No. 88-605

In The

Supreme Court of the United States

October Term, 1988

WILLIAM L. WEBSTER, et al.,

Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, et al.,

Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

APPELLANTS' REPLY BRIEF

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ARGUMENT

I. The Standard for Reviewing Abortion-Related Legislation Should be Reconsidered and Modified.

It is a common assumption of many of the briefs filed by appellees and their amici that the alternative to the regime of abortion rights established by *Roe v. Wade*, 410 U.S. 113 (1973), is the automatic and total criminalization of abortion. That is clearly not the case. The alternative to the Court's continuing effort to oversee virtually all aspects of the abortion controversy is to leave that controversy "with the people and to the political processes the people have devised to govern their affairs." *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting). It will then be up to the legislatures of each state to determine the extent, if any, to which abortion should be prohibited or regulated.

It is not clear how individual states will respond to this challenge. If the experience of other countries is any guide, however, it is unlikely that widespread criminalization of abortion in early pregnancy will result if *Roe v. Wade* is overruled. See M. A. Glendon, *Abortion and divorce in Western Law: American Failures, European Challenges*, 13-15, 49 (1987). Indeed, the Court in *Roe* acknowledged that the states had begun a "trend toward liberalization of abortion statutes." 410 U.S. at 139-140. That trend was preempted by the Court's own action on the issue. Given the chance, there is no reason to believe that the political processes in the individual states will not be able to resolve this issue in a responsible manner, as other western democracies have done. But "[t]o a greater extent than in any other country, our courts have

shut down the legislative process of bargaining, education, and persuasion on the abortion issue." Glendon, *supra*, at 2.[1]

The Missouri statutes at issue in this case are illustrative of what would happen if the regime of strict judicial review mandated in *Roe v. Wade* were abandoned. Contrary to appellees' assertion (Br. 21-22), abortion would not be automatically criminalized under existing Missouri statutes. Nor would methods of birth control that operate after conception but before implantation (such as the IUD or the "morning after" pill) be unlawful. Missouri's declaration that life begins at conception is limited in its effect by "specific provisions to the contrary in the statutes and constitution of this state." § 1.205.2, RSMo 1986. Under current Missouri law, only post-viability abortions are unlawful, and even after viability an abortion may be performed "if necessary to preserve the life or health of the woman." § 188.030, RSMo 1986. That would continue to be the law of Missouri if *Roe* were overruled, absent an affirmative change by the legislature. Thus, a decision by this Court to overrule *Roe v. Wade* would not have the draconian effect suggested by appellees and supporting amici.

Appellees (Br. 3) and various amici (see, e.g., Brief for Certain Members of the Congress of the United States, 14-18) suggest that constitutional adjudication works as a

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[1] Although the Canadian Supreme Court struck down its abortion law on grounds of procedural due process, see *Morgentaler v. Her Majesty the Queen*, 1 S.C.R. 30, 44 D.L.R. 4th 385 (1988), that court has since made clear that the ultimate issue of the legality of abortion is one for legislative, not judicial, determination. See *Borowski v. The Attorney General of Canada*, No. 20411 (March 9, 1989). *Morgentaler* itself can at most be read as subjecting abortion restrictions to an "undue burden" analysis; only one Justice would have gone further to adopt the reasoning in *Roe*.

sort of one-way ratchet, whereby precedents may be overruled in order to expand, but never to contract, constitutional rights. That is clearly not the case. See e.g., *Daniels v. Williams*, 474 U.S. 327, 330-331 (1986); *New Orleans v. Dukes*, 427 U.S. 297, 306 (1976); *Solorio v. United States*, 483 U.S. 435 (1987). In any event, at issue in this case is not the "abolition" of a constitutional right but rather a modification of the standard of review. The Court has previously made such modifications to property and contract rights (e.g., *Ferguson v. Shupka*, 372 U.S. 726 (1963)), to equal protection rights (*New Orleans v. Dukes*, *supra*), to First Amendment rights (*Hudgens v. NLRB*, 424 U.S. 507 (1976); *Miller v. California*, 413 U.S. 15 (1973)), and to double jeopardy rights (*United States v. Scott*, 437 U.S. 82 (1978)). There is no reason inherent in constitutional adjudication or the doctrine of *stare decisis* why the Court should not similarly adjust the standard of review governing a woman's right to choose an abortion under the Fourteenth Amendment to bring its rulings in line with the general requirement that state regulations affecting a liberty interest protected by the due process clause need only be procedurally fair and bear a rational relation to valid state objectives.[2]

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[2] Tacitly acknowledging the incongruity – under general due process jurisprudence – of the standard of review chosen by the Court in *Roe v. Wade*, various amici attempt to find other provisions of the Bill of Rights that will generate the same result. See, e.g., Brief Amicus Curiae for American Jewish Congress, et al. (free exercise clause of First Amendment); Brief for Organizations and Named Women as Amicus Curiae Supporting Appellee (prohibition on involuntary service in Thirteenth Amendment); Brief for the National Coalition Against Domestic Violence as Amicus Curiae Supporting Appellees (equal protection). These arguments, however, to the extent they have not already been rejected by the Court, see *Harris v.*

(Continued on following page)

Appellees' reliance upon the barrier of *stare decisis* is particularly weak because the trimester framework announced in *Roe v. Wade* has proven to be inherently difficult to apply in any consistent or principled manner. Far from settling the issue of abortion in American law, *Roe* and its progeny have fostered confusion and generated unrelenting controversy.[3]

Appellees (Br. 9) contend that "a fundamental right to abortion . . . flow[s] logically out of the general right to privacy or personal autonomy which protects matters of procreation and family life, including contraception" and that "the presence of the fetus" is not sufficient to "undercut[] the 'fundamental nature' of the right itself." The life of the fetus, appellees claim, only comes into play in judging the extent of the State's countervailing interest, not in determining whether the fundamental right to privacy is broad enough to encompass a woman's decision to have an abortion. That contention is plainly incorrect. The existence of the fetus alters the fundamental nature of the decision in question. A woman deciding to have an abortion is not simply choosing a method of

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McRae, 448 U.S. 297, 318-327 (1980), all suffer from the same flaws that infect the decision in *Roe*.

Other amici abandon any attempt to find a constitutional basis for the decision and instead present pure policy arguments to the Court. See, e.g., Brief for Population-Environment Balance, et al., as Amici Curiae Supporting Appellees (overpopulation); Brief Amici Curiae of the National Council of Negro Women, Inc., et al. (plight of poor women). While these policy concerns are not insubstantial, they are properly to be considered by the legislative branch, not the judiciary.

[3] See Brief of Hon. Christopher H. Smith, Hon. Alan B. Mollohan, Hon. John C. Danforth, and Other United States Senators and Members of Congress, as Amici Curiae in Support of Appellants, which addresses at length the inappropriateness of *stare decisis* as a justification for refusing to reconsider *Roe v. Wade*.

contraception. She is choosing "the purposeful termination of a potential human life." *Harris v. McRae*, 448 U.S. 297, 325 (1980). Such a choice is different in kind from choices concerning marital privacy and the use of contraceptives.

The flaw in appellees' argument is apparent. Choices concerning the raising of one's children are clearly encompassed within the sphere of personal autonomy and family choice recognized in such cases as *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). It does not follow, however, that parents have a fundamental right to abuse their children – a "right" overcome only by the State's compelling and countervailing interest in protecting the victims of such abuse. The infliction of serious physical injury by a parent on a child is simply not included within the relevant right to privacy. It is different in kind from the sorts of decisions and activities traditionally embraced by that right. Cf. *Prince v. Massachusetts*, 321 U.S. 158, 164-171 (1944) (rejecting claim that child labor laws are unconstitutional under *Meyer* and *Pierce*).[4]

Similarly, the fact that abortion involves the purposeful termination of a potential human life takes it altogether outside the bounds of the right to privacy recognized in this Court's decisions prior to *Roe v. Wade*. Decisions concerning marital privacy and the use of contraceptives bear no logical relationship to – and should provide no precedential support for – a decision that involves, not the woman alone, but also the potential life

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[4] Appellees' version of the historical regulation of abortion is extremely distorted as exhaustively discussed by Professor Joseph W. Dellapenna in the Brief of the Association for Public Justice and The Value of Life Committee, Inc., in Support of Appellant, William L. Webster; see also Brief of Certain American State Legislators as Amici Curiae in Support of Appellants.

of the fetus. It is certainly true "that a woman's ability to choose an abortion is a species of 'liberty' that is subject to the general protections of the Due Process Clause." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 790 (1986) (White, J., dissenting). But the presence of this liberty interest should be accommodated, like other liberty interests, by the requirement that any state regulation affecting that interest must be procedurally fair and must bear a rational relationship to valid state objectives. For example, if a state "were to prohibit an abortion even where the mother's life is in jeopardy," there would be little doubt that "such a statute would lack a rational relation to a valid state objective." *Roe v. Wade*, 410 U.S. at 173 (Rehnquist, J., dissenting).[5] Heightened scrutiny, however, is neither necessary nor warranted.

A similar flaw infects the Amicus Brief of the American Medical Assoc., et al. (at 25-35), which argues from the premise that "individuals have a fundamental right to make decisions about their medical care" to the conclusion that " a woman's choice whether or not to terminate her pregnancy should be deemed a fundamental liberty interest protected by the Due Process Clause." The conclusion does not follow from the premise for an obvious reason already recognized by this Court: "Abortion is inherently different from other medical procedures,

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[5] The AMA asserts (Br. 37) that the rationality review proposed by appellants and the United States "leaves no room for the woman to terminate a pregnancy to protect her own health or even to save her life." We do not understand the United States to make such an argument; in any event, it is not the position of the State of Missouri. Such a case, of course, would implicate not just a generalized liberty interest, but life itself.

because no other procedure involves the purposeful termination of a potential life." *Harris v. McRae,* 448 U.S. at 325. The Constitution does not grant to physicians the ultimate say on all questions of policy related to medicine. Nor are medical choices constitutionally protected merely because a doctor is involved in implementing them. Otherwise, euthanasia could also "be deemed a fundamental liberty interest protected by the Due Process Clause," as could the use of laetrile and other nonapproved drugs. Cf. *United States v. Moore,* 423 U.S. 122, 131-133 (1975) (physicians may be prosecuted for unlawfully dispensing narcotics).

Appellees (Br. 13-15) and their supporting amici (e.g., 167 Distinguished Scientists Br. at 8-16; AMA Br. at 5-8) also take issue with our contention that *Roe's* selection of viability as the point at which the state may intervene to protect fetal life is arbitrary and unworkable. They contend that there is in fact a fixed "floor" in terms of weeks of gestation below which it is impossible to sustain the life of a fetus outside the womb with artificial support. Nevertheless, appellees acknowledge, as they must, that changes in medical technology have resulted in an "increasing ability over the past decade to save progressively younger neonates" (Br. 13, quoting Report of the Committee on Fetal Extrauterine Survivability to the New York State Task Force on Life and the Law, 9 (January, 1988)). Moreover, as both the record in this case and the various amicus briefs demonstrate, there is no agreement between experts as to exactly what the current lower limit may be. Compare AMA Br. 6 (23-24 weeks) with American Assn. of Prolife Obstetricians and Gynecologists, et al., Br. 6 (22 weeks). And of course, notwithstanding the confident assertions of certain amici to the contrary (see 167 Distinguished Scientists Br. 8), it is impossible to predict the future development of medical technology. In 1973, when *Roe* was decided, no one had heard of the possibility of in vitro fertilization; today,

over 5,500 in vitro babies have been born in the United States alone. *Experts Assess a Decade of In Vitro Fertilization*, N.Y. Times, Tuesday, April 11, 1989, at C5. Similar breakthroughs may occur in the medical technology for bringing a fertilized ovum to gestation.

But *Roe's* selection of viability as the critical point in the State's power to regulate abortion is arbitrary not only because viability is a shifting point. Perhaps even more serious is the uncertainty over how viability is to be determined. The evidence in this case, as the district court acknowledged (J. S. App. A33), reveals that determining the number of weeks of gestation is difficult, and that "inaccuracies of up to four weeks are not uncommon." Given these uncertainties, the *Roe* framework creates the following dilemma: either the State must adopt legislation instructing physicians regarding the determination of viability (as Missouri has done here in § 188.029), or the State must relegate any control over whether abortions are performed on viable fetuses to the sole discretion of private physicians.

This dilemma is entirely the creation of the framework established by *Roe v. Wade*, and illustrates why that framework is unworkable. This Court has on several occasions been required to revisit questions about the proper role of the states in defining viability and the methods for determining viability, and whether those judgments comport with the views of the medical and scientific communities. *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 434-438 (1983); *Colautti v. Franklin*, 439 U.S. 379, 388-389 (1979); *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 64 (1976). These decisions have taken the Court far afield from the traditional sources that are used to resolve questions of constitutional entitlement. Although it is true that advances in science and technology may present issues about the application of established constitutional rights in new contexts that could not have been contemplated by the

framers (e.g., *Katz v. United States*, 389 U.S. 347 (1967) (telephone wire tap)), it is not true that in any other context the very dimensions of the constitutional right turn on disputed issues of technical fact. Because this Court's *Roe v. Wade* framework has required its "continued functioning as the nation's '*ex officio* medical review board with powers to approve or disapprove medical and operational practices and standards throughout the United States,'" *Akron*, 462 U.S. at 456 (O'Connor, J., dissenting), it should be reconsidered, and upon reconsideration, overruled.[6]

II. The State of Missouri May Make Legislative Findings That "the Life of Each Human Being Begins at Conception" and That "Unborn Children Have Protectable Interests in Life, Health, and Well-Being."

The appellees argue that §§ 1.205.1(1) and (2), RSMo 1986, violate the right to privacy because they are operative statutory provisions which define the reach of the State's abortion regulations and may restrict access to some contraceptives. Appellees initially contend that the subsections in question are not identified as prefatory statements. How else can one characterize a statute which begins "1. The general assembly of this state finds . . . "? A "finding" is not a directive. Granted, Missouri does not label its findings as a preamble. But there is no conceivable basis for considering the General Assembly's "findings" as anything but prefatory.

Appellees' contention that it is impermissible for Missouri to preface an act pertaining to unborn children

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[6] Of course, it would always be possible to render the *Roe* framework more workable by abandoning the concept of viability and declaring by fiat that the states have no power to regulate abortion until a fixed number of weeks of gestational age. But this would achieve greater workability only at the expense of dropping any pretense of constitutional legitimacy.

and abortion with a declaration that life begins at conception is plainly incorrect, even assuming the continued validity of *Roe v. Wade*. In *Akron*, 462 U.S. at 444, this Court did say that "a state may not adopt one theory of when life begins to justify its regulation of abortions." But the Court's point was simply that, in balancing the competing constitutional interests at stake and setting the boundaries of permissible regulation of abortion by the states, the Court would not take into account a state's assertion as to when life begins. The Court did not suggest that it was improper for a state to express its views on this issue in the course of passing otherwise constitutional law.

Appellees continue to overlook the substantive language of § 1.205.2, which follows the prefatory findings declared invalid by the court below. § 1.205.2 states as follows:

> Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens and residents of this state, *subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.* (Emphasis added.)

Appellees' argument that the findings of §§ 1.205.1(1) and (2) somehow interfere with access to abortion or contraceptives clearly ignores the explicit limiting language of § 1.205.2. As we explained in our opening brief (at 27-29), § 1.205.2 has significant – and perfectly permissible – effects on state tort, criminal, and property law. But the provision has no effect on the availability of abortion in Missouri because Missouri law makes abortion illegal only after viability. § 188.030, RSMo 1986. See

Argument I, *supra*. It is equally fallacious to wildly hypothesize that § 1.205 will interfere with access to contraceptive materials.

The constitutionality of the substantive language of § 1.205 has never been challenged by the appellees. It is operative law today. Contrary to the court of appeals' opinion (J.S. A64-A65), the limiting language of § 1.205.2 is very meaningful. The language explicitly incorporates existing state and federal law. The court of appeals' construction is directly contrary to the "well-established principle that statutes will be interpreted to avoid constitutional difficulties" [citations omitted]. *Frisby v. Schultz*, 108 S.Ct. 2495, 2501 (1988).

To the extent that the findings of the General Assembly have relevance to Missouri's abortion laws, they simply explain why the State of Missouri chooses to regulate abortion to the full extent permitted by this Court's abortion precedents. Provided the State's substantive restrictions on abortion remain within the limits set by those decisions, however, the state's motivation in fashioning such restrictions is irrelevant. Missouri is not precluded from viewing abortion as the purposeful termination of an actual human life; nor is it required to pledge agnosticism on the subject of when life begins as a prerequisite to any and all regulations of abortion. The court of appeals' blatant intolerance of the expression of a moral viewpoint with which it simply disagrees (see J.S. A64-A65) has no place in constitutional adjudication.

Appellees devote four pages of their argument (Br. 23-26) to an alternative contention that the General Assembly's findings violate the Missouri Constitution. This argument concerning state law was not raised in the district court or passed on by the courts below, and we agree with appellees, *id.* at 23 n. 42, that this Court need not address it. However, since the appellees' arguments are blatantly incorrect under Missouri law, a remand would be inappropriate.

Appellees argue that since the operative language of § 1.205 will impact upon existing tort, property, and criminal law protection for unborn children, then the statute violates Art. III § 23 of the Missouri Constitution because tort, property, and criminal law are not subjects encompassed by the title of the act (J.A. at A22). The quick and easy response is that appellees never challenged the operative language set forth in § 1.205.2. But, it is also very clear under controlling case law that the title of the act in question provided sufficient notice to interested persons of its subject matter, which is the purpose of Art. III § 23 of the Missouri Constitution. *Blue Cross Hospital Service, Inc. v. Frappier*, 681 S.W.2d 923 (Mo. banc 1984). "The test is whether all provisions of the bill fairly relate to the subject expressed in the title, have natural connections therewith, or are incidents or means to accomplish the express purpose." *Id.* at 929, 930. See also *Westin Crown Plaza Hotel Company v. King*, 664 S.W.2d 2 (Mo. banc 1984), wherein the Missouri Supreme Court noted that "[t]he title to a bill need only indicate the general contents of the act," *id.* at 6, and that Art. III § 23 is to be "liberally construed." *Id.* Clearly, all provisions of the act in question fairly relate to the general subject expressed in the title, "Unborn children and abortion."

Appellees' reliance upon Art. III § 28 is equally misplaced because their argument that various statutes affected by the adoption of § 1.205 should have been set forth in the act was rejected by the Missouri Supreme Court in *Century 21 v. City of Jennings*, 700 S.W.2d 809, 812 (Mo. banc 1985), wherein the court held that Art. III § 28 does not require a "detailed cross-referencing of . . . related statutes. 'The fact [an act] has consequences for other statutes does not bring it into conflict with Art. III § 28.' *Boyd-Richardson Company v. Leachman*, 615 S.W.2d 46, 53 (Mo. banc 1981)." By its own terms, § 1.205.2 states that its provisions are fully subject to "specific provisions to the contrary in the statutes and constitution of this

state." So § 1.205 does not amend any specific language of any other Missouri statute. Neither the substantive nor prefatory language of § 1.205 are subject to attack under the Missouri Constitution.

III. The State of Missouri Has a Compelling Interest in Requiring a Physician Determining Viability to Cause to be Performed Such Examinations and Tests as are Necessary to Make a Finding of the Gestational Age, Weight, and Lung Maturity of the Unborn Child

The State's position regarding this issue is fully addressed in the opening brief. A thorough discussion and refutation of appellees' contention that § 188.029 facially requires dangerous or unnecessary medical tests is set forth in the Brief of the American Association of Prolife Obstetricians and Gynecologists (AAPLOG) and the American Association of Pro-Life Pediatricians (AAPLP) as Amici Curiae in Support of Appellants. Under *Roe v. Wade* the State has a compelling interest in protecting a viable unborn child, but that interest is mere verbiage if a physician cannot even be required to make and record the findings which cause him to conclude whether an unborn child is viable.

IV. The State of Missouri May Constitutionally Refuse to Support Abortion Services by Declaring Unlawful the Expenditure of Public Funds for the Purpose of Encouraging or Counseling a Woman to Have an Abortion Not Necessary to Save Her Life.

Appellees contend (Br. 31-35) that the controversy over the ban on the use of public funds to encourage or counsel a woman to have an abortion is "moot." This is incorrect. As appellees note, appellants did not appeal the court of appeals' judgment insofar as it held invalid

those portions of §§ 188.210 and 188.215, RSMo 1986, that forbid public employees from encouraging a woman to have an abortion and that forbid public facilities from being used for that purpose. Appellants only sought review of the judgment insofar as it held invalid the ban in § 188.205 on the use of state funds to encourage or counsel a woman to have an abortion. Appellees now suggest (Br. 31-35) that the funding ban in § 188.205 "appears not to affect Plaintiffs adversely," since "public employees" and "private practitioners in public facilities" may counsel women to have an abortion under the judgment below that §§ 188.210 and 188.215 are invalid (Br. 32), and since "plaintiffs are neither grantees nor employees of programs" whose state funding may be discontinued if they encourage women to have an abortion, *id.* at 32-33.

Appellees' assertion that the funding ban does not "affect Plaintiffs adversely" does not mean, however, that this issue is now "moot." Appellees have confused mootness with standing. If appellees are not affected by the funding ban, then they lack standing to challenge it, and the judgment below should be reversed for that reason, since injury-in-fact is a requirement of standing. *Allen v. Wright*, 468 U.S. 737, 751 (1984). Appellees have no less standing to challenge § 188.205 than they had at the outset of this litigation.[7]

The funding ban forbids state officials from appropriating public funds to counsel or encourage women to have abortions. Thus, state and local agencies and officials may not establish programs for abortion counseling, print brochures that advocate abortion, or hire persons to

[7] Appellants' construction of § 188.205 has never altered. The distinct effect of the funding ban was expressed at length in defendants' post-trial memorandum (see J.S. A45-A46), and it was raised in the appellants' brief in the court of appeals.

serve as abortion counselors. Pregnant women can challenge a law limiting the use of public funds in this manner, since they can allege an injury from it, and the plaintiff class certified by the district court included "pregnant women seeking abortion services or pregnancy counseling within Missouri," J.S. App. A57 n. 1; J.A. A13-A14 (appellees' proposed class).[8] Moreover, appellees' complaint alleged that the funding ban "interfere[s] unconstitutionally with the privacy rights of pregnant women seeking abortions or seeking professional advice and assistance as to their pregnancies." J.A. A17. Appellees' complaint thus alleged that the funding ban concretely injured an identifiable category of persons, which is sufficient to establish appellees' standing to challenge the constitutionality of the funding ban.

On the merits, appellees clearly err in claiming that the funding ban, properly understood, is facially unconstitutional under the First and Fourteenth Amendments. Generally, a law may not be held facially invalid unless its every application is unconstitutional. *United States v. Salerno*, 481 U.S. 739, 745 (1987). A statute can be held facially invalid under the First Amendment, however, if it poses a realistic danger that it will significantly compromise recognized First Amendment protections of parties not before the court. *New York State Club Ass'n, Inc. v. New York*, 108 S.Ct. 2225, 2233 (1988). Neither is true here. Appellees fail to distinguish between a state restriction on the ability of a private party or state employee to counsel a woman to have an abortion – something which is no longer at issue here – and a state restriction on the uses to which its own funds may be put. It is this latter

[8] Appellees imply that the plaintiff class consists only of "public employees," "private practitioners in public facilities," and "grantees [and] employees" of programs whose funds may be discontinued. Br. for Appellees 32-33. The class certified by the district court, however, was far broader, as appellees themselves elsewhere point out. Br. for Appellees 31 n. 54.

issue that is presented by the funding ban. As we explained in our opening brief (at 35-44), neither the First nor Fourteenth Amendment requires a state to supply or to underwrite abortion counseling or any other abortion-related service. See also U.S. Br. 26-27. This Court expressly held in *Maher v. Roe*, 432 U.S. 464 (1977), *Poelker v. Doe*, 432 U.S. 519 (1977), and *Harris v. McRae*, *supra*, that due process guarantees no such right, and the Court reaffirmed that principle this term in *DeShaney v. Winnebago County Dept. of Social Services*, 109 S.Ct. 998, 1003 (1989) ("the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual"). It is also clear that there is no constitutional requirement that the government subsidize the private exercise of First Amendment rights, *Lyng v. International Union*, 108 S.Ct. 1184, 1190 (1988); *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), much less that the government must itself become an advocate for any point of view. In sum, the funding ban only limits the uses to which the state's own funds may be put. As such, it is facially valid under this Court's precedents.

V. The Court of Appeals Erred in Holding That Civil Statutes Forbidding the Performance of Abortion Services by a Public Employee or in a Public Facility Violate a Woman's Right to Privacy.

The court of appeals also held facially unconstitutional Missouri's prohibition on the use of public facilities and public employees to perform or assist in abortions that are not necessary to save the life of the mother. Appellees attempt (Br. 44-50) to defend that ruling by

noting that the prohibition will prevent a private physician, with staff privileges at a public hospital, from performing an abortion at that hospital and thereby make it more difficult for women to have abortions because there may be no private facilities readily available for that purpose. It is clear, however, that the State is no more required to make up for a lack of private facilities to perform abortions than it is required to make up for a lack of private funds for abortions. As long as there is no "direct state interference," *Maher v. Roe*, 432 U.S. at 475, with the performance of abortions by private physicians in private hospitals and clinics, the State may freely implement "its policy choice to favor normal childbirth," *id.* at 477, through its allocation of public facilities and the services of public employees. That such an allocation "may make it difficult . . . for some women to have abortions is neither created nor in any way affected by [Missouri's prohibitions]." *Id.* at 474.

In any event, as already noted, a law may not be held facially invalid unless its every application is unconstitutional. Appellees do not even suggest that the prohibition is unconstitutional as applied to the performance of abortions by public employees in public facilities.[9] The statute cannot therefore be facially invalid. And the statute is certainly not rendered facially invalid by appellees' speculation (Br. 45) that the statute might be applied to prohibit purely private conduct in a private setting simply

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[9] Thus, appellees do not attempt (see Br. 47 n. 73) to defend the court of appeals' conclusion that the restriction on public employees is constitutionally invalid because "it would be totally incongruous to hold that the state cannot deny use of public facilities for paid abortions but may forbid public employees from assisting in those surgical procedures." J.S. A78 n. 15. Nor is that conclusion in any way defensible. Not only is its premise incorrect – as this Court's decision in *Poelker v. Doe, supra,* demonstrates – but the court of appeals' singular concept of what might be incongruous has no bearing on the constitutional issue before this Court.

because some "physical asset" owned by the government was involved. If the State were ever, for example, to extend the reach of the statute by providing for a state monopoly on certain types of medical equipment essential to abortions and by making that equipment available only through lease agreements, then – assuming the continued validity of *Roe v. Wade* – a prohibition on the use of such equipment in performing abortions would be unconstitutional as a "direct state interference with a protected activity." *Maher v. Roe*, 432 U.S. at 475. But nothing approaching that sort of "direct interference" is in question here.

Appellees point out (Br. 48) that Truman Medical Center is a "public facility" within the meaning of § 188.215, see § 188.200(2), RSMo 1986, even though it is run by a private Missouri corporation. The Court should also note that almost one-third of Truman Medical Center's yearly operating revenue is provided by the State of Missouri and political subdivisions of the State; that the Board of Directors of the corporation must include at least fourteen city or county officers and five state employees representing the University of Missouri-Kansas City; and that all facilities of the Truman Medical Center are owned by and the legal title of the land sites is vested in the political subdivision of Jackson County, Missouri. The Truman Medical Center West facility is leased by Jackson County to Truman Medical Center, Inc., for one dollar.[10] Under these circumstances, it is surely natural to regard Truman Medical Center as a "public facility" and surely constitutional for the State to place restrictions on the use of that facility in accordance with public policy. The policies of Truman Medical Center will

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[10] Truman Medical Center, Inc., Financial Statements and Schedules, April 30, 1988 and 1987.

naturally and properly be viewed as those of the State of Missouri and the State of Missouri may set those policies accordingly. Cf. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (discrimination by restaurant that leases space from the state government is attributable to the government as state action).

The statistical evidence presented during the trial of this action established that only 710 of a total of 19,482 abortions performed in Missouri in 1985 were performed in hospitals. (Pl. Exh. 17, Tr. 2-73, 2-76). Truman Medical Center provided 507 of the abortions which were performed in hospitals. (Pl. Exh. 18, Tr. 2-73, 2-76.) There was no evidence in the record that any clinic providing abortions was a public facility as defined by § 188.200(2). Clearly, appellees' own evidence proved that women do not obtain abortions in small community hospitals in the State of Missouri. (Pl. Exh. 18, Tr. 2-73, 2-76.) Further, the record provides no basis for asserting that private hospitals and clinics cannot meet the demand for abortions by women in Missouri. Finally, appellees provide absolutely no justification for asserting that the provisions of Chapter 197, RSMo, will be utilized to prevent private health care institutions from offering needed health services or opening new private facilities. In fact, the parties stipulated that Chapter 197 was not applicable to Reproductive Health Services or Planned Parenthood of Kansas City. (J.A. at A-53, ¶ 16.)

CONCLUSION

In conclusion, the courts below were in error when they rendered their decisions. The judgment of the court of appeals, insofar as it invalidated §§ 1.205.1(1) and 1.205.1(2), the second half of § 188.029, the second half of § 188.205, and the first half of §§ 188.210 and 188.215, should be reversed and the injunctions dissolved.

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