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 COMMITTEES ON CIVIL RIGHTS, MEDICINE AND LAW, AND SEX AND LAW OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND OTHERS† ON BEHALF OF APPELLEES

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March 30, 1989

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THE BEVERLY HILLS BAR ASSOCIATION

COMMITTEE ON WOMEN'S RIGHTS OF THE NEW YORK COUNTY LAWYERS' ASSOCIATION

LAWYERS CLUB OF SAN DIEGO, INC.

WOMEN'S BAR ASSOCIATION OF ILLINIOIS

WOMEN'S BAR ASSOCIATION OF THE STATE OF NEW YORK

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The Committees on Civil Rights, Medicine and Law, and Sex and Law of The Association of the Bar of the City of New York (the "Association") and others, with the consent of counsel to both parties, respectfully submit this brief in support of appellees.

INTEREST OF *AMICI CURIAE*

The Association of the Bar of the City of New York ("the Association"), chartered by the State of New York in 1871, is an organization of over 18,000 attorneys. While most of its members practice in the New York City metropolitan area, the Association has members in nearly every state and in 40 foreign countries. Two important purposes of the Association, as set forth in its Constitution, are "promoting reforms in the law" and "facilitating and improving the administration of justice". The Association accordingly has devoted itself to supporting and defending reforms in the law in cases of substantial public importance before the courts, including this Court.

The Association is committed to the principle of individual liberty enunciated in *Roe v. Wade*. In addition, as a professional group of practicing attorneys, the Association is always troubled when well settled cases of the Court, like *Roe v. Wade*, are threatened by litigants such as appellants, who would have the Court repudiate over 16 years of its own jurisprudence and that of the lower courts as well. Principles of *stare decisis* mandate that the continuity of well established decisions like *Roe v. Wade* should not be undermined by the considerations upon which the current challenge is grounded.

The Association is also committed to the right of women to secure information relating to reproductive decisions free from governmental coercion. The Association is particularly concerned that the questions presented by this appeal, if resolved in the way in which appellants suggest they should be resolved, would substantially curtail, if not altogether eliminate, the rights of women in this critical area of private concern.

The Association is equally committed to the right of freedom of expression, and believes that the statute at issue impinges upon the free speech rights of both physicians and their patients. Physicians and their patients share a relationship similar to that which exists between lawyers and their

clients. The Association's long–standing concern with legislation, like that at issue here, which interferes with the abilities of physicians and their patients to speak freely about reproductive alternatives compels it to urge affirmance of the decision below.

All of these issues are of great significance to the Association. It therefore urges that the Court uphold *Roe v. Wade* and the judgment of the court of appeals finding the Missouri statute in part unconstitutional.

The Arizona Attorneys Action Council is an organization of lawyers dedicated to the preservation of women's rights to the free exercise of family planning decisions, including the right to an abortion. The Council views any limitations on these rights as an invasion of women's right to privacy as protected by the United States Constitution.

The Beverly Hills Bar Association ("BHBA") is a voluntary bar association formed on December 2, 1931 which currently has 3,000 members. The members of BHBA practice in and around the City of Beverly Hills, California. BHBA is committed to the protection of individual liberties and to the promotion of respect for the legal system. BHBA believes that a reversal of the landmark decision in *Roe v. Wade* would impinge on individual liberties and would undermine public confidence in the legal system.

The Committee on Women's Rights of the New York County Lawyers' Association ("NYCLA") is a committee composed of both female and male attorneys who concentrate their efforts on the elimination of discrimination against women. Founded in 1908, NYCLA is a Bar Association with a membership of approximately 11,000 attorneys, most of whom live or work in New York County. NYCLA's concerns include civil liberties, among other issues of social and legal significance. The Committee on Women's Rights, created in 1972, has prepared reports, commented on legislation, organized forums on issues of concern to the legal

profession and participated as *amicus curiae* in litigation directed to the furtherance of women's and civil rights.

Lawyers Club of San Diego, Inc. ("Lawyers Club") is a California bar association founded in 1872, with current membership of almost 700 men and women, most of whom practice and reside in San Diego County, California. The purpose of Lawyers Club is "to advance the status of women in the law, to support and improve the administration of justice and to promote equality of the sexes in our society." The rights of liberty and privacy are key to equality of the sexes. Lawyers Club believes that any encroachment on the protections afforded by the Constitution and *Roe v. Wade* would destroy the fundamental rights of women to control their pregnancies and their bodies.

The Women's Bar Association of Illinois ("WBAI") was founded in 1914 for the purpose of promoting and fostering the interests and welfare of women and women attorneys and to maintain the honor and dignity of the legal profession. WBAI's 1,000 members have long campaigned for individual rights and liberties, including the right of women to make reproductive decisions free from governmental interference. WBAI has filed briefs *amicus curiae* before this Court on behalf of parties whose rights were in jeopardy, most recently on behalf of respondent in *Hishon v. King & Spaulding*, October Term, 1982, No. 82-940.

The Women's Bar Association of the State of New York ("WBASNY") is an organization of over 3,000 attorneys comprising fifteen chapters throughout the State. Founded in 1980, its stated purposes include the following: to cooperate with, aid and support organizations and causes which advance the status and progress of women in the society; to facilitate the administration of justice; and to cultivate the science of jurisprudence. The members of WBASNY support the principles enunciated in *Roe v. Wade*, including the recognition of a constitutionally guaranteed right to privacy.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision of the lower court was correct in all respects.[1] This brief addresses those issues on appeal of particular concern to *amici*: whether the Court should reconsider and overrule *Roe v. Wade*, 410 U.S. 113 (1973), and whether the lower court correctly held unconstitutional the Missouri statute's prohibition on "encouraging and counseling" a woman concerning abortion when her life is not at risk. *Amici* submit that the decision of the court of appeals should be affirmed for at least three reasons.

First, *Roe v. Wade* was correctly decided and has become a decision of great significance to millions of Americans who have premised their expectations about reproductive choices upon it. Principles of *stare decisis* dictate that this Court uphold *Roe v. Wade*. Indeed, in prior decisions reaffirming *Roe v. Wade* and applying its principles, the Court has expressly indicated its respect for *stare decisis*. Appellants have presented no evidence of changes in law or experience that now would warrant a different result. In addition, settled expectations premised upon *Roe v. Wade* also favor the Court's continued adherence to *stare decisis* and to the principles of *Roe v. Wade*.

Second, the court of appeals correctly applied the Court's principles in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), in holding unconstitutional that part of the Missouri statute which prohibits state and state-funded health care providers from "encouraging and counseling" a woman to have an abortion not necessary to save her life. *See Reproductive Health Service v. Webster*, 851 F.2d 1071, 1077-80 (8th Cir. 1988), *prob. juris. noted*, 109 S. Ct. 780 (1989). The Missouri statute clearly violates a woman's First and Fourteenth Amendment rights to liberty

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1 *Amici* assume that the parties will brief all issues before this Court on appeal and confine their focus to the three points addressed below.

and privacy. The Court has consistently held that the government may not interfere with a woman's fundamental right to decide, in consultation with her doctor, whether to terminate a pregnancy by precluding her from obtaining the very information necessary to make that decision. Missouri's statutory prohibition on the provision and receipt of information about abortion places an impermissible restriction on the counseling relationship and on a woman's range of choices.

Third, by prohibiting physicians from "encouraging and counseling" a woman to have an abortion not necessary to save her life, the Missouri statute violates the First Amendment free speech rights of health care providers and their patients by discriminating on the basis of viewpoint. While professional standards require that a physician disclose all relevant information to a patient, the Missouri statute would compel a health care provider to compromise professional obligations in the service of the state's views on abortion. The restrictions on disclosure also would have serious impact on the relationship between physician and patient, in which uncensored communication is essential to maternal and fetal health. The Court has held that dissemination of information about abortion is a protected form of speech. By providing public funding for reproductive health services but prohibiting dissemination by health care professionals of information about abortion, the Missouri statute unconstitutionally censors speech based on viewpoint.

I. *ROE v. WADE* SHOULD BE UPHELD.

A. *Roe v. Wade* was correctly decided.

Roe v. Wade, 410 U.S. 113 (1973), is a decision of great significance—both to the millions of women who rely on the constitutional protections recognized by the case and as the proclamation of a rule that sets the rights of the individual above the views of the state. As Justice Blackmun eloquently wrote, over a decade after *Roe v. Wade*:

> Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and

> autonomy, than a woman's decision—with the guidance of her physician and within the limits specified in *Roe*—whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 772 (1986).

In lieu of analyzing all the decisions that came after *Roe v. Wade*, all the commentary about the decision, and the suggested alternative grounds for the decision, we observe three important aspects of the decision that are as sound today as they were 16 years ago. First, the Court in *Roe v. Wade* was determined to resolve the issue "free of emotion" and based on the Constitution. 410 U.S. at 116-17. Second, both the majority and the dissenters believe that there is a fundamental constitutional right to liberty, which includes a woman's decision whether or not to bear a child. And third, a survey of the legal history of abortion indicates that only in modern times have there been statutes outlawing abortion.

In the current climate, it may be easy to forget that the controversy over abortion long preceded the decision in *Roe v. Wade*. As the Court wrote at the outset in *Roe v. Wade*:

> We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

> In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.
>
> Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection.

410 U.S. at 116-17.

This sentiment was echoed by the Court in 1986, in *Thornburgh v. American College of Obstetricians and Gynecologists*, when it said:

> Constitutional rights do not always have easily ascertainable boundaries, and controversy over the meaning of our Nation's most majestic guarantees frequently has been turbulent. As judges, however, we are sworn to uphold the law even when its content gives rise to bitter dispute. . . . We recognized at the very beginning of our opinion in *Roe*, . . . that abortion raises moral and spiritual questions over which honorable persons can disagree sincerely and profoundly. But those disagreements did not then and do not now relieve us of our duty to apply the Constitution faithfully.

476 U.S. 747, 771-72 (citations omitted).

Thus the continuing controversy over abortion is nothing new, and does not suggest a lack of constitutional validity in *Roe v. Wade*. Indeed, the fact that abortion is so controversial and that any decision on abortion is so deeply rooted in personal, moral and religious beliefs, argues in favor of leaving the choice to the individual—free from governmental actions that burden or restrict individual choices and possibilities.

Further, the legal basis for a constitutional liberty right is indisputably sound. The dissenters in *Roe v. Wade* have fully supported the Court's decisions recognizing a right to privacy and have accepted the precedent of *Griswold v. Con-*

necticut, 381 U.S. 479 (1965), from which *Roe v. Wade* evolved. *See Thornburgh*, 476 U.S. at 773-76 (Stevens, J., concurring). The *Roe* dissenters agreed 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". *Id.* at 776 (quoting *id.* at 790 (White, J., dissenting)).

Absent adoption of the view that life begins at conception, which would effectively create a federal law outlawing abortions in almost all circumstances—and which no Justice of this Court has ever accepted[2]—our constitutional system mandates that the abortion decision be left to the individual, not to state legislatures.

In addition, the Court in *Roe v. Wade* did an extensive survey of legal history in this area, which among other things uncovered that at common law, an abortion performed before "quickening", movement of the fetus in utero, was generally not a crime. After quickening, if abortion was a crime at all, it was a minor crime. *Id.* at 132-36.[3] Such was the law in the United States when the Constitution was written. *Id.* at 138, 140. This remained the law in all but a few states until the mid-19th century. *Id.* at 138. Gradually, beginning in the the mid-19th century, state statutory law replaced the common law, first imposing, then increasing the penalties on abortions. By the end of the 1950s, a large majority of states had statutes banning abortions other than those done to preserve the life of the mother. *Id.* at 139.[4]

Accordingly, three predicates of *Roe v. Wade*—the sensitive and controversial nature of the issue, the constitutional

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2 The *Roe v. Wade* dissenters refused to adopt the view that life begins at conception, instead positing a state interest in the potentiality of life represented by a fetus. *Id.* at 779 (Stevens, J., concurring) (citing *id.* at 792 (White, J., dissenting)).

3 As the Court wrote, anti-abortion legislation was "of relatively recent vintage". *Roe v. Wade*, 410 U.S. at 129.

4 See Brief *Amicus Curiae* of American Historians.

right to privacy, and the legal history of abortions—were sound when this Court rendered its decision and are equally sound today.

B. Principles of *stare decisis* dictate that *Roe v. Wade* should be upheld.

1. *Stare decisis* plays a crucial role in this case.

The doctrine of *stare decisis* is vital to maintain the appearance and actuality of fairness and impartiality by preserving the continuity of the Court's legal principles. In addition, *stare decisis* furthers the important goal of stability in the law, allowing individuals to rely on established legal principles to guide their behavior and affairs. The doctrine also promotes expeditious adjudication by limiting the need to relitigate issues. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970).

As the Court has made clear, *stare decisis* is not to be departed from lightly:

> *[S]tare decisis*, [is] the means by which we insure that the law will not merely change erratically, but will develop in a principled and intelligent fashion. That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.

Vasquez v. Hillery, 474 U.S. 254, 265-66 (1986).[5]

The Court has stressed that the doctrine shields the Court and its decisions "from the vicissitudes of political

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5 The crucial role of *stare decisis* has been repeatedly affirmed by the Court and by its Justices. *See, e.g.*, Sen. Com. on the Judiciary (afternoon sess., Dec. 14, 1987) (Transcript of Proceedings at 212, Miller Reporting Co., Inc., Washington, D.C.); Sen. Com. on the Judiciary, S. Hrg. 99-1064, Serial No. J-99-119, 99th Cong., 2d sess., at 32, 38 (Aug. 5 and 6, 1986); Sen. Com. on the Judiciary, S. Hrg., Serial No. J-97-51, 97th Cong., 1st Sess., at 83 (Sept. 9, 10 and 11, 1981).

controversy". As Justice Stevens wrote in a decision reaffirming *Roe v. Wade*:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.

Thornburgh, 476 U.S. at 782 n.12 (Stevens, J., concurring) (quoting *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943)); *see also Moragne v. States Marine Lines, Inc.*, 398 U.S. at 403.

As the Court recognized in *Roe v. Wade*, cases involving abortion should be decided "free of emotion and of predilection". 410 U.S. at 117. Adherence to *stare decisis* serves this purpose.

2. No change in law or experience has occurred to justify re-examining, much less overruling, *Roe v. Wade*.

As a general rule, *stare decisis* requires a significant change in facts or experience in order to overrule settled precedent. As the Court recently observed:

> While *stare decisis* is not an inexorable command, the careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged "to bring its opinions into agreement with experience and with facts newly ascertained." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting).

Vasquez v. Hillery, 474 U.S. at 266.

In rare cases, the Court has declined to apply the doctrine of *stare decisis* and have overruled a precedent when evolving law has so eroded the precedent or made it so inconsistent with other law that it has become a destabilizing and confusing aberration. *See Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272-77 (1980) (overruling decision interpreting full faith and credit clause because it had been previously narrowed so that it "no longer had any significant practical impact" and because other courts had "overwhelmingly" failed to follow it); *see also Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 391-93 (1983); *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 240-41 (1970).

Just the opposite has occurred with *Roe v. Wade*. In the over 16 years since the decision, the Court has reaffirmed and applied the holding that women have a constitutional right to make private choices on terminating pregnancy at least 13 times. *Connecticut v. Menillo*, 423 U.S. 9 (1975); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Harris v. McRae*, 448 U.S. 297 (1980); *Williams v. Zbaraz*, 448 U.S. 358 (1980); *H. L. v. Matheson*, 450 U.S. 398 (1981); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Planned Parenthood Ass'n. v. Ashcroft*, 462 U.S. 476 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

The Court has also cited *Roe v. Wade* as precedent in every term of the Court. Shepard's lists 177 entries for citations of *Roe* by this Court alone.[6]

Indeed, in two of the cases explicitly reconsidering and upholding *Roe v. Wade*, the application of *stare decisis* is discussed. *See Thornburgh*, 476 U.S. at 780-82; *City of Akron*,

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6 Shepard's United States Citations, entry for *Roe v. Wade*, 410 U.S. 113 (1973) (LEXIS, through 2/89 Supp.).

462 U.S. at 419-20 & n.1 (1982). In *City of Akron*, the Court wrote:

> [T]he doctrine of *stare decisis* while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law. We respect it today, and reaffirm *Roe v. Wade*. . . .
>
> There are especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe v. Wade*. That case was considered with special care. It was first argued during the 1971 Term, and reargued—with extensive briefing—the following Term. The decision was joined by THE CHIEF JUSTICE and six other Justices. Since *Roe* was decided in January 1973, the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy. [Citations omitted.]

462 U.S. at 419-20 & n.1. The principles set forth in *City of Akron* in 1982, for applying *stare decisis* to uphold *Roe v. Wade* are equally compelling today. *Roe* remains a carefully considered, albeit controversial, opinion. And since 1982, it has been repeatedly reaffirmed.

Further, the principle of *stare decisis* was invoked as recently as 1986, in reaffirming *Roe v. Wade*, and discussed at some length. Justice Stevens wrote:

> Nor does the fact that the doctrine of *stare decisis* is not an absolute bar to the reexamination of past interpretations of the Constitution mean that the values underlying that doctrine may be summarily put to one side. There is a strong public interest in stability, and in the orderly conduct of our affairs that is served by a consistent course of constitutional adjudication. Acceptance of the fundamental premises that underlie the decision in *Roe v. Wade*, as well as the application of

> those premises in that case, places the primary responsibility for decision in matters of childbearing squarely in the private sector of our society. The majority remains free to preach the evils of birth control and abortion and to persuade others to make correct decisions while the individual faced with the reality of a difficult choice having serious and personal consequences of major importance to her own future—perhaps to the salvation of her own immortal soul—remains free to seek and to obtain sympathetic guidance from those who share her own value preferences.
>
> In the final analysis, the holding in *Roe v. Wade* presumes that it is far better to permit some individuals to make incorrect decisions than to deny all individuals the right to make decisions that have a profound effect upon their destiny. . . . the lawmakers who placed a special premium on the protection of individual liberty have recognized that certain values are more important than the will of a transient majority.

Thornburgh, 476 U.S. at 780-82 (1986) (Stevens, J., concurring). In the majority opinion in *Thornburgh*, Justice Blackmun wrote:

> [I]t should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

Id. at 759 (Blackmun, J.) (quoting *Brown v. Board of Education*, 349 U.S. 294, 300 (1955)).[7]

Moreover, in the international arena, we are aware of only two nations that have recently drastically restricted abortions after initial liberalization: Rumania in 1984; and Iran after the fall of the Shah. H.P. David, *et al.*, ed., *Born Unwanted* § 17 (1988). Few governments more repressive and more antithetical to American democracy could be found.

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7 Moreover, Justice Stevens responded to the dissenting opinion in *Thornburgh*, which urged that *stare decisis* not be applied because the

In short, neither evolving law nor changing experience supports departure from the doctrine of *stare decisis* with respect to *Roe v. Wade*.[8]

3. Settled expectations militate against overruling *Roe v. Wade*.

One principle underlying *stare decisis* is the need for stability in the law, so that settled expectations are not thrown

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original decision in *Roe* was "mistaken." 476 U.S. at 787. The dissent had stated that "history has been far kinder to those who departed from precedent" that was incorrect, citing as examples the 1930s unwarranted restrictions on governmental power to enact social and economic legislation (*see United States v. Darby*, 312 U.S. 100 (1941); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)); and rejection of racially segregated schools (*see Brown v. Board of Education*, 347 U.S. 483 (1954)). *Id.* at 788 (White, J., dissenting). In addition to the response given by Justice Stevens, 476 U.S. at 779-82, it should be pointed out that in neither of the examples cited in the *Thornburgh* dissent was a decision overruled merely because it was mistaken; in each example there were also changes in law or experience. The decision in *United States v. Darby*, 312 U.S. at 115-17, cited the changing law in upholding a wage and hour statute. The decision in *West Coast Hotel Co. v. Parrish*, 300 U.S. at 397-400, cited the recent experience of the Depression and the exploitation of those with weak bargaining powers in upholding the minimum wage for women. The Court stated that the decisions those cases overruled were aberrations from established legal principles and precedents. Further, *Brown v. Board of Education* was expressly based on the prior erosion of the separate but equal doctrine in cases involving graduate education, 347 U.S. at 491-92, and the then current experience in public education, *id.* at 492-95.

8 Appellants rely upon medical evidence of fetal viability to justify revisiting and overruling *Roe v. Wade*, suggesting that this evidence constitutes a change in facts sufficient to overcome *stare decisis*. This approach is erroneous for two reasons. First, the earliest time at which a fetus can survive has changed little since *Roe v. Wade*. *See* Brief *Amicus Curiae* of the American Medical Association *et al.* *See also* Report of The Committee on Fetal Extrauterine Survivability to the New York State Task Force on Life and the Law (Jan. 1988). Second, *Roe v. Wade* does not turn upon a particular point of viability; it simply permits abortions up to the point of viability, as determined by the physician. *See* 410 U.S. at 164-65. Thus, Missouri's attempt to use fetal viability as a lever to overturn *Roe v. Wade* must fail, as the profferred evidence does not undermine the principle of the case. The other change, the increasing safety of abortions, only supports *Roe*. *See City of Akron*, 462 U.S. at 429 n. 11.

into chaos. As the Court described this principle, termed "the mainstay of *stare decisis*":

> [it is] the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; . . .

Moragne v. States Marine Lines, Inc., 398 U.S. at 403.

The need for preserving settled expectations is particularly acute in the context of *Roe v. Wade*. Decisions involving pregnancy, children, marriage and relationships have long-term consequences that cannot easily be undone. Moreover, such decisions impact more strongly on the lives of the women and men who make them than decisions in any other sphere.

There are many circumstances in which the decision about whether to carry a fetus to term impacts irrevocably on the lives of the woman involved. *See* Brief *Amicus Curiae* of Women Who Have Had Abortions and Others Who Have Supported Them in That Choice in Support of Appellees.

Roe v. Wade has become an accepted part of the judicial landscape. Expectations premised upon it should not be overturned, nor should the case.

4. The overruling of *Roe v. Wade* would place an extraordinary burden on New York State.

As an organization chartered by the State of New York and composed of a membership largely residing in or practicing in the New York City area, the Association is particularly concerned with the impact on New York City and New York State were the Court to overrule *Roe v. Wade*, as are other New York *amici*. That impact may be gauged by the burden resulting from the large number of nonresident women seeking abortion in New York State subsequent to the State's 1970 amendment of its penal law to permit abortion under certain circumstances and prior to the Court's decision in *Roe v.*

Wade.[9] In the face of a reversal of *Roe v. Wade*, New York and other states whose laws permit abortion would once again be overburdened with nonresidents seeking abortion. In all likelihood, that burden would be even greater today, given the increased acceptance of abortion since *Roe v. Wade*.

* * *

In sum, any decision overruling *Roe v. Wade* would be a departure from the Court's long history of adhering to its prior positions, absent compelling reasons to do otherwise. Neither changes in the law nor experience since *Roe* support its overruling. Further, it is important to maintain settled expectations with regard to family life and pregnancy. As Justice Holmes wrote:

> [I]mitation of the past, until we have a clear reason for a change, no more needs justification than appetite. It is a form of the inevitable to be accepted until we have a clear vision of what different things we want.

Thomas v. Washington Gas Light Co., 448 U.S. at 272 n.17 (1980) (quoting O. Holmes, Collected Legal Papers 290 (1920)). Holmes's words are as apt today—in the context of *Roe v. Wade*—as when he first penned them.

II. THE MISSOURI STATUTE IMPERMISSIBLY BURDENS A WOMAN'S FUNDAMENTAL PRIVACY RIGHT TO MAKE INFORMED REPRODUCTIVE DECISIONS.

The Court has consistently recognized that a woman's fundamental right to decide, in consultation with her doctor, whether to terminate a pregnancy is part of her constitutionally protected right to liberty and privacy. *Roe v. Wade*, 410

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9 *See* Brief of the Attorneys General of the States of New York *et al.* as *Amici Curiae* in Support of Appellees for a discussion of the history of New York's abortion legislation and the significant number of nonresident women obtaining abortions in New York State subsequent to adoption of that legislation and prior to *Roe v. Wade*.

U.S. 113 (1973); *City of Akron v. Akron Center for Reproductive Health Inc.*, 462 U.S. 416 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986). In order to protect this fundamental right, the Supreme Court has consistently struck down laws that would obstruct the decision-making process by requiring that health care providers disseminate incomplete information designed to steer a woman's choice in favor of childbirth.

In *Akron*, the Court declared unconstitutional a statute compelling physicians to communicate specific information "designed to influence the woman's informed choice between abortion or childbirth". 462 U.S. at 444. The Court explained: "By insisting upon recitation of a lengthy and inflexible list of information, Akron unreasonably has placed obstacles in the path of the doctor upon whom [the woman is] entitled to rely for advice in connection with her decision". *Id.* at 445 (quoting *Whalen v. Roe*, 429 U.S. 589, 604 n.33 (1977)).

The principle that the government may not unduly interfere with a woman's right to privacy by precluding her from obtaining the very information necessary for her to make constitutionally protected reproductive choices was reaffirmed in *Thornburgh*. There, the Court struck down a state statute requiring a physician to provide a woman with a list of agencies offering alternatives to abortion as "nothing less than an outright attempt to wedge the [government's] message discouraging abortion into the privacy of the informed consent dialogue between the woman and her physician". 476 U.S. at 762.

The court of appeals correctly followed the principles of *Thornburgh* and *Akron* in holding that the part of the Missouri statute prohibiting state and state-funded health care providers from "encouraging or counseling" a woman to have an abortion not necessary to save her life is unconstitutionally vague and an impermissible invasion of a woman's First and Fourteenth Amendment rights to liberty and privacy. *See Reproductive Health Service v. Webster*, 851 F.2d at 1077-80.

The statute's prohibition of encouraging or counseling women about abortion as an option to childbirth is directly at odds with *Akron* and *Thornburgh*. Through this prohibition, Missouri interferes with the woman's decision-making process, and places an impermissible "straitjacket" on the counseling relationship, thus precluding the right to informed consent. *Thornburgh*, 476 U.S. at 762, (quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 67 n.8 (1976)).

The Court's decisions in *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), relied upon erroneously by appellants, are in fact supportive of appellees. Both *McRae* and *Maher* stand for the proposition that although the state does not have to provide the benefit of abortion services through subsidy of abortion procedures, it cannot unduly burden a woman's decision whether to have an abortion. In both cases, the statutes involved funded childbirth but not abortion, but neither statute prevented a woman from exercising her constitutional right to have an abortion. As the Court observed in *McRae*, an indigent woman was left with "at least the same range of choice in deciding whether to obtain a[n] . . . abortion as she would have had if Congress had chosen to subsidize no health care costs at all". *Id.*, 448 U.S. at 317.

Unlike the restrictions at issue in *Maher* and *McRae*, the Missouri law would not leave a woman with the same range of choices she otherwise has because it would drastically restrict the information that a woman may receive regarding reproductive options. Under the Missouri statute, a doctor would be prohibited from "counseling" a woman about her option to have an abortion even when the doctor believes the procedure is medically indicated, although not technically necessary to save her life.

Women are entitled to obtain all medical information relevant to a diagnosed pregnancy. *Roe v. Wade* recognized that carrying a pregnancy to term is generally more dangerous

than a first trimester abortion. 410 U.S. at 149.[10] Pregnant women are entitled to know this and any other relevant medical information. In addition, the pregnant woman who suffers from diabetes, hypertension or sickle-cell anemia would not be told that carrying the fetus to term is a serious threat to her future health and that termination of the pregnancy is a medically indicated option. Such a woman would have no opportunity to decide whether to terminate her pregnancy, a decision protected by the Constitution. She would be denied information or deliberately misinformed, because for her doctor to share such information might well be construed to be "counseling an abortion". Under Missouri's law, women's trust in their doctors would be dangerously misplaced, and women would be misled by partial information, dangerously eroding the physician-patient relationship. *See Cobbs v. Grant*, 8 Cal. Rptr. 229, 243, 104 Cal. Rptr. 505, 514, 502 P.2d 1, 9 (1972).[11]

Equally important, the Court in *Roe v. Wade* recognized the unconditional and constitutionally protected right of a woman to consider and have an abortion up to the point of fetal viability. This right would be substantially impaired by the Missouri statute.

Missouri's statute would create an unwarranted burden on a woman's constitutional right of privacy and would differ substantially from a state's simple refusal to subsidize a

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10 In *Akron*, the Court recognized that since *Roe*, "the safety of second-trimester abortions has increased dramatically". 462 U.S. at 435-36. Recent medical literature indicates that the risk of death from legal abortion is no higher at any point in gestation than in carrying a pregancy to term. *See* Brief *Amicus Curiae* of National Abortion Rights Action League and authorities cited therein.

11 The doctor-patient relationship is based on trust and recognized by law as a fiduciary relationship. Because patients must be able to rely on their physicians to act in good faith and in their best interest, principles of law and ethics require physicians to do so. The physician thus has an obligation to be truthful, to respect the rights of the patient, and to disclose to the patient all pertinent facts regarding the patient's condition and treatment options including the risks and benefits of each.

woman's right to terminate her pregnancy. It would cast its net much further than either *McRae* or *Maher* permits. Under those cases, a woman is free, after obtaining the information upon which to make a decision, to proceed to obtain medical assistance outside of a government subsidized program. In this case, however, women, and particularly the many pregnant teenagers who avail themselves of public services, would be kept ignorant, or worse, would be misled about their options. The court of appeals was therefore correct when it said:

> Missouri is not simply declining to fund abortions when it forbids its doctors to encourage or counsel women to have abortions. Instead, it is erecting an obstacle in the path of women seeking full and uncensored medical advice about alternatives to childbirth. The state's limitation on doctor-patient discussions reflects the state's choice for childbirth over abortion in a way that prevents the patient from making a fully informed and intelligent choice.

Webster, 851 F.2d at 1080.

The "blackout" on abortion information that would be imposed by the Missouri law strikes at the heart of the right announced in *Roe v. Wade* and reaffirmed in *Akron* and *Thornburgh*: the right to be free from unwarranted governmental interference in the inherently private process of deciding, in consultation with experts, whether or not to bear a child. By requiring physicians and health professionals in state funded programs to withhold relevant health information from pregnant women, the Missouri statute would mislead women and prevent them from freely making an informed choice between childbirth and abortion.

III. THE MISSOURI STATUTE VIOLATES THE FIRST AMENDMENT FREE SPEECH RIGHTS OF HEALTH CARE PROVIDERS AND THEIR PATIENTS BY DISCRIMINATING ON THE BASIS OF VIEWPOINT.

A. Medical standards of care require speech about all reproductive alternatives, including abortion.

The First Amendment issue raised by the Missouri statute is simple and significant. The Missouri statute would compel what the First Amendment expressly forbids by restricting expression "because of its message, its ideas, its subject matter, or its content". *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972).

The Missouri statute makes it "unlawful" for a doctor, nurse, social worker or other health care provider "who is a public employee within the scope of his public employment to encourage or counsel a woman to have an abortion not necessary to save her life". Mo. Ann. Stat. § 188.210. This provision would have a devastating impact on the First Amendment rights of government-funded health care providers as well as their patients.[12] By requiring physicians and other health care professionals to withhold information from their patients, contrary to standards promulgated by their professional organizations, the statute would interfere with the constitutional rights of health care providers freely to express their professional opinions.

1. Health care providers have a duty to provide information about abortion.

Once a health care provider accepts a patient, he or she must exercise the standard of care expected of a reasonably prudent member of the profession by providing appropriate referrals and seeking informed consent for treatment, such as provision of contraceptives. Professional standards require

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12 First Amendment protections extend to the physician as well as the patient who receives the information. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976).

performing a pregnancy test before prescribing contraceptives and counseling a patient on health risks and reproductive alternatives, including abortion.[13]

In decision after decision, courts have held that a physician has a duty to disclose all relevant information to a patient. *See, e.g., Betesh v. United States*, 400 F. Supp. 238, 247 (D.D.C. 1974) ("[A] physician undertaking a physical examination has a duty to disclose what he had found and to warn the examinee of any finding that would indicate that the patient is in danger and should seek further medical evaluation and treatment."); *Union Carbide & Carbon Corp. v. Stapleton*, 237 F.2d 229, 232-33 (6th Cir. 1956) (A patient has a right to "rely on the expectation that he would be told of any dangerous condition actually disclosed by [the] examination."); *Bonaparte v. Floyd*, 291 S.C. 427, 354 S.E.2d 40, 45 (Ct. App. 1987) (physician must properly refer patient and provide relevant information); *Truman v. Thomas*, 27 Cal. 3d 285, 293, 165 Cal. Rptr. 308, 312, 611 P.2d 902, 906 (1980) (physician obligated to provide patient "[a]ll the information material to [the patient's] decision"); *Lindquist v. Dengel*, 92 Wash. 2d 257, 595 P.2d 934, 937 (1979) ("[T]o delay a referral . . . could itself be a breach of the general practitioner's duty."); *Lee v. Andrews*, 545 S.W.2d 238, 243 (Tex. Ct. App. 1976) (failure by physician to refer medical problems he cannot treat to specialist may be malpractice). A physician's duty is no less when the information concerns abortion and its alternatives; and a state may not, consistent with constitutional principles, compel a health care provider to com-

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13 *See American Public Health Association Recommended Program Guide for Abortion Services (Revised 1979)*, 70 Am. J. Pub. Health 652 (1980); American College of Obstetricians and Gynecologists, *Standards for Obstetric-Gynecologic Services* (6th ed. 1985), American Academy of Pediatrics, *Pregnancy and Abortion Counseling*, 63 Pediatrics 920 (1979); American Psychological Association, *Ethical Principles of Psychologists*, 36 Am. Psychologist 580, 633-38 (1981); American Medical Association, *Current Opinions of the Council on Ethical and Judicial Affairs* (1986); American Psychiatric Association, *Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry* (1981).

promise professional obligations in the service of the state's particular views on any subject, including abortion.[14]

2. Uncensored communications between physician and patient are essential to maternal and fetal health.

The right to make fully informed medical decisions is grounded in the "well-recognized common-law right of self-determination that '[e]very human being of adult years and sound mind has a right to determine what shall be done with [her] own body. . . .'" *In re Farrell*, 108 N.J. 335, 347, 529 A.2d 404, 410 (1987) (quoting *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 129-130, 105 N.E. 92, 93 (1914)). The censored speech on the part of health care professionals required by the Missouri statute would have a devastating effect on pregnant women. The relationship between health care provider and patient is generally marked by an imbalance in knowledge. A patient often has a "dependence upon and trust in [her] physician for the information upon which [she] relies during the decisional process, thus raising an obligation in the physician that transcends arms-length transactions". *Cobbs v. Grant*, 8 Cal. 3d 229, 242, 104 Cal. Rptr. 505, 513, 502 P.2d 1, 9 (1972).

The element of trust in her health care provider is particularly important when a woman has just been told that she is pregnant. At that moment, she may be upset and frightened, uncertain as to what she should do. She will often turn to her health care provider for the accurate, complete, and unbiased information she needs to make decisions. If the government steps between the doctor and patient at the precise moment when she most needs a trusting relationship,

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14 Indeed, a number of state courts have found that physicians have a duty to inform parents at risk of giving birth to a child with a disability of prenatal diagnostic tests, if they are available, and of the option of abortion. *See, e.g., Phillips v. United States*, 508 F. Supp. 544 (D.S.C. 1981); *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979); *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807 (1978).

the relationship is tainted; indeed, it is likely to be destroyed, leaving the client without any assistance and reluctant to seek health care at all.

Good communication between physician and patient promotes a number of important therapeutic goals. Patients who are involved in making decisions about their own treatment are "likely to emerge from therapy in better health". President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Making Health Care Decisions: the Ethical and Legal Implications of Informed Consent in the Patient-Practitioner Relationship*, Vol. 1 at 69 (1982). This is because patients who are fully informed by their physicians about their conditions and the treatment alternatives are more likely to comply with proposed therapies, have reduced levels of anxiety, experience speedier recovery, and protect their own well-being by monitoring their medication dosages or by recognizing and reporting any symptoms requiring reevaluation of a particular therapy. *Id.* at 69-70. Moreover, patients who make informed decisions about their health care are more likely to advance their own life plans. *Id.* at 70. In particular, women who have a full range of reproductive options open to them in an environment supportive of their needs are more likely to take charge of their lives and their fertility.[15]

B. Abortion information is a protected form of speech.

The dissemination of information about abortion has been recognized as a protected form of speech. *Bigelow v. Virginia*, 421 U.S. 809 (1975). In *Bigelow*, the Court held a state statute making it a misdemeanor to encourage abortion unconstitutional. The Court found that advertisement of

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15 *See* Birdsall & Chester, *Contraception and the Status of Women: What is the Link?*, 19 Fam. Plan. Persp. 14, 17 (1987) ("Low fertility . . . is not sufficient or even necessary for improving the status of women. Rather, women's knowledge that they can control the timing of their childbearing enlarges [their] economic choices and enhances their status."); Adler, *Sex Roles and Unwanted Pregnancy in Adolescent and Adult Women*, Prof. Psychology 12, 63 (1981).

abortion services was a form of expression protected by the First Amendment.[16]

The Court consistently has struck down regulations that limit expressions of opinion on issues of public controversy. *See, e.g., Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980); *FCC v. League of Women Voters*, 468 U.S. 364 (1984). The prohibited information here is similarly of great public interest. Not only would those who need abortion services be denied the information, but those interested in reproductive health also would be deprived of access to unbiased information as well as opinions about abortion.

C. The Missouri statute unconstitutionally censors speech on the basis of viewpoint about abortion.

In funding reproductive health services, Missouri has opened a forum for the discussion of pregnancy and reproductive health. Information is provided through reproductive counseling as well as through libraries in public facilities containing comprehensive references on health care, including books, pamphlets and individual materials for patient and public use. Having opened this forum, the government must maintain strict viewpoint neutrality and ensure that the information given is nondiscriminatory.

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16 Accordingly, other courts have granted First Amendment protection to such speech. *Planned Parenthood v. Arizona*, 718 F.2d 938, 942 (9th Cir. 1983), *appeal after remand*, 789 F.2d 1348 (9th Cir.), *aff'd mem. sub nom. Babbitt v. Planned Parenthood*, 107 S. Ct. 391 (1986); *Planned Parenthood Ass'n v. Fitzpatrick*, 401 F. Supp. 554, 577-78 (E.D. Pa. 1975), *aff'd mem. sub nom. Franklin v. Fitzpatrick*, 428 U.S. 901 (1976). *Planned Parenthood Ass'n v. Kempiners*, 531 F. Supp. 320, 330-33 (N.D. Ill. 1981), *vacated and remanded on other grounds*, 700 F.2d 1115 (7th Cir.), *on remand*, 568 F. Supp. 1490 (N.D. Ill. 1983); *Valley Family Planning v. North Dakota*, 489 F. Supp. 238, 242 (D.N.D. 1980), *aff'd on other grounds*, 661 F.2d 99(8th Cir. 1981); *DKT Memorial Fund Ltd. v. Agency for International Development*, 691 F. Supp. 394 (D.D.C. 1988); *Massachusetts v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988); *Planned Parenthood Federation v. Bowen*, 680 F. Supp. 1465 (D. Colo. 1988). *But see New York v. Bowen*, 690 F. Supp. 1261, 1273 (S.D.N.Y. 1988), *appeal filed*, No. 88-6204 (2d Cir. filed 1988).

For example, in *Board of Education v. Pico*, 457 U.S. 853 (1982), a plurality of the Court held that, despite a school board's broad discretion in determining how to spend its money on books for the school library, if board members ordered the removal of books with the intent "to deny respondents access to ideas with which petitioners disagreed", their action would violate the Constitution. *Id.* at 871.[17]

Constitutional principles of viewpoint neutrality dictate that the allocation of public funds may not be motivated by the desire to suppress "unacceptable" ideas while subsidizing "acceptable" ones. In *FCC v. League of Women Voters*, 468 U.S. 364, 383-84 (1984), the Court struck down a ban on editorializing by publicly funded radio stations because the ban was "motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest". *Id. See also Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (government regulation of publications on the basis of their content violates the First Amendment.)[18] As the Court has observed, "where the State's interest is to disseminate an ideology, no

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17 *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 (United States Information Agency may not deny various benefits, including certification for exemption from import duties, because of content of films or viewpoints expressed therein); *American Council of the Blind v. Boorstin*, 644 F. Supp. 811, 815-16 (D.D.C. 1986) (Library of Congress may not stop government-subsidized production of Braille editions of *Playboy* because of the sexual content of the magazine).

18 Missouri argues that its statute simply effects a legislative decision not to fund activities promoting abortion and accordingly does not implicate free speech principles, invoking *Harris v. McRae*, 448 U.S. 297 (1980). *See* Brief for Appellants at pp. 35-38. *McRae* is not supportive of Missouri's position, however, because it is impossible to distinguish family planning counseling that includes information on abortion from counseling that does not without restricting freedom of expression.

Nor do *Regan v. Taxation with Representation*, 461 U.S. 540 (1983) ("*TWR*"), or *Lyng v. United Auto Workers*, 108 S. Ct. 1184 (1988), apply. In *TWR*, the Court upheld against a First Amendment challenge the provision

matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such a message". *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).[19]

By forcing the physician—viewed by the patient as the source of accurate, impartial medical information—to act as the mouthpiece for the government's disapproval of abortion, Missouri unconstitutionally circumvents the First Amendment while minimizing women's access to abortion information. Its statute simply does not withstand scrutiny.

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of the Internal Revenue Code denying tax-exempt status to organizations, a substantial part of whose activities consists of lobbying. In *Lyng*, the Court found constitutional an amendment to the Food Stamp Act prohibiting a grant of food stamps to a striker's household when need is based on income loss during a strike. In both cases, the Court found that the challenged legislation simply represented a decision not to subsidize particular kinds of activity–political lobbying (*TWR*) and striking (*Lyng*). In contrast, abortion counseling cannot be viewed as a distinct activity, such as lobbying or going on strike, which the government may refuse to subsidize without encroaching on First Amendment concerns. Missouri has decided to provide its citizens with information about reproductive health services. Although it need not pay for abortions, it may not prohibit its employees even from mentioning them.

19 In *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 800 (1985), the Court upheld an Executive Order banning access by legal defense and political advocacy organizations to a forum only because the ban was viewpoint neutral. The Court noted, moreover, that even a facially neutral regulation would fall if it were "in reality a facade for viewpoint-based discrimination". 473 U.S. at 811. The Missouri statute explicitly discriminates on the basis of viewpoint about abortion and thus fails *Cornelius*' test.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to uphold *Roe v. Wade* and to affirm the decision of the Court of Appeals for the Eighth Circuit in this case.

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March 30, 1989

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