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

BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION, THE NATIONAL EDUCATION ASSOCIATION, PEOPLE FOR THE AMERICAN WAY, THE NEWSPAPER GUILD, THE NATIONAL WRITERS UNION, AND THE FRESNO FREE COLLEGE FOUNDATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: PAGE

Statutes and Regulations:

Other Authorities:

PAGE

I

INTEREST OF AMICI*

The American Civil Liberties Union (ACLU) is a nationwide non-partisan, membership organization dedicated to defending the principles embodied in the Bill of Rights. Since its founding nearly 70 years ago, the ACLU has been particularly concerned with government action—whether administrative, legislative, or judicial—that restricts the free flow of information contemplated by the First Amendment. In addition, the ACLU established a Reproductive Freedom Project in 1974 interested in protecting a woman's fundamental right to privacy and reproductive freedom. The ACLU believes that full and unbiased information about the abortion option is critical to reproductive choice and that attempts to censor and manipulate the doctor-patient dialogue in an effort to promote childbirth over abortion violate the First Amendment.

The National Education Association (NEA) is a nationwide employee organization with a current membership of some 1.9 million members, the vast majority of whom are employed by public educational institutions. NEA operates through a network of affiliated organizations: it has state affiliate organizations in each of the 50 states, and it has approximately 12,000 local affiliates in individual school districts, colleges and universities throughout the United States. One of the principal purposes of NEA and its affiliates is to protect the constitutional rights of educational employees, including their First Amendment right of free speech. Because the Court is being asked in this case to decide, *inter alia*, issues of importance to the exercise of free speech by public employees, NEA has an interest in the outcome.

People for the American Way is a nonpartisan, education-oriented citizen's organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to the nation's heritage of tolerance and pluralism, People for the

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* The parties have consented to the submission of this brief in letters on file with this Court.

American Way now has 275,000 members nationwide. The organization's primary mission is to educate the public on the vital importance of the democratic tradition and to defend it against attacks from those who would seek to limit our fundamental freedoms, particularly our First Amendment rights.

The Newspaper Guild is a labor union representing some 40,000 employees of newspapers, magazines, wire services, and related enterprises in the United States, Canada, and Puerto Rico. It has been actively involved in protecting the First Amendment rights of its members and all Americans.

The National Writers Union (NWU) is a five-year-old organization dedicated to improving wages and working conditions for freelance writers as well as fighting for free speech issues that have an impact on NWU's members. As representative of 2,500 writers nationwide, some of whom work for publicly-funded agencies, the NWU views with deep concern any attempt, by legislation or other means, to restrict free speech or to control the flow of information.

The Fresno Free College Foundation is a community organization with offices in Fresno, California. Its origin in 1968 is connected to an academic freedom case and, since that time, it has, in various ways, been supportive of academic freedom and the civil liberties of students, professors, and citizens. Since 1968 the Fresno College Foundation has been dedicated to the preservation of a free and open society through the support of free inquiry and the free expression of ideas.

INTRODUCTORY STATEMENT

Missouri's prohibition on the use of public funds to "encourage or counsel a woman to have an abortion not necessary to save her life," Mo. Rev. Stat. § 188.205 (1986); *see also id.* § 188.210, can be viewed from several perspectives. From Missouri's perspective, the question is whether a state must tolerate speech by publicly subsidized health care professionals that is contrary to an avowed state policy favoring childbirth over abortion. Not surprisingly, Missouri calls this a "public sub-

sidy'' case. From the perspective of a publicly-funded doctor or counselor, however, the question is whether the state may politicize the doctor-patient dialogue by forcing a health care professional to truncate and distort information and advice to patients in order to advance state policy. Health care professionals such as the public employee plaintiffs herein call this an ''employee free speech'' case.

It would, however, be simplistic to decide this case by a process of categorization. The significant First Amendment issues posed by Missouri's statutory scheme cannot be answered by labeling the case a ''subsidy'' or ''employee free speech'' case. Under either rubric, the fundamental question before the Court is whether the communication at issue—medically relevant speech between a health care professional and a patient—is of sufficient public import to warrant significant First Amendment protection from viewpoint-based censorship designed to promote state policy. If it is—and *amici* do not believe that anyone would argue to the contrary—Missouri's statutory scheme must fall, whether analyzed by this Court as a violation of the public employee's right to free speech, *see* Point I *infra*, or as an invidious manipulation of a subsidy to suppress disfavored ideas, *see* Point II *infra*.

Viewed as a public employee speech case, the ban must fall because it is an unprecedented attempt to limit the ability of government-funded health care professionals—doctors, social workers, nurses—to speak their minds openly and honestly on matters of public concern in the performance of their public functions.

Viewed as a public subsidy case, Missouri's scheme must fall as an attempt to impose viewpoint-based censorship rules upon an entire workforce. While Missouri may fund willing speakers to advance its policies, it may not turn all persons receiving public funds into unwilling exponents of state policy by requiring them, whatever their function, to present only one side of a medical issue of transcendant importance to the low-income women who depend almost entirely on government-funded personnel for information and advice.

There is yet a third perspective from which to view the Missouri statutory scheme—the perspective of a patient seeking medical advice and counsel from a publicly subsidized doctor. Missouri's concerns about subsidizing speech with which it disagrees, and even the health care professional's interest in performing the essence of the medical function, pale into relative insignificance before the low-income patient's urgent need for medical advice and information that is free of a political litmus test. The invasion of the patient's right to know is the ultimate casualty of the Missouri scheme.

By imposing a statutory gag on a doctor's speech to a pregnant patient regarding the medical advisability or availability of abortion, Missouri has gone far beyond the legitimate regulation of speech by public employees or others it subsidizes. It has attempted to politicize the practice of medicine in violation of the deepest ethical precepts of the medical profession. It is as if Missouri had informed publicly funded Legal Aid lawyers that they were free to discuss criminal law with their clients, but were forbidden to counsel or encourage them to bring motions to suppress.

While *amici* agree that government may—indeed, should—influence the job-related speech of certain public officials during the performance of their official duties, Missouri's attempt to manipulate the flow of advice from a public health professional to a patient concerning abortion is a flagrant violation of the First Amendment rights of both the public health professional and the patient. When the state "buys" the services of a public health doctor, it does not "buy" the doctor's medical integrity. When a patient consults a public health professional, she has a right to expect more than a government shill.

STATEMENT OF FACTS

Mo. Rev. Stat. § 188.205 prohibits any state-subsidized health professional from "encouraging or counseling a woman to have an abortion not necessary to save her life."[1] The statute prohibits a physician receiving public funds from "encouraging or counseling" an abortion, even when continuation of a pregnancy would jeopardize a patient's health.[2] Only when an abortion is "necessary to save the woman's life" may a physician or counselor advise a woman of the full range of pregnancy treatment options and recommend that she consider an abortion. Mo. Rev. Stat. § 188.205.[3]

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1 Mo. Rev. Stat. § 188.205 (1986) states:

> It shall be unlawful for any public funds to be expended for the purpose of . . . encouraging or counseling a woman to have an abortion not necessary to save her life.

The statute broadly defines "public funds" to include:

> . . . any funds received or controlled by this state or any agency or political subdivision thereof, including, but not limited to, funds derived from federal, state or local taxes, gifts or grants from any source, public or private, federal grants or payments, or intergovernmental transfers.

Mo. Rev. Stat. § 188.200(3).

2 The drafters of the Missouri statute consciously omitted the phrase "or health" from each of the statutory provisions. *See* Mo. Rev. Stat. §§ 188.205, 210, 215.

Various doctors testified during trial that abortion may be medically indicated "where there are gross fetal anomalies . . . , or where maternal health may be compromised by cardiac disease, recurrent cerebral vascular accidents (CVAS or strokes), diabetic retinopathy (which threatens blindness) and renal disorders." Abortions may also be indicated in the presence of diabetes, cancer, or early amniotic sac rupture. *Reproductive Health Servs. v. Webster*, 662 F. Supp. 407, 427 n.52 (W.D. Mo. 1987), *aff'd*, 851 F.2d 1071 (8th Cir. 1988), *prob. juris. noted*, 109 S.Ct. 780 (1988) (citing trial testimony of Drs. Maulik, Pearman and Hern at Trial Transcript 1-44 to 1-52, 1-129 and 1-131, 2-25 to 2-27).

3 While the State argues in its brief that the statute does not restrict the provision of mere information about abortion, Brief for Appel-

A related provision makes clear that Missouri intends, through its statutory scheme, to prohibit its own employees—including doctors, nurses, counselors, and social workers—from speaking non-pejoratively about abortion within the scope of their employment, even when necessary to preserve a patient's health. Mo. Rev. Stat. § 188.210; *see also id.* § 188.215 (prohibiting the use of a "public facility" for "encouraging or counseling" abortion).[4]

Under Missouri's statutory scheme, a health care professional employed in a Missouri state hospital, or subsidized by the State, must violate the deepest ethical precepts of her pro-

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lants at 42 [hereinafter "Mo. Br."], the Eighth Circuit correctly rejected this argument on the ground that "the scope of the . . . ban appears literally to be much broader than the interpretation offered by the state." *See* Point III *infra*.

4 Mo. Rev. Stat. § 188.210 states:

> . . . It shall be unlawful for a doctor, nurse or other health care personnel, a social worker, a counselor or persons of similar occupation who is [sic] a public employee within the scope of his employment to encourage or counsel a woman to have an abortion not necessary to save her life.

Mo. Rev. Stat. § 188.215 states:

> It shall be unlawful for any public facility to be used . . . for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life.

Missouri's decision to appeal only one of the three provisions struck down by the Eighth Circuit, Mo. Rev. Stat. § 188.205, quoted *supra* note 1, is an attempt to shift the Court's attention to the generalized ban on the use of public funds. The State thereby seeks to obscure the fact that, as applied to doctors and nurses in the Missouri public health system, a ban on the use of "public funds" to counsel about abortion is indistinguishable from a ban on the speech of doctors who, like the named plaintiffs herein, are employed and therefore paid by the State of Missouri. To the extent that a doctor is paid with "public funds," she is as bound by Mo. Rev. Stat. § 188.205 as by § 188.210. In fact, Missouri's abandonment of Mo. Rev. Stat. § 188.210 in favor of Mo. Rev. Stat. § 188.205 appears to be nothing more than a strategic ploy designed to facilitate the simplistic labeling of this case as a "subsidy" case, instead of one involving the free speech of public employees and others.

fession by withholding counseling from a pregnant patient on the availability or medical advisability of an abortion. These precepts, established by the American College of Obstetricians and Gynecologists ("ACOG") and previously relied upon by this Court, *see, e.g.*, *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 429 n.11, 437 n.26, 449 n.40, 450 n.43 (1983), state that, "[i]n the event of an unwanted pregnancy, the physician should counsel the patient about her options of continuing the pregnancy to term and keeping the infant, continuing the pregnancy to term and offering the infant for legal adoption, or aborting the pregnancy." ACOG, *Standards for Obstetric-Gynecologic Services* 57 (1985).[5]

Further, as Missouri itself recognizes in its creation of a statutory exception for abortions necessary to save a woman's life, a doctor is not merely a passive repository of raw data. Doctors, in the everyday exercise of their professional responsibilities, routinely advise patients on the pros and cons, risks and benefits of alternative courses of treatment.[6] Indeed, the American Medical Association ("AMA") itself requires physicians "to present the medical facts accurately to the patient or to the individual responsible for his care *and to make recommendations* for management in accordance with good medical practice." AMA, *Current Opinions of the Council on Ethical and Judicial Affairs* § 8.07 (1986) (emphasis added). Health care

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5 "Counseling directed solely toward either promoting or preventing abortion does not sufficiently reflect the full nature of the problem or the range of options to which the patient is entitled. Appropriately balanced counseling, combined with the available and accessible facilities, provides the minimum base for the opportunity to make a truly informed choice." ACOG, Statement of Policy, *Further Ethical Considerations in Induced Abortion*, ¶ 4; *see also*, American Medical Association, *Current Opinions of the Council on Ethical and Judicial Affairs* § 8.07 (1986).

6 Drs. Maulik and Pearman testified that ethical obligations compelled them to counsel women about abortion and make recommendations based on their medical opinion. They stated that a prohibition on this would be "devastating" to medical practice. *Reproductive Health Servs.*, 662 F. Supp. at 427 n.53 (citing trial testimony of Drs. Maulik and Pearman at 1-44 and 1-52, 1-129 and 1-131).

providers who fail to adhere to these principles risk professional censure or civil liability.[7]

SUMMARY OF ARGUMENT

Missouri's prohibition against the use of public funds to "encourage or counsel" abortion violates the First Amendment for three reasons. First, § 188.205's restriction on the use of public funds operates primarily to restrict the speech of public employees in the State of Missouri. While the State has attempted to escape the constitutional implications of this fact by not appealing the ruling of the Eighth Circuit as to § 188.210, it cannot do so. Named plaintiff doctors in this case work as public employees and Missouri's prohibition on the use of public funds to counsel about abortion restricts their freedom of speech in the course of their public employment.[8] Public employees retain First Amendment rights to speak free from government coercion, even on the job and about matters related

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7 *See, e.g.*, President's Comm'n for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Making Health Care Decisions* 76 (1982) ("a physician is obliged to mention all alternative treatments, including those he or she does not provide or favor, so long as they are supported by respectable medical opinion"). *See also* Rose, *Informed Consent: History, Theory, and Practice*, 7 Am. J. of Ontology 82 (1986); Miller, *Informed Consent: I*, 244 J. A.M.A. 2100 (1980); Katz, *Informed Consent—A Fairy Tale? Law's Vision*, 39 U. Pitt. L. Rev. 137 (1977); Waltz and Scheuneman, *Informed Consent to Therapy*, 64 Nw. U.L. Rev. 628 (1969).

As this Court has made clear, "[i]t remains primarily the responsibility of the physician [or other health care worker under the physician's supervision] to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances." *Akron*, 462 U.S. at 443. Missouri has itself recognized that such information must include the "foreseeable risks [if any] and possible alternatives" of a proposed course. *See, e.g., Kinser v. Elkadi*, 674 S.W.2d 226, 232 (Mo. Ct. App. 1984). For a pregnant woman, these alternatives include childbirth, adoption, and abortion. ACOG, *Standards for Obstetric-Gynecologic Services* 57 (1985).

8 If this were not the case, there would be no case or controversy. *See* Brief of Appellee at _____.

to their official function. When speech by a government employee on a matter of public concern does not inhibit the performance of her duties, and particularly when it is necessary to the performance of those duties, it is protected by the First Amendment.

Second, the statutory provision challenged here creates an impermissible distinction on the basis of viewpoint. Under the provision, recipients of public funds are free to counsel against abortion, but are prohibited from speaking non-pejoratively about abortion. Legislative efforts to suppress one viewpoint so as to promote another are subject to the strictest First Amendment scrutiny. The mandatory omission of medical information and advice about abortion compels physicians, whose salaries Missouri has chosen to subsidize, to act as instruments of state policy in violation of their medical judgment and their First Amendment rights. A provision that permits the dissemination of only skewed medical advice to a reliant audience must be invalidated.

Finally, the challenged provision is unconstitutionally vague and overbroad. It is vague because the statute's terms fail clearly to distinguish speech which is prohibited from that which is permitted. It is overbroad because it sweeps within its ambit even informational speech about abortion by physicians and others employed by the State. The State's effort in its brief to clarify and limit the scope of the law serves only to reinforce the conclusion that the statute is impermissibly vague.

Missouri has profferred no compelling state interest to justify its restrictions on constitutionally protected speech, and it has chosen means that sweep broadly over First Amendment freedoms.

ARGUMENT

All parties agree that if a state statute sought, through the imposition of criminal sanctions, to prevent a private doctor from counseling a patient about the advisability or availability of a lawful course of treatment, the statute would violate the First Amendment. *See Bigelow v. Virginia*, 421 U.S. 809 (1975); *See also In re Primus*, 436 U.S. 412 (1978).[9] *See also Poe v. Ullman*, 367 U.S. 497, 513 (1961) (Douglas, J., dissenting) ("The right of the doctor to advise his patients according to his best lights seems so obviously within First Amendment rights as to need no extended discussion").[10]

Missouri argues, however, that when public health professionals are paid with public funds, the State may advance its policy of favoring childbirth over abortion by dictating the content of the medical information and advice that funded doctors and nurses are permitted to give their patients. While it is, of course, true that government may generally speak in favor of its policy choices,[11] the breathtaking assertion of plenary state power over speech by state-funded professionals asserted by Missouri herein, were it to be taken seriously, would threaten the integrity of our public health, legal aid, and state university systems.

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9 Indeed where the constitutionally protected right to choose abortion is concerned, this Court has struck down any attempt to invade or "straight-jacket" the doctor-patient dialogue under the Fourteenth Amendment. *See Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 762 (1986); *Akron*, 462 U.S. at 443-45.

10 The dissent was from a standing decision not bearing on the First Amendment. *Poe*, 367 U.S. at 510. (Douglas, J., dissenting).

11 *See, e.g., Meese v. Keene*, 107 S.Ct. 1862 (1987); *see generally*, M. Yudof, *When Government Speaks* (1983); Shiffrin, *Government Speech*, 27 U.C.L.A. L. Rev. 565 (1980).

I. MISSOURI'S STATUTE LIMITS THE ABILITY OF HEALTH PROFESSIONALS EMPLOYED BY THE STATE TO SPEAK FREELY AND TRUTHFULLY TO THEIR PATIENTS ABOUT MATTERS OF MEDICAL IMPORTANCE AND THEREFORE VIOLATES THE FIRST AMENDMENT.

This Court has consistently recognized that the First Amendment grants significant protection to public employees. *E.g.*, *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891 (1987); *Connick v. Myers*, 461 U.S. 138 (1983); *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979); *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *cf. Wieman v. Updegraf*, 344 U.S. 183, 194 (1952) (Frankfurter, J., concurring) (academic freedom of state university professors protected). This protection extends to speech occurring on the job[12] and to speech expressed by an employee in a private conversation. *E.g.*, *Rankin*, 107 S. Ct. at 2899; *Givhan*, 439 U.S. at 413-16.

Missouri attempts to sidestep the plain import of these cases by assuming that all speech is fungible in determining the range of permissible governmental censorship.[13] Government's power

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12 Lower courts consistently apply the analysis of *Pickering* to speech occurring on the job or in the course of employment. *See Patteson v. Johnson*, 787 F.2d 1245 (8th Cir. 1986) (Deputy State Auditor's negative testimony before state senate committee concerning audit is protected speech); *Roth v. Veteran's Admin. of United States*, 856 F.2d 1401 (9th Cir. 1988) (hired "trouble shooters' " allegations of misuse of public funds and inefficient operation of hospital are protected speech); *Greenberg v. Knetko*, 811 F.2d 1057 (7th Cir. 1987) (citations and unauthorized actions taken by social worker in Department of Children and Family Services to protect physical and mental health of children are protected speech).

13 The State also argues that the speech prohibited by the statutory provision in question is not of "public concern." *See* Mo. Br. at 38-39. While reasonable people may differ over whether a trivial and tasteless

to interfere with public employee speech is not, however, monolithic. It varies depending upon the nature of the speech and the interests at stake. While a state would undoubtedly have the power to prevent its employees from engaging, while on the job, in racially or sexually insulting speech directed to the public, *Rankin*, 107 S. Ct. at 2903 (Scalia, J., dissenting), at a minimum, it lacks the power to conform the medical counseling of its doctors; the scholarship of its university professors; or the legal advice of its public defenders to the shifting sands of "state policy."

Under existing doctrine, the free speech protection available to a given expression by a public employee is a function of three factors: (1) the employee's interest in engaging in the expression in question; (2) the hearer's interest in receiving the information

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remark by a public employee to a boyfriend about an attempt to assassinate President Reagan is worthy of constitutional protection, *Rankin*, 107 S. Ct. 2891, it cannot be seriously contested that medically relevant speech between a doctor and patient is of "public concern" under the First Amendment.

The "content, form, and context" of such speech is of critical public concern. *See Connick*, 461 U.S. at 147-48. The freedom of a doctor to advise a patient within the scope of professional judgment and to provide medical care to low-income women consistent with prevailing standards is of paramount public concern. Further, the public interest in availability of information about abortion is evident. The public health consequences of denying women this information are increased maternal morbidity and mortality due to delayed abortion, unwanted parenthood, and increased morbidity and mortality due to health-endangering pregnancy and childbirth. Cates & Grimes, *Morbidity and Mortality of Abortions in the United States*, in *Abortion and Sterilization: Medical and Social Aspects* (J. Hodgson ed. 1981); Centers for Disease Control, Dept. of Health and Human Services, *Abortion Surveillance 1979-1980* (1983); Alan Guttmacher Institute, *Teenage Pregnancy: The Problem That Hasn't Gone Away* 16 (1981); *Born Unwanted: Developmental Effects of Denied Abortion* (H. David *et al.* eds. 1988); *High Risk Pregnancy and Delivery* (F. Arias ed. 1984); S.L. Romney, N.J. Hay, A.B. Little, J.A. Merill, E.J. Quilligan, & R.W. Standler, *Gynecology & Obstetrics* 703-95 (2d ed. 1981). *See also Johnston v. Koppes*, 850 F.2d 594 (9th Cir. 1988). Finally, that speech occurs in a private conversation is no barrier to a finding that it concerns a subject of public importance. *Givhan*, 439 U.S. at 413.

in question; and (3) the relationship between the speech in question and the employee's public function.[14] Where, as here, a public health professional has an extraordinarily powerful interest in self-expression; a patient has a critical need for the information; and counseling is at the core of the doctor's public function, the First Amendment forbids Missouri from censoring the speech in the name of fidelity to its policies.

In both *Pickering* and *Givhan*, these factors pointed strongly toward protection of the speech in question. The public teacher in *Pickering* believed that the budgetary decisions of the school administration were making it impossible for him to fulfill his responsibilities to his students. The teacher in *Givhan* believed that the policies of her school were frustrating its desegregation. Both the speakers and the listeners had significant interests in the communication of these messages, and the speech was intimately connected with the teachers' public functions. Not surprisingly, in both cases this Court unanimously invalidated the dismissals of the teachers for their protected speech.[15]

In *Rankin*, by contrast, the three factors were significantly weaker. The public employee's interest in expressing a hope for the successful assassination of the President was problematic. Viewing the speech in the context of a conversation addressing

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14 When speech of public concern occurs on the job, this Court has looked as well to the governmental employer's "interest in the effective and efficient fulfillment of its responsibilities to the public," *Connick*, 461 U.S. at 150, in short, to the government employer's "legitimate purpose in 'promot[ing] efficiency and *integrity* in the discharge of official duties . . . .' " *Id.* at 150-151 (emphasis added) (citation omitted). *See also Pickering*, 391 U.S. at 570-73. Because there is no meritorious argument that the speech prohibited by Missouri would disrupt employee relations in the workplace or interfere with a state health care institution's ability to fulfill its public function, *amici* focus on the question whether the speech at issue is consistent or at odds with the "integrity of the discharge" of a publicly employed physician's duties.

15 Justice Rehnquist wrote for a unanimous Court in *Givhan*; Justice Marshall, for a unanimous Court in *Pickering*. Justice White concurred in *Pickering* only insofar as the teacher's speech was truthful. 391 U.S. at 583 (White, J., concurring in part and dissenting in part).

the policies of the Reagan Administration, however, a majority of the Court discerned cognizable speaker and hearer interests. Moreover, while the speech in question bore no relationship to the employee's function, it did not appear to have inhibited the performance of this function. Given the relative weakness of the three factors, *Rankin* was a close case. Nevertheless, a majority found the speech protected.[16]

Measured against the speech protected in *Pickering*, *Givhan*, and *Rankin*, the public health professional's speech at issue here merits vigorous First Amendment protection. The doctor who is subject to Missouri's restriction on speech has an even greater interest in self-expression than did the teachers in *Pickering* and *Givhan*. Under the Missouri statutory scheme, a publicly employed doctor may not advise any patient about the availability of the abortion option. Confronted by a patient whose health would be imperilled by the continuation of a pregnancy, the physician is caught in a particularly vicious bind. On the one hand, canons of medical ethics may compel the doctor, on penalty of professional censure or loss of licensure, to speak in favor of abortion as a medical option of choice, *see* ethical standards discussed in Statement of Facts *supra*; on the other hand, Missouri's statutory scheme forbids the doctor from "encouraging or counseling" the patient to have an abortion not necessary to save her life. The net result is a statutorily compelled violation of the single most important tenet of a doctor's professional code.

The history of the First Amendment has been, in significant part, an attempt to shield speakers of conscience from state imposed restrictions on deeply felt self-expression. *See generally*, T. Emerson, *The System of Freedom of Expression* at Ch. 2. (1970). There can hardly be a more compelling candidate for

16 In *Connick*, 461 U.S. 138, the Court upheld the dismissal of a public employee, finding none of the speech-protective interests present. The Court found that the employee's speech did not implicate issues of public importance, thus minimizing the speaker and hearer interests; and did interfere with the performance of her public function, thus maximizing the government's interest.

such protection than a public health professional faced with a statutorily mandated violation of her oath to heal the sick and to provide accurate and complete information to all patients.

Similarly, the hearer's interest in this case dwarfs the interests found sufficient in *Pickering* and *Givhan*, to say nothing of *Rankin*.[17] A patient in the Missouri public hospital system generally cannot afford private medical care. She is dependent on the medical advice she receives from publicly funded health professionals to enable her to make an informed and autonomous choice whether to continue a pregnancy or to undergo an abortion. Her interest in receiving truthful advice from public health professionals cannot be overstated, especially since the choice at issue is itself constitutionally protected. Yet, the Missouri statutory scheme attempts to skew the nature of the medical advice that she will receive, in the name of advancing a state policy favoring childbirth over abortion. In effect, Missouri attempts to use medical censorship as a device to manipulate the behavior of poor women in favor of childbirth. Such a regime makes a mockery of the patient's constitutionally protected right to choose freely whether or not to bear a child.[18]

Finally, the speech at issue in this case is even closer to the employee's core public function than was the speech in *Pickering* or *Givhan*. In those cases, the speech at issue bore a substantial relationship to the public responsibilities of the teachers. In this case, the speech at issue goes to the very essence of the health professional's public function. Indeed, the prohibited speech is inextricable from the function which publicly employed physicians are hired to perform. When the state hires

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17 The Supreme Court has repeatedly recognized that the right to speak includes the right to receive information. *See Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring); *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974); *Board of Educ. v. Pico*, 457 U.S. 853, 867-68 (1982) (plurality opinion).

18 On this basis, the Eighth Circuit held:

> "We can perceive of few obstacles more burdensome to the right to decide than a state-imposed blackout on the information necessary to make a decision."

Reproductive Health Servs., 851 F.2d at 1080.

a doctor, it necessarily engages her to provide sound medical care consistent with ethical and common law standards. The essence of that task is the giving of truthful and complete medical advice. Censorship of that advice in the name of "state policy" is totally inconsistent with the employee's public function.

Thus, whether measured by the intensity of the public health professional's interest in self-expression; the urgency of the patient's interest in receiving uncensored advice; or the incompatibility of censorship of medical advice with the health professional's public function, Missouri's attempt at turning health professionals into creatures of "state policy" cannot withstand First Amendment scrutiny.

While public employee speech cases provide a helpful framework within which to consider Missouri's attempt at censoring the medical advice of its public health professionals, the nature of the speech at issue here suggests an even more analogous line of authority—this Court's attempt to preserve academic freedom within the nation's publicly funded universities.[19] In a historic series of cases, the Court has recognized that the First Amendment limits the power of the state to interfere with the on-the-job speech of publicly funded university educators. *E.g.*, *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Sweezy v. New Hampshire*, 354 U.S. 234, 261-62 (1957) (Frankfurter, J., concurring); *Wieman v. Updegraf*, 344 U.S. 183, 195-97 (1952) (Frankfurter, J., concurring). *See also Epperson v. Arkansas*, 393 U.S. 97 (1968); *Edwards v. Aguillard*, 107 S.Ct. 2573 (1987); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

The Court's academic freedom cases reflect the collision of two principles—the power of the state to influence the speech of publicly funded educators through the selection of curriculum and general pedagogic policy, on the one hand; and the importance of intellectual freedom, critical inquiry, and open-

19 University professors, like physicians, have the highest interest in maintaining freedom of expression within the scope and in the course of performing their essential functions.

mindedness to the success of the educational mission on the other. *See Board of Educ. v. Pico*, 457 U.S. at 876-82 (Blackmun, J., concurring). But the state's interest in directing pedagogic policy fades in the university context because, as the Court has recognized, the free interplay of ideas is at the heart of higher education in a democracy.[20]

As Justice Frankfurter recognized in his concurrence in *Sweezy*, the state's power to regulate job-related, publicly funded speech, broad as it is, cannot destroy the freedom of a public educator to carry out the essence of his public function in a state university—the teaching of open minds. 354 U.S. at 261-63. Similarly, Missouri's power to regulate the speech of its public employees cannot destroy the freedom of a public health professional to carry out the essence of her public function—the provision of accurate and complete medical advice. Indeed, as strong as Justice Frankfurter's case for "academic freedom" may have been, the First Amendment argument in favor of "medical freedom" is even stronger.

Before in our nation's history, dedicated ideologues sought to use the public purse to prevent publicly-funded employees from fulfilling a professional duty to speak their minds. The targets were not public health professionals caught between their ethics and a ban on counseling abortion, but public school teachers caught between their duty to teach and a ban on espousing Darwinian theories of evolution in the classroom. *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927); *Epperson v. Arkansas*, 393 U.S. 97; *Edwards v. Aguillard*, 107 S.Ct. 2573. These cases upheld the freedom of teachers in the classroom. As the Court noted in *Epperson*, "[o]ur Courts . . . have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief." 393

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20 *See, e.g., Pico*, 457 U.S. at 920 (Rehnquist, J., dissenting) ("the government as educator is subject to fewer [constitutional] strictures when operating an elementary and secondary school system than when operating an institution of higher learning"); *Wieman*, 344 U.S. at 196-97 (Frankfurter, J., concurring).

U.S. at 104; *id.* at 115-16 (Stewart J., concurring) (based explicitly on academic freedom grounds).

If well-meaning zealots were not permitted to prevent public school teachers from educating students about the origins of human life, surely those who have succeeded in enacting the statutory gag challenged in this case cannot be permitted to prevent physicians from providing pregnant patients with encouragement and counseling about abortion.

II. MISSOURI'S ATTEMPT TO IMPOSE VIEWPOINT-BASED SPEECH RESTRICTIONS CONCERNING ABORTION ON HEALTH CARE PROFESSIONALS RECEIVING PUBLIC FUNDS VIOLATES THE FIRST AMENDMENT.

In a world where literally millions of Americans depend upon government-funded programs to provide them with critical guidance in areas as diverse as medical care, law, and higher education, the prospect of state manipulation of the free flow of information and advice from government-funded professionals to individual hearers in the name of advancing "state policy" poses an intolerable threat to First Amendment values.[21] One of the ultimate purposes of the First Amendment is the protection of the individual's capacity for informed and autonomous choice.[22] That capacity is seriously undermined when the state is permitted to censor the flow of publicly funded professional information and advice. Under such a regime, hearers are given the illusion of autonomous choice; but the reality of control rests with the state.

This case raises the question whether the state may compel subsidized health professionals to omit information about one

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21 *See* Yudof, *supra* note 11, at 157; *see also* Benshoof, *The Chastity Act: Government Manipulation of Abortion Information and the First Amendment*, 101 Harv. L. Rev. 1916, 1931-37 (1988).

22 *See Cohen v. California*, 403 U.S. 15, 24 (1971) ("putting the decision as to what views shall be voiced into the hands of each of us . . . [reflects] the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests").

side of a controversial health care decision in attempting to insure that the choices of individuals comport with government policy.[23] In seeking to couch the issue before the Court as a mere decision not to provide "public funds" for counseling or encouragement about abortion, Missouri has raised the First Amendment stakes. Instead of a relatively narrow statutory provision like Mo. Rev. Stat. § 188.210, which applied to a designated category of public employees, the flat ban imposed by § 188.205 on certain abortion-related speech by persons receiving "public funds" casts a larger net of censorship.[24] It appears to apply to every public employee, in every context; as well as to every private person receiving funds from the State.[25]

While willing government officials may speak in favor of one side of a controversial issue without automatically incurring an

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23 This question is more sharply presented in three cases currently pending in three United States Courts of Appeals. *New York v. Bowen*, 690 F. Supp. 1261 (S.D.N.Y. 1988), *appeal pending*, Nos. 88-6204/06 (2d Cir.); *Planned Parenthood Fed'n of Am. v. Bowen*, 680 F. Supp. 1465 (preliminary injunction), 687 F. Supp. 540 (permanent injunction) (D. Colo. 1988), *appeal pending*, No. 88-2251 (10th Cir.); *Massachusetts v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988), *appeal pending*, No. 88-1279 (1st Cir.). In these cases, the meaning and effect of the challenged federal regulations are undisputed: all non-pejorative speech about and referral for abortion are prohibited and physicians are simultaneously compelled to refer all pregnant patients for prenatal care. *See* 53 Fed. Reg. 2922-46 (1988) (to be codified at 42 C.F.R. §§ 59.2, 59.5, 59.7, 59.8, 59.9, 59.10).

24 If the state lacks the power to censor the speech of public employees who are paid entirely by the state, *see* Point I *supra*, it necessarily lacks the power to censor private physicians whom it only partially subsidizes.

25 Mo. Rev. Stat. § 188.200(3), quoted *supra* note 1, broadly defines "public funds" as those "received or controlled" by the State and, notwithstanding the Supremacy Clause of the United States Constitution, expressly purports to regulate federal funds as well. States may not, however, attach conditions to the disbursement of federal funds that exclude recipients who would otherwise be eligible under the federal enabling legislation and regulations. *See Townsend v. Swank*, 404 U.S. 282, 291 (1971); *King v. Smith*, 392 U.S. 309, 333 (1968); *Planned Parenthood Ass'n of Utah v. Dandoy*, 635 F. Supp. 184, 189-90 (D. Utah 1986); *see also Ridgway v. Ridgway*, 454 U.S. 46, 54-55 (1981).

obligation to subsidize their opponents;[26] and while public employees may be subjected to non-discriminatory rules requiring them to refrain from certain political activity that conflicts with their public function,[27] the government may not, consistently with the First Amendment, engage in viewpoint discrimination designed to force every subsidized individual or entity to present only one side of a controversial issue to the public. Under our Constitution the state lacks the power to turn its workforce into a propaganda machine that parrots the party line. *See generally*, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *Cammarano v. United States*, 358 U.S. 498 (1959).

For these reasons, the Supreme Court has consistently invalidated the uneven allocation of subsidies based on the viewpoint or content of the funded expression. In *FCC v. League of Women Voters*, 468 U.S. 364 (1984), this Court invalidated a ban on editorializing in stations receiving federal grants for public broadcasting because the ban was intended "to limit discussion of controversial topics and thus to shape the agenda for public debate." *Id.* at 384.[28] Similarly, in *Arkansas Writers' Project v. Ragland*, 107 S.Ct. 1722 (1987), the Court declared unconstitutional an Arkansas statute that taxed certain newspapers and magazines while exempting others: "official scrutiny

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26 Government officials need not subsidize the opposition every time the government speaks, but the First Amendment precludes the government from taking unfair advantage of its incumbency to advance its own positions. Thus, for example, government funds may not be used to pay for campaign activities. *See generally*, Yudof, *supra* note 11; Shiffrin, *supra* note 11. *See Block v. Meese*, 793 F.2d 1303, 1312-14 (D.C. Cir.), *cert. denied*, 478 U.S. 1021 (1986).

27 *See Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973); *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947).

28 Significantly, the four Justices who dissented in *FCC* did so because they viewed the editorializing ban as viewpoint neutral, not because they believed the government could condition a benefit on a viewpoint-discriminatory limit on speech. *Id.* at 407 (Rehnquist, J., dissenting) ("In no sense can it be said that Congress has prohibited only editorial views of one particular ideological bent").

of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment." *Id.* at 1728. *See also id.* at 1731 (Scalia, J., dissenting) ("a more stringent, prophylactic rule is appropriate . . . when the subsidy pertains to the expression of a particular viewpoint on a matter of political concern"); *Regan v. Taxation With Representation*, 461 U.S. 540, 548 (1983) (" '[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas' ") (citation omitted); *cf. Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 811-813 (1985) (plurality opinion) (remanding for determination whether exclusion of certain speech from a nonpublic forum was "in reality a facade for viewpoint discrimination"). Thus, while the State is free to speak in favor of childbirth, Missouri is not free to impose a viewpoint-based restriction on subsidized speech simply to advance this policy.[29]

Unlike most "government speech" cases, where the effect of the government's speech in favor of its policies is to increase the amount of information available to the public, Missouri asserts the power to prevent public health professionals from providing truthful advice to patients solely because the advice is contrary to government policy. Thus, Missouri seeks to advance its poli-

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29 *See also Gay & Lesbian Law Students Ass'n v. Gohn*, 850 F.2d 361, 366-68 (8th Cir. 1988) (public university may not withhold funding from student group because it "dislikes their ideas"); *Bullfrog Films v. Wick*, 847 F.2d 502, 509-10 & n.11 (9th Cir. 1988) (USIA may not deny films certification for exemption from import duties because of content of films or viewpoints expressed in them); *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1040 (D.C. Cir. 1980) (IRS may not deny tax exemptions under standards so imprecise that they risk viewpoint- or content-based discrimination in allocation of benefits); *American Council of the Blind v. Boorstin*, 644 F. Supp. 811, 815-16 (D.D.C. 1986) (Library of Congress may not stop subsidized production of braille editions of *Playboy* because of its sexual content). *See generally*, Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20 (1975); Stephan, *The First Amendment and Content Discrimination*, 68 Va. L. Rev. 203 (1982); Stone, *Content Regulation and the First Amendment*, 25 Wm & Mary L. Rev. 189 (1983).

cies in this case by selectively induced ignorance. *But see Griswold v. Connecticut*, 381 U.S. 479, 482 (1985) ("The State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge").

Missouri's assertion of the unchecked power to censor the medical advice of its public health doctors flows from a fundamental misconception. The State incorrectly assumes that because government is under no constitutional obligation to fund a particular medical procedure,[30] or to subsidize a given political activity,[31] it is free to prevent its medical employees from delivering truthful professional "counseling" about the advisability of engaging in the activity or procedure privately. Mo. Br. at 38-40. However, the power to refrain from subsidizing an activity does not translate into the power to ban truthful

30 *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977). In these cases, this Court held that the government need not reimburse the medical costs of certain abortions. The government's power to subsidize some medical procedures but not others does not mean, however, that government may discriminate in funding on the basis of a health care professional's viewpoint or speech about abortion. Free speech, particularly when exercised in furtherance of a constitutional right, is independently protected under the First Amendment. *Cf. Meyer v. Grant*, 108 S.Ct. 1886, 1893-94 (1988) (state power to limit gambling does not permit state to limit advocacy of legalization of gambling).

31 *Lyng v. International Union, United Auto., Aerospace and Agric. Implement Workers of Am.*, 108 S.Ct. 1184 (1988). In *Lyng* this Court upheld an amendment to the Food Stamp Act withholding benefits from the households of some striking workers. Although the denial of benefits may indirectly have coerced some workers to shun expressive activities, the amendment did not itself fund expression in a viewpoint-discriminatory manner. Had Congress established a special information bureau for the purpose of informing the public about the availability of welfare benefits, but required that strikers seeking information from the bureau not be told about the availability of food stamps or other benefits for which they would be eligible, then *Lyng* might bear upon this case. Further, unlike *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), this case does not involve a viewpoint-neutral decision to subsidize one category of private speaker, but not another. Rather, it is an unconstitutional attempt to dictate to subsidized health care professionals which views are permissible to express and which are forbidden. *Id.* at 548.

public employee speech about it when, as here, the speech is necessary to permit a hearer to make an informed choice about whether to engage in the activity with private funds.[32] When Missouri decides not to subsidize an activity, it makes a choice about the allocation of finite resources. When, however, Missouri attempts to prevent public health professionals from speaking truthfully about the medical advisability of an abortion, the State is no longer engaged in allocating its own resources; it is attempting to manipulate the private behavior of its citizens by controlling the flow of information to them. Such a regime is wholly antithetical to the postulates of a free society.

III. MO. REV. STAT. § 188.205 IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

Missouri suggests that the challenged provision does not forbid the dissemination of "information" about abortion, but withholds funding only from speech "affirmatively advocating" that a woman have an abortion. Mo. Br. at 42.[33] The statutory language does not, however, articulate any such intelligible distinction between abortion advocacy and other kinds of information or dialogue about abortion. Instead, it refers broadly to "counseling" which, in the context of delivery of health care, is susceptible to a wide range of interpretations. It could mean, for example: informing a woman that abortion is one legal and medically feasible option in her case; helping an individual to clarify her own responses to the abortion option;

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32 *Cf. FCC v. League of Women Voters*, 468 U.S. at 400 (government cannot dispense benefits in a way that inhibits party's use of its own funds to exercise fundamental right).

33 Missouri's claim that the statute merely assures neutrality on the issue of abortion would be more credible if the statute forbade the taking of a negative position on abortion as well as a positive one. Instead, Missouri has enacted a classic viewpoint-based speech restriction. *See* Point II *supra*. Further, the manifest impossibility of determining the point at which the permissible delivery of "information" about an abortion shades into impermissible "counseling or encouraging" abortion is what led the Eighth Circuit to hold the statute unconstitutionally vague. *Reproductive Health Servs.*, 851 F.2d at 1078.

providing the information that a woman seeking abortion would need in order to give her informed consent to the procedure; answering a woman's questions about different abortion procedures; or explaining to a woman why abortion would pose fewer risks than childbirth in her case. The State's effort in its brief to confine the statute's broad language cannot compensate for the absence of a clarifying construction by the Missouri courts, which are uniquely empowered to articulate saving constructions of vague state laws. *Smith v. Goguen*, 415 U.S. 566, 573 (1974).

Statutory provisions such as § 188.205, which do not clearly distinguish permissible from forbidden speech, violate the due process and free speech rights of those to whom they apply. *See, e.g., Kolender v. Lawson*, 461 U.S. 352, 358 (1983); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). *See generally*, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960).[34] This constitutional requirement of clarity in statutory drafting serves three related functions. First, it is designed to give fair notice of prohibited conduct. *E.g., Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). A statute that places a doctor's job on the line on the basis of what she says in the course of treatment cannot use terms so vague that she cannot discern in advance what speech is forbidden. The related concern that unclear statutory drafting causes people to steer wide of prohibited conduct is especially problematic when the statute touches speech, as does § 188.205. Undue self-censorship is constitutionally unacceptable. *E.g., City of Lakewood v. Plain Dealer Publishing Co.*, 108 S.Ct. 2138, 2144 (1988); *Kolender*, 461 U.S. at 358; *Bag-*

34 The Missouri statute is not exempt from a vagueness challenge because it imposes civil, not criminal, penalties. The same standard applies when First Amendment rights are implicated. Civil statutes that infringe on an employee's right to free speech have been held unconstitutionally vague. *See Keyishian v. Board of Regents*, 385 U.S. 589; *Baggett*, 377 U.S. 360; *Cramp v. Board of Educ.*, 368 U.S. 278 (1961). *See also Griacco v. Pennsylvania*, 382 U.S. 399 (1966); *A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233 (1925).

gett, 377 U.S. at 372. Finally, the vagueness doctrine is designed to place precise restrictions on the ability of enforcement officials to use the law to harass persons with whom they disagree. *E.g.*, *City of Lakewood*, 108 S.Ct. at 2144; *Smith v. Goguen*, 415 U.S. at 575; *Kolender*, 461 U.S. at 358. In the emotionally charged atmosphere of the debate over abortion, *see Thornburgh v. ACOG*, 476 U.S. at 771-72, this third prong of the vagueness doctrine is of particular significance. The Eighth Circuit was, thus, clearly correct when it invalidated Missouri's statutory scheme on vagueness grounds.[35]

Even if § 188.205 were capable of an occasional constitutional application, the provision is facially invalid because it is substantially overbroad. The unconstitutional operation of the Missouri statutory scheme to silence publicly employed health professionals, *see* Point I *supra*, will constitute the bulk of the statute's applications. The "substantial overbreadth" test enunciated in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), and *New York State Club Ass'n v. New York City*, 108 S.Ct. 2225 (1988), is, therefore, clearly satisfied. Moreover, even if the statute on its face distinguished between non-directive, psychotherapeutic, or informational counseling and affirmative medical advice, it would still reach protected speech. A doctor cannot be reduced to a passive repository of "information." Encouragement and directive advice in favor of medically indicated treatments are an integral part of the doctor's art. The statute is thus overbroad in this respect as well. *See generally*, *Houston v. Hill*, 107 S.Ct. 2502 (1987); *Board of Airport Comm'rs v. Jews for Jesus*, 107 S.Ct. 2568 (1987); *Schad v. Mt. Ephraim*, 452 U.S. 61 (1981); *Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Thornhill v. Alabama*, 310 U.S. 88 (1940). *See generally*, Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970).

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35 The vagueness of the statute has been exacerbated by Missouri's decision not to appeal § 188.210 thereby rendering the intended scope of § 188.205 unclear. As noted *supra*, if Missouri no longer intends to restrict the speech of public employees who would otherwise have been subject to the provisions of § 188.210, no case or controversy remains herein. *See* Brief of Appellee at _____.

IV. MISSOURI'S STATUTE SERVES NO COMPELLING STATE INTEREST NOR IS IT NARROWLY TAILORED.

Because the Missouri statutory scheme infringes upon cherished First Amendment guarantees, it can be justified only if it is narrowly tailored to serve a compelling state interest. *Ragland*, 107 S.Ct. at 1728.

The State advances one primary purpose in support of the statute: the desire "not to expend public funds . . . for the purpose of performing abortion services, including encouraging or counseling a woman to have an abortion . . . ." Mo. Br. at 38. This interest falls far short of "compelling."

While the government's "value judgment favoring childbirth over abortion" may be sufficient "under the less demanding test of rationality that applies in the absence of . . . the impingement of a fundamental right," *Maher*, 432 U.S. at 474, 478; *see also McRae*, 448 U.S. at 324, this interest is insufficient where, as here, First Amendment rights are violated. Insofar as Missouri sought to censor non-pejorative speech about abortion, this interest fails even a "rationality" test. A governmental "desire to suppress a particular point of view" is never "reasonable." *Cornelius*, 473 U.S. at 811-13 (plurality opinion); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

Nor has the State chosen narrow means. As shown *supra*, Point III, the terms "encouraging or counseling" are susceptible to myriad interpretations, and the prohibition on counseling and encouragement except when "necessary to save [the woman's] life," § 188.205, makes the ban applicable in nearly every medical setting. The State might have drafted a restriction reaching only speech inherently inconsistent with the physician's function, or it might have withheld funds only for the performance of abortions without restricting speech at all. *Cf. McRae*, 448 U.S. 297; *Maher*, 432 U.S. 464. Instead, it chose means that sweep with unconstitutional breadth over protected freedoms.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court affirm the decision of the United States Court of Appeals for the Eighth Circuit holding Missouri's law unconstitutional under the First Amendment.

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March 30, 1989