981). Thus, the effect of the Missouri statute is to require a pathologist to perform the initial gross examination, which is normally the responsibility of the attending physician and which will often make the pathologist's services unnecessary.

On the record before us, I must conclude that the State has not "met its burden of demonstrating that [the pathologist requirement] further[s] important health-related State concerns." *Akron*, *ante*, at 12. There has been no showing that tissue examinations by a pathologist do more to protect health than examinations by a nonpathologist physician. Moreover, I cannot agree with the Court that Missouri's pathologist requirement has "no significant impact" *ante*, at 8, on a woman's exercise of her right to an abortion. It is undisputed that this requirement may increase the cost of a first-trimester abortion by as much as \$40. See *ante*, at 10, n. 12; 483 F. Supp., at 700, n. 48. Although this increase may seem insignificant from the Court's comfortable perspective, I cannot say that it is equally insignificant to every woman seeking an abortion. For the woman on welfare or the unemployed teenager, this additional cost may well put

²The District Court made no findings on this point, noting only that some witnesses for the State had testified that "pathology should be done" for every abortion. 483 F. Supp. 679, 700, n. 49 (WD Mo. 1980).

the price of an abortion beyond reach.³ Cf. *Harper v. Virginia Board of Elections*, 383 U. S. 663, 668 (1966) (\$1.50 poll tax “excludes those unable to pay”); *Burns v. Ohio*, 360 U. S. 252, 255, 257 (1959) (\$20 docket fee “foreclose[s] access” to appellate review for indigents).

In *Planned Parenthood of Central Mo. v. Danforth*, 428 U. S. 52, 81 (1976), the Court warned that the minor record-keeping requirements upheld in that case “perhaps approach[ed] impermissible limits.” Today in *Akron*, we have struck down restrictions on first-trimester abortions that “may in some cases add to the cost of providing abortions.” *Ante*, at 30; see *ante*, at 31–32. Missouri’s requirement of a pathologist’s report unquestionably adds significantly to the cost of providing abortions, and Missouri has not shown that it serves any substantial health-related purpose. Under these circumstances, I would hold that constitutional limits have been exceeded.

II

In Missouri, an abortion may be performed after viability only if necessary to preserve the life or health of the woman. Mo. Rev. Stat. §188.030.1 (1983). When a post-viability abortion is performed, Missouri law provides that “there [must be] in attendance a [second] physician . . . who shall take control of and provide immediate medical care for a child born as a result of the abortion.” Mo. Rev. Stat. §188.030.3 (1983). The Court recognized in *Roe v. Wade*, 410 U. S., at

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164-165, that a State's interests in preserving maternal health and protecting the potentiality of human life may justify regulation and even prohibition of post-viability abortions, except those necessary to preserve the life and health of the mother. But regulations governing post-viability abortions, like those at any other stage of pregnancy, must be "tailored to the recognized state interests." *Id.*, at 165; see *H.L. v. Matheson*, 450 U. S. 398, 413 (1981) ("statute plainly serves important state interests, [and] is narrowly drawn to protect only those interests"); *Roe*, 410 U. S., at 155 ("legislative enactments must be narrowly drawn to express only the legitimate state interests at stake").

A

The Court upholds the second physician requirement on the basis that it "furthers the State's compelling interest in protecting the lives of viable fetuses." *Ante*, at 8. While I agree that a second physician indeed may aid in preserving the life of a fetus born alive, this type of aid is possible only when the abortion method used is one that may result in a live birth. Although Missouri ordinarily requires a physician performing a post-viability abortion to use the abortion method most likely to preserve fetal life, this restriction does not apply when this method "would present a greater risk to the life and health of the woman." Mo. Rev. Stat. § 188.030.2 (1983).

The District Court found that the dilatation and evacuation (D&E) method of abortion entails no chance of fetal survival, and that it will nevertheless be the method of choice for some women who need post-viability abortions. In some cases, in other words, maternal health considerations will preclude the use of procedures that might result in a live birth. 483 F. Supp., at 694.⁴ When a D&E abortion is performed, the

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second physician can do nothing to further the State's compelling interest in protecting potential life. His presence is superfluous. The second-physician requirement thus is overbroad and "imposes a burden on women in cases where the burden is not justified by any possibility of survival of the fetus." 655 F. 2d, at 865-866.

The Court reasons that the State's interest in preserving potential life "justifies the State in requiring a second physician at *every* third-trimester abortion" because "[w]e . . . cannot assume that *all* third-trimester abortions will be D&E abortions, or that there will be no live births." *Ante*, at 7, n. 7 (emphasis added). But the fact that other methods of post-viability abortions may result in live births cannot justify requiring a second physician to attend an abortion at which the chance of a live birth is nonexistent. The choice of method presumably will be made in advance,⁵ and any need for a second physician disappears when the woman's health requires that the choice be D&E. Because the statute is not tailored to protect the State's legitimate interests, I would hold it invalid.⁶

which the Court of Appeals has concurred. *Branti v. Finkel*, 445 U. S. 507, 512, n. 6 (1980).

⁵ In addition to requiring the physician to select the method most likely to preserve fetal life, so long as it presents no greater risk to the pregnant woman, Missouri requires that the physician "certify in writing the available method or techniques considered and the reasons for choosing the method or technique employed." Mo. Rev. Stat. § 188.030.2 (1983). This ensures that the choice of method will be a reasoned one.

⁶ The State argues that its second-physician requirement is justified even when D&E is used, because "[i]f the statute specifically excepted D&E procedures, abortionists would be encouraged to use it more frequently to avoid the expense of a second physician, to ensure a dead fetus, to prevent the presence of a second professional to observe malpractice or the choice of a questionable procedure from a safety viewpoint, a fetus-destroying procedure, or to avoid their own awakening to concern for the newborn." Brief for Cross-Petitioners in No. 81-1623, p. 44. The Court rejected this purported justification for a second physician in *Doe v. Bol-*

B

In addition, I would hold that the statute's failure to provide a clear exception for emergency situations renders it unconstitutional. As the Court recognizes, *ante*, at 7, n. 8, an emergency may arise in which delay could be dangerous to the life or health of the woman. A second physician may not always be available in such a situation; yet the statute appears to require one. It states, in unqualified terms, that a post-viability abortion "*shall* be performed . . . *only* when there is in attendance" a second physician who "*shall* take control of" any child born as a result of the abortion, and it imposes certain duties on "the physician *required* by this section to be in attendance." Mo. Rev. Stat. §188.030.3 (emphasis added). By requiring the attendance of a second physician even when the resulting delay may be harmful to the health of the pregnant woman, the statute impermissibly fails to make clear "that the woman's life and health must always prevail over the fetus' life and health when they conflict." *Colautti v. Franklin*, 439 U. S. 379, 400 (1979).

The Court attempts to cure this defect by asserting that the final clause of the statute, requiring the two physicians to "take all reasonable steps . . . to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman," could be construed to permit emergency post-viability abortions without a second physician. *Ante*, at 7, n. 8. This construction is contrary to the plain language of the statute; the clause upon which the Court relies refers to the duties of both physicians during the performance of the abortion, but it in no way suggests that the second physician may be dispensed with.

ton, 410 U. S. 179, 199 (1973): "If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment. If he fails in this, professional censure and deprivation of his license are available remedies. Required acquiescence by co-practitioners has no rational connection with a patient's needs and unduly infringes on the physician's right to practice."

Moreover, since the Court's proposed construction is not binding on the courts of Missouri,⁷ a physician performing an emergency post-viability abortion cannot rely on it with any degree of confidence. The statute thus remains impermissibly vague; it fails to inform the physician whether he may proceed with a post-viability abortion in an emergency, or whether he must wait for a second physician even if the woman's life or health will be further imperiled by the delay. This vagueness may well have a severe chilling effect on the physician who perceives the patient's need for a post-viability abortion. In *Colautti v. Franklin*, we considered a statute that failed to specify whether it "require[d] the physician to make a 'trade-off' between the woman's health and additional percentage points of fetal survival." 439 U. S., at 400. The Court held there that "where conflicting duties of this magnitude are involved, the State, at the least, must proceed with greater precision before it may subject a physician to possible criminal sanctions." *Id.*, at 400-401.⁸ I would apply that reasoning here, and hold Missouri's second-physician requirement invalid on this ground as well.⁹

⁷"Only the [Missouri] courts can supply the requisite construction, since of course 'we lack jurisdiction authoritatively to construe state legislation.'" *Gooding v. Wilson*, 405 U. S. 518, 520 (1972), quoting *United States v. Thirty-seven Photographs*, 402 U. S. 363, 369 (1971).

⁸A physician who fails to comply with Missouri's second-physician requirement faces criminal penalties and the loss of his license. Mo. Rev. Stat. §§ 188.065, 188.075 (1983).

⁹Because I would hold the statute unconstitutional on these grounds, I do not reach the question whether Missouri's second-physician requirement impermissibly interferes with the doctor-patient relationship. I note, however, that Missouri does not require attendance of a second physician at any other medical procedure, including a premature birth. There was testimony at trial that a newborn infant, whether the product of a normal birth or an abortion, ordinarily remains the responsibility of the woman's physician until he turns its care over to another. App. 133; see ACOG, Standards for Obstetric-Gynecologic Services 31 (1982) ("The individual who delivers the baby is responsible for the immediate post-delivery care of the newborn until another person assumes this duty").

This allocation of responsibility makes sense. Consultation and team-

III

Missouri law prohibits the performance of an abortion on an unemancipated minor absent parental consent or a court order. Mo. Rev. Stat. § 188.028 (1983). A minor who has not obtained parental consent may petition the juvenile court for court consent or the right to self-consent. The statute then provides that

“the court shall for good cause:

“(a) Grant the petition for majority rights for the purpose of consenting to the abortion; or

“(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion . . . ; or

“(c) Deny the petition, setting forth the grounds on which the petition is denied. . . .” § 188.028.2(4).

The Court recognizes that this statute “[o]n its face . . . authorizes juvenile courts to choose among any of the alternatives outlined in the section.” *Ante*, at 13 (footnote omitted). The District Court took a similar view, noting that “each of the three [alternatives] is clearly independent of the others, connected in the statute with the disjunctive ‘or.’” The District Court also concluded that “[a]lternative (c) permits the court to ‘deny the petition,’ guided only by the general standard that such action be ‘for good cause.’” 483 F. Supp., at 689. The District Court thus found it “clear . . . that alternative (c) authorizes the juvenile court to deny the minor’s petition for good cause, but does not require a prior finding that the minor is not sufficiently mature and not competent to make a decision regarding abortion independently.” *Ibid*.

If the statute is construed in accordance with its plain lan-

work are fundamental in medical practice, but in an operating room a patient’s life or health may depend on split-second decisions by the physician. If responsibility and control must be shared between two physicians with the lines of authority unclear, precious moments may be lost to the detriment of both woman and child.

guage, it would be unconstitutional under the standards set forth by the plurality in *Bellotti v. Baird*, 443 U. S. 622, 643-644, 647-648 (1979) (*Bellotti II*), and applied by the Court today. To avoid the necessity of invalidating the statute, the Court applies the maxim that, "[w]here fairly possible, courts should construe a statute to avoid a danger of unconstitutionality." *Ante*, at 14. The Court thus approves the construction adopted by the Court of Appeals, concluding that a Missouri juvenile court may not "deny a [minor's] petition 'for good cause' unless it first [finds] . . . that the minor was not mature enough to make her own decision." *Ante*, at 14.

The Court's maxim of statutory construction may be a wise one for federal courts to follow in discerning the meaning of federal statutes, but it is not one we can impose on state courts interpreting their own law. The interpretation of Missouri law is a matter for the courts of Missouri, and "[t]he majority's construction of state law is, of course, not binding on the Missouri courts." *Planned Parenthood of Central Mo. v. Danforth*, 428 U. S., at 101, n. 4 (opinion of WHITE, J.). A Missouri juvenile court considering a petition brought by a mature minor may therefore conclude, despite this Court's optimistic assertion to the contrary, that Missouri's judicial consent statute means exactly what it says: the court may "for good cause . . . [d]eny the petition."¹⁰

¹⁰ This statute was enacted in 1979, after the Court's decision in *Bellotti v. Baird*, 428 U. S. 132 (1976) (*Bellotti I*), but very shortly before its 1979 decision in *Bellotti II*. The Massachusetts statute held invalid in *Bellotti II*, like the Missouri statute before us today, permitted a court to grant or deny a minor's petition "for good cause shown." See *Bellotti II*, 443 U. S., at 625. The Massachusetts Supreme Judicial Court interpreted this language to authorize the withholding of consent "in circumstances where [the court] determines that the best interests of the minor will not be served by an abortion," even if the minor "is capable of making, and has made, an informed and reasonable decision to have an abortion." *Id.*, at 630, quoting *Baird v. Attorney General*, 371 Mass. 741, 748, 360 N. E. 2d

It is certainly possible that the courts of Missouri will agree with this Court and construe Missouri law as the Court does today. But this is a task that must be left to the state courts. We cannot perform it for them. In *Bellotti v. Baird*, 428 U. S. 132 (1976) (*Bellotti I*), the Court held that the District Court should have abstained where “an unconstrued state statute is susceptible of a construction by the state judiciary ‘which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.’” *Id.*, at 147, quoting *Harrison v. NAACP*, 360 U. S. 167, 177 (1959); see *Railroad Comm’n v. Pullman Co.*, 312 U. S. 496 (1941). I feel that the District Court should have abstained here as well.¹¹ Although Missouri does not have a certification procedure comparable to the one employed in *Bellotti I*, its rules of procedure provide for expedited review of questions of “general interest or importance.” Mo. S. Ct. Rules 83.02, 83.06 (1983). In *Bellotti I*, moreover, we did not “mean to intimate that abstention would be improper . . . were certification not possible.” 428 U. S., at 151.¹² In cases where

288, 293 (1977). The Court does not explain why it expects the Missouri courts to reach a different result.

¹¹ The Court’s interpretation of Missouri law is directly contrary to the interpretation given by the United States District Judge, who has been on the Missouri bench, state or federal, for over 30 years. The District Judge declined to abstain on the basis that “[i]t is clear to this Court that section 188.028 is *not* susceptible to a reasonable construction which would avoid the federal constitutional question controlling in *Bellotti II*.” 483 F. Supp., at 690 (emphasis added). This District Judge’s interpretation of the statute should indicate that it is at least sufficiently ambiguous to necessitate abstention. Cf. *Bishop v. Wood*, 426 U. S. 341, 345–347 (1976).

¹² While “speed in resolution” of this constitutional challenge remains important, *Bellotti I*, 428 U. S., at 151, it is worthy of note that enforcement of these statutes has been stayed pending the outcome of this litigation. The District Court would have been free to keep its stay in effect, in exercising its power to retain jurisdiction over the constitutional issue. See *England v. Medical Examiners*, 375 U. S. 411 (1964).

constitutional rights of this magnitude are at stake, we should refrain from speculating on the meaning of Missouri law when an authoritative interpretation may be obtained by other means.¹³

¹³ Because I believe abstention is appropriate, I do not reach the question whether Missouri's parental-judicial consent statute as construed by the Court is constitutional.

pp. 10-12, K

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

From: **Justice Blackmun**

Circulated: _____

Recirculated: _____ **MAY 19 1983**

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 81-1255 AND 81-1623

**PLANNED PARENTHOOD ASSOCIATION OF
KANSAS CITY, MISSOURI, INC.,
ET AL., PETITIONERS**

81-1255

v.

**JOHN ASHCROFT, ATTORNEY GENERAL OF
MISSOURI, ET AL.**

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MISSOURI, ET AL., PETITIONERS**

81-1623

v.

**PLANNED PARENTHOOD ASSOCIATION OF
KANSAS CITY, MISSOURI, INC., ET AL.**

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

[May —, 1983]

JUSTICE BLACKMUN, concurring in part and dissenting in part.

The Court's decision today in *Akron v. Akron Center for Reproductive Health, Inc.*, ante, invalidates the city of Akron's hospitalization requirement and a host of other provisions that infringe on a woman's decision to terminate her pregnancy through abortion. I agree with the Court that Missouri's hospitalization requirement is invalid under the *Akron* analysis, and I join Parts I and II of the Court's opinion in the present cases. I do not agree, however, that the remaining Missouri statutes challenged in these cases satisfy

the constitutional standards set forth in *Akron* and the Court's prior decisions.

I

Missouri law provides that whenever an abortion is performed, a tissue sample must be submitted to a "board eligible or certified pathologist" for a report. Mo. Rev. Stat. § 188.047 (1983). This requirement applies to first trimester abortions as well as to those performed later in pregnancy. Our past decisions establish that the performance of abortions during the first trimester must be left "free of interference by the State." *Akron, ante*, at 12, quoting *Roe v. Wade*, 410 U. S. 113, 163 (1973). As we have noted in *Akron*, this does not mean that every regulation touching upon first-trimester abortions is constitutionally impermissible. But to pass constitutional muster, regulations affecting first-trimester abortions must "have no significant impact on the woman's exercise of her right" and must be "justified by important state health objectives." *Akron, ante*, at 11; see *ante*, at 8.

Missouri's requirement of a pathologist's report is not justified by important health objectives. Although pathology examinations may be "useful and even necessary in some cases," *ante*, at 10, Missouri requires more than a pathology examination and a pathology report; it demands that the examination be performed and the report prepared by a "board eligible or certified pathologist" rather than by the attending physician. Contrary to the Court's assertion, *ante*, at 9, this requirement of a report by a pathologist is not in accord with "generally accepted medical standards." The routine and accepted medical practice is for the attending physician to perform a gross (visual) examination of any tissue removed during an abortion. Only if the physician detects abnormalities is there a need to send a tissue sample to a pathologist. The American College of Obstetricians and Gynecologists (ACOG) does not recommend an examination by a pathologist in every case:

"In the situation of elective termination of pregnancy, the attending physician should record a description of the gross products. Unless definite embryonic or fetal parts can be identified, the products of elective interruptions of pregnancy must be submitted to a pathologist for gross and microscopic examination.

". . . Aspirated tissue should be examined to ensure the presence of villi or fetal parts prior to the patient's release from the facility. If villi or fetal parts are not identified with certainty, the tissue specimen must be sent for further pathologic examination. . . ." ACOG, Standards for Obstetric-Gynecologic Services 52, 54 (1982).¹

Nor does the National Abortion Federation believe that such an examination is necessary:

"All tissue must be examined grossly at the time of the abortion procedure by a physician or trained assistant and the results recorded in the chart. In the absence of visible fetal parts or placenta upon gross examination, obtained tissue may be examined under a low power microscope for the detection of villi. If this examination is inconclusive, the tissue should be sent to the nearest suitable pathology laboratory for microscopic examination." National Abortion Federation Standards 6 (1981) (emphasis deleted).

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On the record before us, I must conclude that the State has not "met its burden of demonstrating that [the pathologist requirement] further[s] important health-related State concerns." *Akron*, *ante*, at 12. There has been no showing that tissue examinations by a pathologist do more to protect health than examinations by a nonpathologist physician. Moreover, I cannot agree with the Court that Missouri's pathologist requirement has "no significant impact" *ante*, at 8, on a woman's exercise of her right to an abortion. It is undisputed that this requirement may increase the cost of a first-trimester abortion by as much as \$40. See *ante*, at 10, n. 12; 483 F. Supp., at 700, n. 48. Although this increase may seem insignificant from the Court's comfortable perspective, I cannot say that it is equally insignificant to every woman seeking an abortion. For the woman on welfare or the unemployed teenager, this additional cost may well put

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In addition, I would hold that the statute's failure to provide a clear exception for emergency situations renders it unconstitutional. As the Court recognizes, *ante*, at 7, n. 8, an emergency may arise in which delay could be dangerous to the life or health of the woman. A second physician may not always be available in such a situation; yet the statute appears to require one. It states, in unqualified terms, that a post-viability abortion "*shall* be performed . . . *only* when there is in attendance" a second physician who "*shall* take control of" any child born as a result of the abortion, and it imposes certain duties on "the physician *required* by this section to be in attendance." Mo. Rev. Stat. § 188.030.3 (emphasis added). By requiring the attendance of a second physician even when the resulting delay may be harmful to the health of the pregnant woman, the statute impermissibly fails to make clear "that the woman's life and health must always prevail over the fetus' life and health when they conflict." *Colautti v. Franklin*, 439 U. S. 379, 400 (1979).

The Court attempts to cure this defect by asserting that the final clause of the statute, requiring the two physicians to "take all reasonable steps . . . to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman," could be construed to permit emergency post-viability abortions without a second physician. *Ante*, at 7, n. 8. This construction is contrary to the plain language of the statute; the clause upon which the Court relies refers to the duties of both physicians during the performance of the abortion, but it in no way suggests that the second physician may be dispensed with.

ton, 410 U. S. 179, 199 (1973): "If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment. If he fails in this, professional censure and deprivation of his license are available remedies. Required acquiescence by co-practitioners has no rational connection with a patient's needs and unduly infringes on the physician's right to practice."

Moreover, since the Court's proposed construction is not binding on the courts of Missouri,⁷ a physician performing an emergency post-viability abortion cannot rely on it with any degree of confidence. The statute thus remains impermissibly vague; it fails to inform the physician whether he may proceed with a post-viability abortion in an emergency, or whether he must wait for a second physician even if the woman's life or health will be further imperiled by the delay. This vagueness may well have a severe chilling effect on the physician who perceives the patient's need for a post-viability abortion. In *Colautti v. Franklin*, we considered a statute that failed to specify whether it "require[d] the physician to make a 'trade-off' between the woman's health and additional percentage points of fetal survival." 439 U. S., at 400. The Court held there that "where conflicting duties of this magnitude are involved, the State, at the least, must proceed with greater precision before it may subject a physician to possible criminal sanctions." *Id.*, at 400-401.⁸ I would apply that reasoning here, and hold Missouri's second-physician requirement invalid on this ground as well.⁹

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This allocation of responsibility makes sense. Consultation and team-

III

Missouri law prohibits the performance of an abortion on an unemancipated minor absent parental consent or a court order. Mo. Rev. Stat. § 188.028 (1983).

A

Until today, the Court has never upheld "a requirement of a consent substitute, either parental or judicial," *ante*, at 11. In *Planned Parenthood of Central Mo. v. Danforth*, 428 U. S., at 74, the Court invalidated a parental consent requirement on the ground that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient, regardless of the reason for withholding the consent." In *Bellotti v. Baird*, 443 U. S. 622 (1979) (*Bellotti II*), eight Justices agreed that a statute permitting a judicial veto of a mature minor's decision to have an abortion was unconstitutional. See *id.*, at 649-650 (opinion of POWELL, J.); *id.*, at 654-656 (opinion of STEVENS, J.). Although four Justices stated in *Bellotti II* that a appropriately structured judicial consent requirement would be constitutional, *id.*, at 647-648 (opinion of POWELL, J.), this statement was not necessary to the result of the case and did not command a majority. Four other Justices concluded that any judicial-consent statute would suffer from the same flaw the Court identified in *Danforth*: it would give a third party an absolute veto over the decision of the physician and his patient. *Id.*, at 655-656 (opinion of STEVENS, J.).

I continue to adhere to the views expressed by JUSTICE STEVENS in *Bellotti II*:

work are fundamental in medical practice, but in an operating room a patient's life or health may depend on split-second decisions by the physician. If responsibility and control must be shared between two physicians with the lines of authority unclear, precious moments may be lost to the detriment of both woman and child.

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"It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties. . . . As a practical matter, I would suppose that the need to commence judicial proceedings in order to obtain a legal abortion would impose a burden at least as great as, and probably greater than, that imposed on the minor child by the need to obtain the consent of the parent. Moreover, once this burden is met, the only standard provided for the judge's decision is the best interest of the minor. That standard provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores whose enforcement upon the minor—particularly when contrary to her own informed and reasonable decision—is fundamentally at odds with privacy interests underlying the constitutional protection afforded to her decision." 443 U. S., at 655-656 (footnote omitted).

Because Mo. Rev. Stat. § 188.028 permits a parental or judicial veto of a minor's decision to obtain an abortion, I would hold it unconstitutional.

B

Even if I believed that a State could require parental or judicial consent, I could not accept the Court's conclusion that the Missouri consent statute should be upheld. Under Missouri law, a minor who has not obtained parental consent may petition the juvenile court for court consent or the right to self-consent. Section 188.028.2(4) then provides that:

"the court shall for good cause:

"(a) Grant the petition for majority rights for the purpose of consenting to the abortion; or

"(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion . . . ; or

"(c) Deny the petition, setting forth the grounds on

which the petition is denied. . . .”

The Court recognizes that this statute “[o]n its face . . . authorizes juvenile courts to choose among any of the alternatives outlined in the section.” *Ante*, at 13 (footnote omitted). The District Court took a similar view, noting that “each of the three [alternatives] is clearly independent of the others, connected in the statute with the disjunctive ‘or.’” The District Court also concluded that “[a]lternative (c) permits the court to ‘deny the petition,’ guided only by the general standard that such action be ‘for good cause.’” 483 F. Supp., at 689. The District Court thus found it “clear . . . that alternative (c) authorizes the juvenile court to deny the minor’s petition for good cause, but does not require a prior finding that the minor is not sufficiently mature and not competent to make a decision regarding abortion independently.” *Ibid*.

If the statute is construed in accordance with its plain language, it would be unconstitutional under the standards set forth in either the opinion of JUSTICE POWELL or the opinion of JUSTICE STEVENS in *Bellotti II*, 443 U. S., at 643–644, 647–648, 652–656. To avoid the necessity of invalidating the statute, the Court applies the maxim that, “[w]here fairly possible, courts should construe a statute to avoid a danger of unconstitutionality.” *Ante*, at 14. The Court thus approves the construction adopted by the Court of Appeals, concluding that a Missouri juvenile court may not “deny a [minor’s] petition ‘for good cause’ unless it first [finds] . . . that the minor was not mature enough to make her own decision.” *Ante*, at 14.

The Court’s maxim of statutory construction may be a wise one for federal courts to follow in discerning the meaning of federal statutes, but it is not one we can impose on state courts interpreting their own law. The interpretation of Missouri law is a matter for the courts of Missouri, and “[t]he majority’s construction of state law is, of course, not bind-

ing on the Missouri courts.” *Planned Parenthood of Central Mo. v. Danforth*, 428 U. S., at 101, n. 4 (opinion of WHITE, J.). A Missouri juvenile court considering a petition brought by a mature minor may therefore conclude, despite this Court’s optimistic assertion to the contrary, that Missouri’s judicial consent statute means exactly what it says: the court may “for good cause . . . [d]eny the petition.”¹⁰

It is certainly possible that the courts of Missouri will agree with this Court and construe Missouri law as the Court does today. But this is a task that must be left to the state courts. We cannot perform it for them. In *Bellotti v. Baird*, 428 U. S. 132 (1976) (*Bellotti I*), the Court held that the District Court should have abstained where “an unconstrued state statute is susceptible of a construction by the state judiciary ‘which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.’” *Id.*, at 147, quoting *Harrison v. NAACP*, 360 U. S. 167, 177 (1959); see *Railroad Comm’n v. Pullman Co.*, 312 U. S. 496 (1941). I feel that the District Court should have abstained here as well.¹¹ Although Missouri does not have a certification pro-

¹⁰ This statute was enacted in 1979, after the Court’s decision in *Bellotti v. Baird*, 428 U. S. 132 (1976) (*Bellotti I*), but very shortly before its 1979 decision in *Bellotti II*. The Massachusetts statute held invalid in *Bellotti II*, like the Missouri statute before us today, permitted a court to grant or deny a minor’s petition “for good cause shown.” See *Bellotti II*, 443 U. S., at 625. The Massachusetts Supreme Judicial Court interpreted this language to authorize the withholding of consent “in circumstances where [the court] determines that the best interests of the minor will not be served by an abortion,” even if the minor “is capable of making, and has made, an informed and reasonable decision to have an abortion.” *Id.*, at 630, quoting *Baird v. Attorney General*, 371 Mass. 741, 748, 360 N. E. 2d 288, 293 (1977). The Court does not explain why it expects the Missouri courts to reach a different result.

¹¹ The Court’s interpretation of Missouri law is directly contrary to the interpretation given by the United States District Judge, who has been on the Missouri bench, state or federal, for over 30 years. The District Judge

cedure comparable to the one employed in *Bellotti I*, its rules of procedure provide for expedited review of questions of "general interest or importance." Mo. S. Ct. Rules 83.02, 83.06 (1983). In *Bellotti I*, moreover, we did not "mean to intimate that abstention would be improper . . . were certification not possible." 428 U. S., at 151.¹² In cases where constitutional rights of this magnitude are at stake, we should refrain from speculating on the meaning of Missouri law when an authoritative interpretation may be obtained by other means.

declined to abstain on the basis that "[i]t is clear to this Court that section 188.028 is *not* susceptible to a reasonable construction which would avoid the federal constitutional question controlling in *Bellotti II*." 483 F. Supp., at 690 (emphasis added). This District Judge's interpretation of the statute should indicate that it is at least sufficiently ambiguous to necessitate abstention. Cf. *Bishop v. Wood*, 426 U. S. 341, 345-347 (1976).

¹² While "speed in resolution" of this constitutional challenge remains important, *Bellotti I*, 428 U. S., at 151, it is worthy of note that enforcement of these statutes has been stayed pending the outcome of this litigation. The District Court would have been free to keep its stay in effect, in exercising its power to retain jurisdiction over the constitutional issue. See *England v. Medical Examiners*, 375 U. S. 411 (1964).

footnote omitted

pp. 10-11 (minor changes only. I
must reread HABS
2nd Draft - in which he
made major changes)

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

C.F. P

From: Justice Blackmun

Circulated: _____

Recirculated: MAY 23 1983

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 81-1255 AND 81-1623

PLANNED PARENTHOOD ASSOCIATION OF
KANSAS CITY, MISSOURI, INC.,
ET AL., PETITIONERS

81-1255

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF
MISSOURI, ET AL.

JOHN ASHCROFT, ATTORNEY GENERAL OF
MISSOURI, ET AL., PETITIONERS

81-1623

v.

PLANNED PARENTHOOD ASSOCIATION OF
KANSAS CITY, MISSOURI, INC., ET AL.

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

[May —, 1983]

JUSTICE BLACKMUN, concurring in part and dissenting in
part.

The Court's decision today in *Akron v. Akron Center for Reproductive Health, Inc.*, ante, invalidates the city of Akron's hospitalization requirement and a host of other provisions that infringe on a woman's decision to terminate her pregnancy through abortion. I agree with the Court that Missouri's hospitalization requirement is invalid under the *Akron* analysis, and I join Parts I and II of the Court's opinion in the present cases. I do not agree, however, that the remaining Missouri statutes challenged in these cases satisfy

the constitutional standards set forth in *Akron* and the Court's prior decisions.

I

Missouri law provides that whenever an abortion is performed, a tissue sample must be submitted to a "board eligible or certified pathologist" for a report. Mo. Rev. Stat. § 188.047 (1983). This requirement applies to first trimester abortions as well as to those performed later in pregnancy. Our past decisions establish that the performance of abortions during the first trimester must be left "free of interference by the State." *Akron, ante*, at 12, quoting *Roe v. Wade*, 410 U. S. 113, 163 (1973). As we have noted in *Akron*, this does not mean that every regulation touching upon first-trimester abortions is constitutionally impermissible. But to pass constitutional muster, regulations affecting first-trimester abortions must "have no significant impact on the woman's exercise of her right" and must be "justified by important state health objectives." *Akron, ante*, at 11; see *ante*, at 8.

} do we use
this quote?

Missouri's requirement of a pathologist's report is not justified by important health objectives. Although pathology examinations may be "useful and even necessary in some cases," *ante*, at 10, Missouri requires more than a pathology examination and a pathology report; it demands that the examination be performed and the report prepared by a "board eligible or certified pathologist" rather than by the attending physician. Contrary to the Court's assertion, *ante*, at 9, this requirement of a report by a pathologist is not in accord with "generally accepted medical standards." The routine and accepted medical practice is for the attending physician to perform a gross (visual) examination of any tissue removed during an abortion. Only if the physician detects abnormalities is there a need to send a tissue sample to a pathologist. The American College of Obstetricians and Gynecologists (ACOG) does not recommend an examination by a pathologist in every case:

"In the situation of elective termination of pregnancy, the attending physician should record a description of the gross products. Unless definite embryonic or fetal parts can be identified, the products of elective interruptions of pregnancy must be submitted to a pathologist for gross and microscopic examination.

" . . . Aspirated tissue should be examined to ensure the presence of villi or fetal parts prior to the patient's release from the facility. If villi or fetal parts are not identified with certainty, the tissue specimen must be sent for further pathologic examination. . . ." ACOG, Standards for Obstetric-Gynecologic Services 52, 54 (1982).¹

Nor does the National Abortion Federation believe that such an examination is necessary:

"All tissue must be examined grossly at the time of the abortion procedure by a physician or trained assistant and the results recorded in the chart. In the absence of visible fetal parts or placenta upon gross examination, obtained tissue may be examined under a low power microscope for the detection of villi. If this examination is inconclusive, the tissue should be sent to the nearest suitable pathology laboratory for microscopic examination." National Abortion Federation Standards 6 (1981) (emphasis deleted).

The Court fails to distinguish between the medical practice

¹ See also ACOG, Standards for Obstetric-Gynecologic Services 66 (1982):

"Tissue removed should be submitted to a pathologist for examination. . . . An exception to the practice may be in elective terminations of pregnancy in which definitive embryonic or fetal parts can be identified. In such instances, the physician should record a description of the gross products. Unless definite embryonic or fetal parts can be identified, the products of elective interruptions of pregnancy must be submitted to a pathologist for gross and microscopic examination."

of performing a "tissue examination," *ante*, at 11, and Missouri's requirement that this examination be performed by a pathologist. As the Court of Appeals pointed out, there was expert testimony at trial that a nonpathologist physician is as capable of performing an adequate gross examination as is a pathologist, and that the "abnormalities which are of concern" are readily detectable by a physician. 655 F. 2d 848, 871, n. 37 (CA8 1981); see App. 135.² While a pathologist may be better able to perform a microscopic examination, Missouri law does not require a microscopic examination unless "fetal parts or placenta are not identified." 13 Mo. Admin. Code § 50-151.030(1) (1981). Thus, the effect of the Missouri statute is to require a pathologist to perform the initial gross examination, which is normally the responsibility of the attending physician and which will often make the pathologist's services unnecessary.

On the record before us, I must conclude that the State has not "met its burden of demonstrating that [the pathologist requirement] further[s] important health-related State concerns." *Akron*, *ante*, at 12. There has been no showing that tissue examinations by a pathologist do more to protect health than examinations by a nonpathologist physician. Moreover, I cannot agree with the Court that Missouri's pathologist requirement has "no significant impact" *ante*, at 8, on a woman's exercise of her right to an abortion. It is undisputed that this requirement may increase the cost of a first-trimester abortion by as much as \$40. See *ante*, at 10, n. 12; 483 F. Supp., at 700, n. 48. Although this increase may seem insignificant from the Court's comfortable perspective, I cannot say that it is equally insignificant to every woman seeking an abortion. For the woman on welfare or the unemployed teenager, this additional cost may well put

²The District Court made no findings on this point, noting only that some witnesses for the State had testified that "pathology should be done" for every abortion. 483 F. Supp. 679, 700, n. 49 (WD Mo. 1980).

the price of an abortion beyond reach.³ Cf. *Harper v. Virginia Board of Elections*, 383 U. S. 663, 668 (1966) (\$1.50 poll tax “excludes those unable to pay”); *Burns v. Ohio*, 360 U. S. 252, 255, 257 (1959) (\$20 docket fee “foreclose[s] access” to appellate review for indigents).

In *Planned Parenthood of Central Mo. v. Danforth*, 428 U. S. 52, 81 (1976), the Court warned that the minor record-keeping requirements upheld in that case “perhaps approach[ed] impermissible limits.” Today in *Akron*, we have struck down restrictions on first-trimester abortions that “may in some cases add to the cost of providing abortions.” *Ante*, at 30; see *ante*, at 31–32. Missouri’s requirement of a pathologist’s report unquestionably adds significantly to the cost of providing abortions, and Missouri has not shown that it serves any substantial health-related purpose. Under these circumstances, I would hold that constitutional limits have been exceeded.

II

In Missouri, an abortion may be performed after viability only if necessary to preserve the life or health of the woman. Mo. Rev. Stat. §188.030.1 (1983). When a post-viability abortion is performed, Missouri law provides that “there [must be] in attendance a [second] physician . . . who shall take control of and provide immediate medical care for a child born as a result of the abortion.” Mo. Rev. Stat. §188.030.3 (1983). The Court recognized in *Roe v. Wade*, 410 U. S., at

³ A \$40 pathologist’s fee may increase the price of a first-trimester abortion by 20% or more. See 655 F. 2d, at 869, n. 35 (cost of first-trimester abortion at Reproductive Health Services is \$170); F. Jaffe, B. Lindheim, and P. Lee, *Abortion Politics: Private Morality and Public Policy* 36 (1981) (cost of first-trimester clinic abortion ranges from approximately \$185 to \$235); Henshaw, *Freestanding Abortion Clinics: Services, Structure, Fees*, 14 *Family Planning Perspectives* 248, 255 (1982) (average cost of first-trimester clinic abortion is \$190); NAF Membership Directory 18–19 (1982/1983) (NAF clinics in Missouri charge \$180 to \$225 for first-trimester abortion).

164-165, that a State's interests in preserving maternal health and protecting the potentiality of human life may justify regulation and even prohibition of post-viability abortions, except those necessary to preserve the life and health of the mother. But regulations governing post-viability abortions, like those at any other stage of pregnancy, must be "tailored to the recognized state interests." *Id.*, at 165; see *H.L. v. Matheson*, 450 U. S. 398, 413 (1981) ("statute plainly serves important state interests, [and] is narrowly drawn to protect only those interests"); *Roe*, 410 U. S., at 155 ("legislative enactments must be narrowly drawn to express only the legitimate state interests at stake").

A

The Court upholds the second physician requirement on the basis that it "furthers the State's compelling interest in protecting the lives of viable fetuses." *Ante*, at 8. While I agree that a second physician indeed may aid in preserving the life of a fetus born alive, this type of aid is possible only when the abortion method used is one that may result in a live birth. Although Missouri ordinarily requires a physician performing a post-viability abortion to use the abortion method most likely to preserve fetal life, this restriction does not apply when this method "would present a greater risk to the life and health of the woman." Mo. Rev. Stat. § 188.030.2 (1983).

The District Court found that the dilatation and evacuation (D&E) method of abortion entails no chance of fetal survival, and that it will nevertheless be the method of choice for some women who need post-viability abortions. In some cases, in other words, maternal health considerations will preclude the use of procedures that might result in a live birth. 483 F. Supp., at 694.⁴ When a D&E abortion is performed, the

⁴The Court of Appeals upheld this factual finding. 665 F. 2d, at 865. As a general rule, we do not review a District Court's factual findings in

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second physician can do nothing to further the State's compelling interest in protecting potential life. His presence is superfluous. The second-physician requirement thus is overbroad and "imposes a burden on women in cases where the burden is not justified by any possibility of survival of the fetus." 655 F. 2d, at 865-866.

The Court reasons that the State's interest in preserving potential life "justifies the State in requiring a second physician at *every* third-trimester abortion" because "[w]e . . . cannot assume that *all* third-trimester abortions will be D&E abortions, or that there will be no live births." *Ante*, at 7, n. 7 (emphasis added). But the fact that other methods of post-viability abortions may result in live births cannot justify requiring a second physician to attend an abortion at which the chance of a live birth is nonexistent. The choice of method presumably will be made in advance,⁵ and any need for a second physician disappears when the woman's health requires that the choice be D&E. Because the statute is not tailored to protect the State's legitimate interests, I would hold it invalid.⁶

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which the Court of Appeals has concurred. *Branti v. Finkel*, 445 U. S. 507, 512, n. 6 (1980).

⁵ In addition to requiring the physician to select the method most likely to preserve fetal life, so long as it presents no greater risk to the pregnant woman, Missouri requires that the physician "certify in writing the available method or techniques considered and the reasons for choosing the method or technique employed." Mo. Rev. Stat. § 188.030.2 (1983). This ensures that the choice of method will be a reasoned one.

⁶ The State argues that its second-physician requirement is justified even when D&E is used, because "[i]f the statute specifically excepted D&E procedures, abortionists would be encouraged to use it more frequently to avoid the expense of a second physician, to ensure a dead fetus, to prevent the presence of a second professional to observe malpractice or the choice of a questionable procedure from a safety viewpoint, a fetus-destroying procedure, or to avoid their own awakening to concern for the newborn." Brief for Cross-Petitioners in No. 81-1623, p. 44. The Court rejected this purported justification for a second physician in *Doe v. Bol-*

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In addition, I would hold that the statute's failure to provide a clear exception for emergency situations renders it unconstitutional. As the Court recognizes, *ante*, at 7, n. 8, an emergency may arise in which delay could be dangerous to the life or health of the woman. A second physician may not always be available in such a situation; yet the statute appears to require one. It states, in unqualified terms, that a post-viability abortion "*shall* be performed . . . *only* when there is in attendance" a second physician who "*shall* take control of" any child born as a result of the abortion, and it imposes certain duties on "the physician *required* by this section to be in attendance." Mo. Rev. Stat. § 188.030.3 (emphasis added). By requiring the attendance of a second physician even when the resulting delay may be harmful to the health of the pregnant woman, the statute impermissibly fails to make clear "that the woman's life and health must always prevail over the fetus' life and health when they conflict." *Colautti v. Franklin*, 439 U. S. 379, 400 (1979).

The Court attempts to cure this defect by asserting that the final clause of the statute, requiring the two physicians to "take all reasonable steps . . . to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman," could be construed to permit emergency post-viability abortions without a second physician. *Ante*, at 7, n. 8. This construction is contrary to the plain language of the statute; the clause upon which the Court relies refers to the duties of both physicians during the performance of the abortion, but it in no way suggests that the second physician may be dispensed with.

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Moreover, since the Court's proposed construction is not binding on the courts of Missouri,⁷ a physician performing an emergency post-viability abortion cannot rely on it with any degree of confidence. The statute thus remains impermissibly vague; it fails to inform the physician whether he may proceed with a post-viability abortion in an emergency, or whether he must wait for a second physician even if the woman's life or health will be further imperiled by the delay. This vagueness may well have a severe chilling effect on the physician who perceives the patient's need for a post-viability abortion. In *Colautti v. Franklin*, we considered a statute that failed to specify whether it "require[d] the physician to make a 'trade-off' between the woman's health and additional percentage points of fetal survival." 439 U. S., at 400. The Court held there that "where conflicting duties of this magnitude are involved, the State, at the least, must proceed with greater precision before it may subject a physician to possible criminal sanctions." *Id.*, at 400-401.⁸ I would apply that reasoning here, and hold Missouri's second-physician requirement invalid on this ground as well.⁹

⁷"Only the [Missouri] courts can supply the requisite construction, since of course 'we lack jurisdiction authoritatively to construe state legislation.'" *Gooding v. Wilson*, 405 U. S. 518, 520 (1972), quoting *United States v. Thirty-seven Photographs*, 402 U. S. 363, 369 (1971).

⁸A physician who fails to comply with Missouri's second-physician requirement faces criminal penalties and the loss of his license. Mo. Rev. Stat. §§ 188.065, 188.075 (1983).

⁹Because I would hold the statute unconstitutional on these grounds, I do not reach the question whether Missouri's second-physician requirement impermissibly interferes with the doctor-patient relationship. I note, however, that Missouri does not require attendance of a second physician at any other medical procedure, including a premature birth. There was testimony at trial that a newborn infant, whether the product of a normal birth or an abortion, ordinarily remains the responsibility of the woman's physician until he turns its care over to another. App. 133; see ACOG, Standards for Obstetric-Gynecologic Services 31 (1982) ("The individual who delivers the baby is responsible for the immediate post-delivery care of the newborn until another person assumes this duty").

This allocation of responsibility makes sense. Consultation and team-

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Until today, the Court has never upheld “a requirement of a consent substitute, either parental or judicial,” *ante*, at 11. In *Planned Parenthood of Central Mo. v. Danforth*, 428 U. S., at 74, the Court invalidated a parental consent requirement on the ground that “the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient, regardless of the reason for withholding the consent.” In *Bellotti v. Baird*, 443 U. S. 622 (1979) (*Bellotti II*), eight Justices agreed that a Massachusetts statute permitting a judicial veto of a mature minor’s decision to have an abortion was unconstitutional. See *id.*, at 649–650 (opinion of POWELL, J.); *id.*, at 654–656 (opinion of STEVENS, J.). Although four Justices stated in *Bellotti II* that an appropriately structured judicial consent requirement would be constitutional, *id.*, at 647–648 (opinion of POWELL, J.), this statement was not necessary to the result of the case and did not command a majority. Four other Justices concluded that any judicial-consent statute would suffer from the same flaw the Court identified in *Danforth*: it would give a third party an absolute veto over the decision of the physician and his patient. *Id.*, at 655–656 (opinion of STEVENS, J.).

I continue to adhere to the views expressed by JUSTICE STEVENS in *Bellotti II*:

“It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny

work are fundamental in medical practice, but in an operating room a patient’s life or health may depend on split-second decisions by the physician. If responsibility and control must be shared between two physicians with the lines of authority unclear, precious moments may be lost to the detriment of both woman and child.

and in defiance of the contrary opinion of the sovereign or other third parties. . . . As a practical matter, I would suppose that the need to commence judicial proceedings in order to obtain a legal abortion would impose a burden at least as great as, and probably greater than, that imposed on the minor child by the need to obtain the consent of the parent. Moreover, once this burden is met, the only standard provided for the judge's decision is the best interest of the minor. That standard provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores whose enforcement upon the minor—particularly when contrary to her own informed and reasonable decision—is fundamentally at odds with privacy interests underlying the constitutional protection afforded to her decision." 443 U. S., at 655-656 (footnote omitted).

Because Mo. Rev. Stat. § 188.028 permits a parental or judicial veto of a minor's decision to obtain an abortion, I would hold it unconstitutional.

/ omission

Pages: 1, 2, 4, 6, 7, 8, 9
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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

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4th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 81-1255 AND 81-1623

PLANNED PARENTHOOD ASSOCIATION OF
KANSAS CITY, MISSOURI, INC.,
ET AL., PETITIONERS

81-1255

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF
MISSOURI, ET AL.

JOHN ASHCROFT, ATTORNEY GENERAL OF
MISSOURI, ET AL., PETITIONERS

81-1623

v.

PLANNED PARENTHOOD ASSOCIATION OF
KANSAS CITY, MISSOURI, INC., ET AL.

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

[June —, 1983]

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, concurring in part and dissenting in part.

The Court's decision today in *Akron v. Akron Center for Reproductive Health, Inc.*, ante, invalidates the city of Akron's hospitalization requirement and a host of other provisions that infringe on a woman's decision to terminate her pregnancy through abortion. I agree that Missouri's hospitalization requirement is invalid under the *Akron* analysis, and I join Parts I and II of JUSTICE POWELL's opinion in the present cases. I do not agree, however, that the remaining

Reggie Marshall

Substantially as we saw it yesterday.
Job

Missouri statutes challenged in these cases satisfy the constitutional standards set forth in *Akron* and the Court's prior decisions.

I

Missouri law provides that whenever an abortion is performed, a tissue sample must be submitted to a "board eligible or certified pathologist" for a report. Mo. Rev. Stat. § 188.047 (1983). This requirement applies to first trimester abortions as well as to those performed later in pregnancy. Our past decisions establish that the performance of abortions during the first trimester must be left "free of interference by the State." *Akron, ante*, at 12, quoting *Roe v. Wade*, 410 U. S. 113, 163 (1973). As we have noted in *Akron*, this does not mean that every regulation touching upon first-trimester abortions is constitutionally impermissible. But to pass constitutional muster, regulations affecting first-trimester abortions must "have no significant impact on the woman's exercise of her right" and must be "justified by important state health objectives." *Akron, ante*, at 11; see *ante*, at 13.

Missouri's requirement of a pathologist's report is not justified by important health objectives. Although pathology examinations may be "useful and even necessary in some cases," *ante*, at 10, Missouri requires more than a pathology examination and a pathology report; it demands that the examination be performed and the report prepared by a "board eligible or certified pathologist" rather than by the attending physician. Contrary to JUSTICE POWELL'S assertion, *ante*, at 10, this requirement of a report by a pathologist is not in accord with "generally accepted medical standards." The routine and accepted medical practice is for the attending physician to perform a gross (visual) examination of any tissue removed during an abortion. Only if the physician detects abnormalities is there a need to send a tissue sample to a pathologist. The American College of Obstetricians and

Gynecologists (ACOG) does not recommend an examination by a pathologist in every case:

"In the situation of elective termination of pregnancy, the attending physician should record a description of the gross products. Unless definite embryonic or fetal parts can be identified, the products of elective interruptions of pregnancy must be submitted to a pathologist for gross and microscopic examination.

". . . Aspirated tissue should be examined to ensure the presence of villi or fetal parts prior to the patient's release from the facility. If villi or fetal parts are not identified with certainty, the tissue specimen must be sent for further pathologic examination. . . ." ACOG, Standards for Obstetric-Gynecologic Services 52, 54 (1982).¹

Nor does the National Abortion Federation believe that such an examination is necessary:

"All tissue must be examined grossly at the time of the abortion procedure by a physician or trained assistant and the results recorded in the chart. In the absence of visible fetal parts or placenta upon gross examination, obtained tissue may be examined under a low power microscope for the detection of villi. If this examination is inconclusive, the tissue should be sent to the nearest suitable pathology laboratory for microscopic examina-

¹See also ACOG, Standards for Obstetric-Gynecologic Services 66 (1982):

"Tissue removed should be submitted to a pathologist for examination. . . . An exception to the practice may be in elective terminations of pregnancy in which definitive embryonic or fetal parts can be identified. In such instances, the physician should record a description of the gross products. Unless definite embryonic or fetal parts can be identified, the products of elective interruptions of pregnancy must be submitted to a pathologist for gross and microscopic examination."

tion." National Abortion Federation Standards 6 (1981) (emphasis deleted).

As the Court of Appeals pointed out, there was expert testimony at trial that a nonpathologist physician is as capable of performing an adequate gross examination as is a pathologist, and that the "abnormalities which are of concern" are readily detectable by a physician. 655 F. 2d 848, 871, n. 37 (CA8 1981); see App. 135.² While a pathologist may be better able to perform a microscopic examination, Missouri law does not require a microscopic examination unless "fetal parts or placenta are not identified." 13 Mo. Admin. Code § 50-151.030(1) (1981). Thus, the effect of the Missouri statute is to require a pathologist to perform the initial gross examination, which is normally the responsibility of the attending physician and which will often make the pathologist's services unnecessary.

On the record before us, I must conclude that the State has not "met its burden of demonstrating that [the pathologist requirement] further[s] important health-related State concerns." *Akron, ante*, at 12.³ There has been no showing that tissue examinations by a pathologist do more to protect health than examinations by a nonpathologist physician. Missouri does not require pathologists' reports for any other surgical procedures performed in clinics, or for minor surgery performed in hospitals. 13 Mo. Admin. Code § 50-20.030(3)(A)(7) (1977). Moreover, I cannot agree with JUSTICE POWELL that Missouri's pathologist requirement has "no significant impact" *ante*, at 13, on a woman's exercise of

²The District Court made no findings on this point, noting only that some witnesses for the State had testified that "pathology should be done" for every abortion. 483 F. Supp. 679, 700, n. 49 (WD Mo. 1980).

³JUSTICE POWELL appears to draw support from the facts that "questionable practices" occur at some abortion clinics, while at others "the standards of medical practice . . . may not be the highest." *Ante*, at 12, n. 12. There is no evidence, however, that such questionable practices occur in Missouri.

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her right to an abortion. It is undisputed that this requirement may increase the cost of a first-trimester abortion by as much as \$40. See 483 F. Supp., at 700, n. 48. Although this increase may seem insignificant from the Court's comfortable perspective, I cannot say that it is equally insignificant to every woman seeking an abortion. For the woman on welfare or the unemployed teenager, this additional cost may well put the price of an abortion beyond reach.⁴ Cf. *Harper v. Virginia Board of Elections*, 383 U. S. 663, 668 (1966) (\$1.50 poll tax "excludes those unable to pay"); *Burns v. Ohio*, 360 U. S. 252, 255, 257 (1959) (\$20 docket fee "foreclose[s] access" to appellate review for indigents).

In *Planned Parenthood of Central Mo. v. Danforth*, 428 U. S. 52, 81 (1976), the Court warned that the minor record-keeping requirements upheld in that case "perhaps approach[ed] impermissible limits." Today in *Akron*, we have struck down restrictions on first-trimester abortions that "may in some cases add to the cost of providing abortions." *Ante*, at 30; see *ante*, at 31-32. Missouri's requirement of a pathologist's report unquestionably adds significantly to the cost of providing abortions, and Missouri has not shown that it serves any substantial health-related purpose. Under these circumstances, I would hold that constitutional limits have been exceeded.

II

In Missouri, an abortion may be performed after viability only if necessary to preserve the life or health of the woman.

⁴ A \$40 pathologist's fee may increase the price of a first-trimester abortion by 20% or more. See 655 F. 2d, at 869, n. 35 (cost of first-trimester abortion at Reproductive Health Services is \$170); F. Jaffe, B. Lindheim, and P. Lee, *Abortion Politics: Private Morality and Public Policy* 36 (1981) (cost of first-trimester clinic abortion ranges from approximately \$185 to \$235); Henshaw, *Freestanding Abortion Clinics: Services, Structure, Fees*, 14 *Family Planning Perspectives* 248, 255 (1982) (average cost of first-trimester clinic abortion is \$190); NAF Membership Directory 18-19 (1982/1983) (NAF clinics in Missouri charge \$180 to \$225 for first-trimester abortion).

Mo. Rev. Stat. § 188.030.1 (1983). When a post-viability abortion is performed, Missouri law provides that “there [must be] in attendance a [second] physician . . . who shall take control of and provide immediate medical care for a child born as a result of the abortion.” Mo. Rev. Stat. § 188.030.3 (1983). The Court recognized in *Roe v. Wade*, 410 U. S., at 164–165, that a State’s interests in preserving maternal health and protecting the potentiality of human life may justify regulation and even prohibition of post-viability abortions, except those necessary to preserve the life and health of the mother. But regulations governing post-viability abortions, like those at any other stage of pregnancy, must be “tailored to the recognized state interests.” *Id.*, at 165; see *H.L. v. Matheson*, 450 U. S. 398, 413 (1981) (“statute plainly serves important state interests, [and] is narrowly drawn to protect only those interests”); *Roe*, 410 U. S., at 155 (“legislative enactments must be narrowly drawn to express only the legitimate state interests at stake”).

A

The second physician requirement is upheld in this case on the basis that it “reasonably furthers ~~further~~ the State’s compelling interest in protecting the lives of viable fetuses.” *Ante*, at 9. While I agree that a second physician indeed may aid in preserving the life of a fetus born alive, this type of aid is possible only when the abortion method used is one that may result in a live birth. Although Missouri ordinarily requires a physician performing a post-viability abortion to use the abortion method most likely to preserve fetal life, this restriction

does not apply when this method “would present a greater risk to the life and health of the woman.” Mo. Rev. Stat. § 188.030.2 (1983).

The District Court found that the dilatation and evacuation (D&E) method of abortion entails no chance of fetal survival, and that it will nevertheless be the method of choice for some

women who need post-viability abortions. In some cases, in other words, maternal health considerations will preclude the use of procedures that might result in a live birth. 483 F. Supp., at 694.⁵ When a D&E abortion is performed, the second physician can do nothing to further the State's compelling interest in protecting potential life. His presence is superfluous. The second-physician requirement thus is overbroad and "imposes a burden on women in cases where the burden is not justified by any possibility of survival of the fetus." 655 F. 2d, at 865-866.

JUSTICE POWELL apparently believes that the State's interest in preserving potential life justifies the State in requiring a second physician at all post-viability abortions because some methods other than D&E may result in live births. But this fact cannot justify requiring a second physician to attend an abortion at which the chance of a live birth is nonexistent. The choice of method presumably will be made in ad-

⁵The District Court relied on the testimony of Doctors Robert Crist and Richard Schmidt. Doctor Crist testified that in some instances abortion methods other than D&E would be "absolutely contraindicated" by the woman's health condition, 2 Record 438-439, giving the example of a recent patient with hemolytic anemia that would have been aggravated by the use of prostaglandins or other labor-inducing abortion methods, *id.*, at 428. Doctor Schmidt testified that "[t]here very well may be" situations in which D&E would be used because other methods were contraindicated. 4 Record 836. Although Doctor Schmidt previously had testified that a post-viability D&E abortion was "almost inconceivable," this was in response to a question by the State's attorney regarding whether D&E would be used "[a]bsent the possibility that there is extreme contraindication for the use of prostaglandins or saline, or of hysterotomy." *Id.*, at 787. Any inconsistencies in Doctor Schmidt's testimony apparently were resolved by the District Court in the plaintiffs' favor.

The Court of Appeals upheld the District Court's factual finding that health reasons sometimes would require the use of D&E for post-viability abortions. 665 F. 2d, at 865. Absent the most exceptional circumstances,

we do not review a District Court's factual findings in which the Court of Appeals has concurred. *Branti v. Finkel*, 445 U. S. 507, 512, n. 6 (1980).

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vance,⁶ and any need for a second physician disappears when the woman's health requires that the choice be D&E. Because the statute is not tailored to protect the State's legitimate interests, I would hold it invalid.⁷

B

In addition, I would hold that the statute's failure to provide a clear exception for emergency situations renders it unconstitutional. As JUSTICE POWELL recognizes, *ante*, at 8, n. 8, an emergency may arise in which delay could be dangerous to the life or health of the woman. A second physician may not always be available in such a situation; yet the statute appears to require one. It states, in unqualified terms, that a post-viability abortion "*shall* be performed . . . *only* when there is in attendance" a second physician who "*shall* take control of" any child born as a result of the abortion, and it imposes certain duties on "the physician *required* by this

⁶ In addition to requiring the physician to select the method most likely to preserve fetal life, so long as it presents no greater risk to the pregnant woman, Missouri requires that the physician "certify in writing the available method or techniques considered and the reasons for choosing the method or technique employed." Mo. Rev. Stat. § 188.030.2 (1983). This ensures that the choice of method will be a reasoned one.

⁷ The State argues that its second-physician requirement is justified even when D&E is used, because "[i]f the statute specifically excepted D&E procedures, abortionists would be encouraged to use it more frequently to avoid the expense of a second physician, to ensure a dead fetus, to prevent the presence of a second professional to observe malpractice or the choice of a questionable procedure from a safety viewpoint, a fetus-destroying procedure, or to avoid their own awakening to concern for the newborn." Brief for Cross-Petitioners in No. 81-1623, p. 44. The Court rejected this purported justification for a second physician in *Doe v. Bolton*, 410 U. S. 179, 199 (1973): "If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment. If he fails in this, professional censure and deprivation of his license are available remedies. Required acquiescence by co-practitioners has no rational connection with a patient's needs and unduly infringes on the physician's right to practice."

section to be in attendance.” Mo. Rev. Stat. §188.030.3 (emphasis added). By requiring the attendance of a second physician even when the resulting delay may be harmful to the health of the pregnant woman, the statute impermissibly fails to make clear “that the woman’s life and health must always prevail over the fetus’ life and health when they conflict.” *Colautti v. Franklin*, 439 U. S. 379, 400 (1979).

JUSTICE POWELL attempts to cure this defect by asserting that the final clause of the statute, requiring the two physicians to “take all reasonable steps . . . to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman,” could be construed to permit emergency post-viability abortions without a second physician. *Ante*, at 8, n. 8. This construction is contrary to the plain language of the statute; the clause upon which JUSTICE POWELL relies refers to the duties of both physicians during the performance of the abortion, but it in no way suggests that the second physician may be dispensed with.

Moreover, since JUSTICE POWELL’s proposed construction is not binding on the courts of Missouri,⁸ a physician performing an emergency post-viability abortion cannot rely on it with any degree of confidence. The statute thus remains impermissibly vague; it fails to inform the physician whether he may proceed with a post-viability abortion in an emergency, or whether he must wait for a second physician even if the woman’s life or health will be further imperiled by the delay. This vagueness may well have a severe chilling effect on the physician who perceives the patient’s need for a post-viability abortion. In *Colautti v. Franklin*, we considered a statute that failed to specify whether it “require[d] the physi-

⁸“Only the [Missouri] courts can supply the requisite construction, since of course ‘we lack jurisdiction authoritatively to construe state legislation.’” *Gooding v. Wilson*, 405 U. S. 518, 520 (1972), quoting *United States v. Thirty-seven Photographs*, 402 U. S. 363, 369 (1971).

cian to make a "trade-off" between the woman's health and additional percentage points of fetal survival." 439 U. S., at 400. The Court held there that "where conflicting duties of this magnitude are involved, the State, at the least, must proceed with greater precision before it may subject a physician to possible criminal sanctions." *Id.*, at 400-401.⁹ I would apply that reasoning here, and hold Missouri's second-physician requirement invalid on this ground as well.¹⁰

III

Missouri law prohibits the performance of an abortion on an unemancipated minor absent parental consent or a court order. Mo. Rev. Stat. § 188.028 (1983).

Until today, the Court has never upheld "a requirement of a consent substitute, either parental or judicial," *ante*, at 14. In *Planned Parenthood of Central Mo. v. Danforth*, 428 U. S., at 74, the Court invalidated a parental consent requirement on the ground that "the State does not have the

⁹ A physician who fails to comply with Missouri's second-physician requirement faces criminal penalties and the loss of his license. Mo. Rev. Stat. §§ 188.065, 188.075 (1983).

¹⁰ Because I would hold the statute unconstitutional on these grounds, I do not reach the question whether Missouri's second-physician requirement impermissibly interferes with the doctor-patient relationship. I note, however, that Missouri does not require attendance of a second physician at any other medical procedure, including a premature birth. There was testimony at trial that a newborn infant, whether the product of a normal birth or an abortion, ordinarily remains the responsibility of the woman's physician until he turns its care over to another. App. 133; see ACOG, Standards for Obstetric-Gynecologic Services 31 (1982) ("The individual who delivers the baby is responsible for the immediate post-delivery care of the newborn until another person assumes this duty").

This allocation of responsibility makes sense. Consultation and teamwork are fundamental in medical practice, but in an operating room a patient's life or health may depend on split-second decisions by the physician. If responsibility and control must be shared between two physicians with the lines of authority unclear, precious moments may be lost to the detriment of both woman and child.

constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient, regardless of the reason for withholding the consent." In *Bellotti v. Baird*, 443 U. S. 622 (1979) (*Bellotti II*), eight Justices agreed that a Massachusetts statute permitting a judicial veto of a mature minor's decision to have an abortion was unconstitutional. See *id.*, at 649-650 (opinion of POWELL, J.); *id.*, at 654-656 (opinion of STEVENS, J.). Although four Justices stated in *Bellotti II* that an appropriately structured judicial consent requirement would be constitutional, *id.*, at 647-648 (opinion of POWELL, J.), this statement was not necessary to the result of the case and did not command a majority. Four other Justices concluded that any judicial-consent statute would suffer from the same flaw the Court identified in *Danforth*: it would give a third party an absolute veto over the decision of the physician and his patient. *Id.*, at 655-656 (opinion of STEVENS, J.).

I continue to adhere to the views expressed by JUSTICE STEVENS in *Bellotti II*:

"It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties. . . . As a practical matter, I would suppose that the need to commence judicial proceedings in order to obtain a legal abortion would impose a burden at least as great as, and probably greater than, that imposed on the minor child by the need to obtain the consent of the parent. Moreover, once this burden is met, the only standard provided for the judge's decision is the best interest of the minor. That standard provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores whose enforcement upon the minor—particularly when contrary to her own informed and reasonable decision—is fundamentally at odds with privacy interests underly-

ing the constitutional protection afforded to her decision." 443 U. S., at 655-656 (footnote omitted).

Because Mo. Rev. Stat. § 188.028 permits a parental or judicial veto of a minor's decision to obtain an abortion, I would hold it unconstitutional.