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 Amicus Curiae for American Jewish Congress,
Board of Homeland Ministries — United Church of Christ,
National Jewish Community Relations Advisory Council,
The Presbyterian Church (U.S.A.) by James E. Andrews
as Stated Clerk of General Assembly,
The Religious Coalition for Abortion Rights,
St. Louis Catholics for Choice,
and thirty other religious groups.**

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Question Presented.

Did the Court of Appeals for the Eighth Circuit properly apply this Court's decision in *Roe* v. *Wade,* 410 U.S. 113 (1973) in protecting the privacy and freedom of conscience and religion of pregnant women?

Table of Contents.

Question presented i

Table of authorities iv

Interest of amici curiae 2

Statement of the case 4

Summary of argument 4

Argument 6

I. The Missouri statute impermissibly intrudes upon individual decisions protected by the right to privacy and by the free exercise clause of the First Amendment 6

A. Private decisions over family life are doubly protected by the Constitution's respect for individual privacy and the Constitution's commitment to religious liberty 7

B. By restricting abortion, the Missouri statute unconstitutionally invades private religious freedoms assured protection for individuals by the free exercise clause and demanded by the variety of religious views about abortion 10

II. The free exercise clause withdraws subjects of religious conscience from the vicissitudes of political controversy and is never more important than when heated and hostile political debate endangers religious freedom 20

Conclusion 22

Table of Authorities Cited.

Cases.

Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) 7, 10

Boddie v. Connecticut, 401 U.S. 371 (1971) 9

Bowen v. Roy, 476 U.S. 693 (1986) 19

Cantwell v. Connecticut, 310 U.S. 296 (1940) 19

Colautti v. Franklin, 439 U.S. 379 (1979) 7

Eisenstadt v. Baird, 405 U.S. 438 (1972) 8

Griswold v. Connecticut, 381 U.S. 479 (1965) 8, 9

Harris v. McRae, 448 U.S. 297 (1980) 17n

Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) 19

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Loving v. Virginia, 388 U.S. 1 (1967) 8

Maher v. Roe, 432 U.S. 464 (1977) 11n

McRae v. Califano, 491 F. Supp. 630 (E.D.N.Y. 1980) 11n, 12, 14, 15

Meyer v. Nebraska, 262 U.S. 390 (1923) 8n

Moore v. East Cleveland, 431 U.S. 494 (1977) 9

Paul v. Davis, 424 U.S. 693 (1976) 8n

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Planned Parenthood v. Danforth, 428 U.S. 52 (1976) 8, 10

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Roberts v. United States Jaycees, 468 U.S. 609 (1984) 8n

Roe v. Wade, 410 U.S. 113 (1973) i, 3, 7, 10, 16 et seq

Sherbert v. Verner, 374 U.S. 398 (1963) 19

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United States v. Seeger, 380 U.S. 163 (1965) 19

Wallace v. Jaffree, 472 U.S. 38 (1985) 22

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 18, 20, 21, 22

Wisconsin v. Yoder, 406 U.S. 205 (1972) 8, 9, 19

Wooley v. Maynard, 430 U.S. 705 (1977) 18

Zablocki v. Redhail, 434 U.S. 374 (1978) 9

CONSTITUTIONAL PROVISIONS.

United States Constitution

First Amendment 4, 5, 6, 7, 8 et seq.

Fourteenth Amendment 5, 7, 8n

STATUTE.

Missouri Law

Sections 1.205.1(1), 188.025, 188.029, 188.039, 188.205, 188.210 and 188.215 7n

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Feldman, D., Marital Relations, Birth Control, and Abortion in Jewish Law 271-284 (1974) 15

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Zwerin, R. and R. Shapiro, Judaism & Abortion 1-4 (1987) 15

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Brief Amicus Curiae for Albuquerque Monthly Meeting of Religious Society of Friends, American Friends Service Committee, American Humanist Association, American Jewish Committee, American Jewish Congress, Americans for Religious Liberty, Anti-Defamation League of B'nai B'rith, B'nai B'rith Women, Board of Homeland Ministries — United Church of Christ, Commission on Social Action of Reformed Judaism, The Episcopal Diocese of Massachusetts — Women in Crisis Committee, The Episcopal Diocese of New York, Episcopal Women's Caucus, Federation of Reconstructionist Congregations and Havurot, General Board of Church and Society — The United Methodist

Church, Institute of Women Today, Jewish Labor Committee, NA'MAT, National Assembly of Religious Women, National Council of Jewish Women, National Federation of Temple Sisterhoods, National Jewish Community Relations Advisory Council, North American Federation of Temple Youth, The Presbyterian Church (U.S.A.) by James E. Andrews as Stated Clerk of General Assembly, The Religious Coalition for Abortion Rights, St. Louis Catholics for Choice, Union of American Hebrew Congregations, Unitarian Universalist Association, Unitarian Universalist Women's Federation, United Church of Christ Coordinating Center for Women, United Church of Christ Office of Church in Society, Washington Ethical Action Center of the America Ethical Union, Women in Ministry — Garrett Evangelical Seminary, Women in Mission and Ministry — Episcopal Church U.S.A., Women's League for Conservative Judaism, The Right Reverend Bill Burrill, Bishop of the Episcopal Church of Rochester; The Right Reverend Barbara C. Harris, Suffragan Bishop of the Episcopal Church of Massachusetts; The Right Reverend Edward W. Jones, Bishop of the Episcopal Church of Indianapolis; The Right Reverend David E. Johnson, Bishop of the Episcopal Church of Massachusetts; The Right Reverend Coleman McGehee, Bishop of the Episcopal Church of Michigan; The Right Reverend John S. Spong, Bishop of the Episcopal Church of Newark; The Right Reverend John T. Walker, Bishop of the Episcopal Church of Washington, D.C., and The Right Reverend O'Kelley Whitaker, Bishop of the Episcopal Church of Central New York, as Amicus Curiae Supporting Appellees.

Interest of Amici Curiae.

Amici are religious organizations and representatives of religious groups dedicated to preserving religious freedom for

all persons, and to protecting a woman's right to terminate her pregnancy in consultation with her religious conscience. Associated with a variety of religions, amici are organizations including the American Friends Service Committee, the American Jewish Committee, the American Jewish Congress, the Anti-Defamation League of B'nai B'rith, the Episcopal Diocese of New York, the Presbyterian Church (U.S.A.) by James E. Andrews as Stated Clerk of General Assembly, the Religious Coalition for Abortion Rights, and the St. Louis Catholics for Choice. The thoughtful statements of interests provided by individual organizations, included here as Appendix A at 1a, demonstrate their unique and contrasting perspectives on the issues of religious conscience and abortion, and their shared commitment to the Constitution's removal of these issues from gov ernmental control. A full listing of the amici curiae signing this brief in support of respondents appears as Appendix B at 14a. Amici received leave to file this brief from the parties in this action.

As organizations representing a variety of sincere religious perspectives, the amici object to any governmental attempts to interfere in the exercise of individual religious conscience with regard to procreative choice. Because the amici recognize the many divergent theological answers to the questions raised by abortion, the amici agree that each woman should be free to consult with her religious convictions, as well as her best medical advice, without governmental coercion or constraint when exercising religious and personal conscience in making a decision whether to terminate her pregnancy. The amici therefore object to Missouri's attempts to regulate a woman's decision whether to obtain an abortion, and support the reaffirmation of *Roe* v. *Wade,* 410 U.S. 113 (1973), as a necessary means of protecting each person's ability to exercise freedom of religion and conscience.

Statement of the Case.

Amici adopt the Statement of the Case set forth by the appellees.

Summary of Argument.

Abortion is undoubtedly one of the most hotly debated issues in this country. The debate reveals profound religious disagreement. Views range from the belief that abortion is a sin forbidden by divine authority to the view that abortion may be a religious obligation if needed to preserve the life or well-being of the pregnant woman. Even a brief examination of the religious beliefs of the Roman Catholic Church, the Baptist Churches, the Episcopal Church (USA), the United Church of Christ, the Presbyterian Church, the United Methodist Church, and the Orthodox, Conservative, Reform, and Reconstructionist traditions of Judaism reveals the immensely varied and intensely sincere religious differences about this important issue of procreative judgment.

Given the dramatically contrasting religious views about whether and when abortion is permitted or required, state statutes drastically curtailing access to abortion unacceptably interfere with constitutionally protected religious and private conscience. Missouri's ban against abortion in public facilities, its ban against counseling about abortion by public employees, and its pronouncement that life begins at conception impermissibly invade religious liberty and freedom of conscience. Even though the Missouri law makes no mention of religion, it violates the Free Exercise Clause of the First Amendment. Especially in this sensitive area of great religious concern, public orthodoxy must be restrained and private conscience must be protected.

The Court of Appeals for the Eighth Circuit properly concluded that the Missouri statutes restricting abortion violated the constitutional injunction to place certain kinds of governmental activities out of bounds. This constitutional injunction relies on the First Amendment's guarantees of religious freedom as well as the right to privacy founded in the Fourteenth Amendment. The Missouri statutes thus are doubly defective: they abridge the right to privacy and also the doctrines preserving freedom of conscience and religion.

Both the right of individual privacy and the right of religious liberty protect critical decisions about whether to marry or divorce, and whether to conceive and bear a child. The Constitution has long provided, and must continue to assure, protection against governmental arrogation of crucial decisions which require the guidance of religious teachings and individual conscience.

If this Court were now to overturn its consistent position and to invite state legislation constraining or prohibiting abortion, the result would be extensive and disturbing government embroilment with matters of private religious conscience. Religiously-inspired proponents on all sides of this issue would besiege state legislators. State law-makers would be consumed by the enormous divisions between and even within religious groups on the issue of abortion. Public spaces would be occupied by religious controversies likely to erupt in acts of intolerance and violence. It is just these dangers that the Free Exercise Clause meant to avoid.

This Court's vigilant protection of the privacy of pregnant women is not a decision to favor or even approve abortion, but instead a commitment to preserve individual autonomy. That, of course, must be the lodestar in a country as diverse and as committed to freedom as ours. The Court's role in preserving the space for the free exercise of personal and religious conscience is never more crucial than where there is

massive public turmoil surrounding the subject. Otherwise, majorities, and even effectively mobilized minorities, can invoke the power of the state to curb the religious freedoms of those they do not like. The amici joining in this brief attest to the profound, prayerful commitments of extraordinarily diverse religious groups to this vision of tolerance enacted in our Constitution. It is this nation's strength that our Constitution can elicit the trust of peoples across diverse and clashing faiths. In the face of so complex and inescapably private a matter as the decision to terminate or continue a pregnancy, this Court should not now betray the people's trust by allowing a state to undermine the mandated respect for religious liberty and personal conscience.

Argument.

I. The Missouri Statute Impermissibly Intrudes upon Individual Decisions Protected by the Right to Privacy and by the Free Exercise Clause of the First Amendment.

Decisions about family life are of such pre-eminent, foundational importance in our nation that this Court has afforded the double protection of precedents under the rights of both personal privacy and religious liberty. Both lines of precedent assure not only a limited government, but also a sphere of private pursuits informed by each individual's religious traditions and personal conscience. Missouri's regulation of abortion impermissibly constrains private decision-making over basic family choices accorded protection by this Court. This

Court therefore should affirm the decision by the Eighth Circuit Court of Appeals.[1]

A. *Private Decisions over Family Life Are Doubly Protected by the Constitution's Respect for Individual Privacy and the Constitution's Commitment to Religious Liberty.*

The constitutional commitment to protect personal privacy is part of the larger constitutional scheme that places certain kinds of governmental activities out of bounds. That larger scheme significantly relies on the First Amendment's guarantees of religious freedom as well as the right to privacy founded in the Fourteenth Amendment. The subjects of procreation, contraception, and abortion are private in two major respects: they involve the fundamental privacy of each individual and the importantly private enclaves of religious and community groups. The constitutional challenges to the Missouri law carry the double force of doctrines developed under the right of privacy and doctrines preserving freedom of conscience and religion.

Thus, the Eighth Circuit Court of Appeals reached a conclusion compelled not only by this Court's decisions in *Thornburgh* v. *American College of Obstetricians and Gynecologists,* 476 U.S. 747 (1986); *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Colautti* v. *Franklin,* 439 U.S. 379 (1979); *Roe* v. *Wade,* 410 U.S. 113 (1973).

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[1] The Court of Appeals rejected sections of the Missouri law that banned the use of public funds for encouraging or counseling a woman to have an abortion not necessary to save her life, requiring doctors to perform viability tests, forbidding any public employee from encouraging or counseling a woman to have an abortion not necessary to save her life, forbidding the use of any public facilities for that purpose, and declaring that life begins at conception. Sections 1.205.1(1), 188.025, 188.029, 188.039, 188.205, 188.210, and 188.215 of the Missouri law, which appear in the Jurisdictional Statement Appendix at A87-A91, will hereinafter be described in this brief as "the Missouri law."

In addition, the constitutional right to privacy enforced in these decisions is underscored and bolstered by the command of the Free Exercise Clause of the First Amendment. Together, the right of privacy and the right to religious liberty exclude the state from personal decisions about the critical issues of family life, reproduction, and child-rearing. See *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976) (privacy); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972) (privacy); *Loving* v. *Virginia*, 388 U.S. 1 (1967) (privacy and equality); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) (privacy); and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) (free exercise). Missouri's law impermissibly secularizes these choices. The state law constrains critical, private choices about child-bearing and thereby burdens the free exercise of religion and its crucial component, protection of individual conscience.

It is not by accident that this Court's historic protections for families draw on both notions of individual privacy and notions of religious liberty.[2] Deciding whether to marry or divorce, and whether to conceive and bear a child are simultaneously matters of individual choice and religious significance. The Constitution has provided, and must continue to assure, protection against governmental arrogation of crucial decisions which require the guidance of religious teachings and individual conscience.

[2] Whatever its specific sources in the Constitution, the privacy right accords with a conception that family decisions should be free from state control. " '[M]arriage, procreation, contraception, family relationships, and child rearing and education' . . . 'while defying categorical description,' identify certain zones of privacy in which personal relationships or decisions are protected from government interference." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 631 (1984) (O'Connor, J., concurring) (citing *Paul* v. *Davis*, 424 U.S. 693, 713 (1976)); *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923) ("Without doubt, [liberty guaranteed in the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.")

Under the Constitution, this Court consistently has guarded family decisions from invasive state regulations. The Court has guaranteed parents the right to select private, religious schools for instructing their children, *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925) and the right to an exemption from compulsory schooling laws where those laws contradicted a particular religious way of life, *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972). Similarly, the Court has rejected state efforts to burden access to divorce, *Boddie* v. *Connecticut,* 401 U.S. 371 (1971), and also rejected state burdens on access to marriage even when pursued to enforce previously incurred child support obligations, *Zablocki* v. *Redhail,* 434 U.S. 374 (1978). Deference to the special, even sacred, realm of the family guides the Court's guarantees of private choice about marriage, procreation and contraception. *Griswold* v. *Connecticut,* 381 U.S. 479 (1965): "We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Id.* at 486. Similarly, this Court has long "'respected the private realm of family life which the state cannot enter,'" see *id.* at 495 (Goldberg, J.) (quoting *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944)). See also *Moore* v. *East Cleveland,* 431 U.S. 494 (1977) (city's zoning restrictions cannot prevent family members' choice to live together). The Court's vigilant protection of family privacy properly and necessarily allocates to private individuals the decision to proceed with or to terminate a pregnancy before the state's interest in potential life develops sufficient strength to overcome the state's interest in preserving the health, welfare, and choice of the woman. This Court has properly respected the demand for particularized decisions made in the context of any individual woman's life, personal autonomy, religion, and medical advice. No generalized legislative decision, removed from the

particular family context, could protect the private realm nor acknowledge the critical role for individual religious belief and conscience in what may be a most difficult moment.

The Court's position on this issue is not a decision to favor or even approve abortion, but instead a commitment to preserve the privacy and autonomy of a pregnant woman. Her decision, made in the context of her unique family and community situation, is a matter of her own conscience. This explains *Thornburgh* v. *American College of Obstetricians and Gynecologists,* 476 U.S. 747 (1986); *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Planned Parenthood* v. *Danforth,* 428 U.S. 52 (1976); *Roe* v. *Wade,* 410 U.S. 113 (1973). Any contrary course would permit — indeed, elicit — state encroachment into this constitutionally protected subject. It would inject secular authority where only religious and private conscience belong. That is precisely what both the right to privacy and the Free Exercise Clause of the First Amendment prohibit. State regulations of abortion like the Missouri statute not only violate the sanctity of individual decisions about family life, but also intrude upon intense religious controversies over matters reserved by the Constitution to private individuals.

B. *By Restricting Abortion, the Missouri Statute Unconstitutionally Invades Private Religious Freedoms Assured Protection for Individuals by the Free Exercise Clause and Demanded by the Variety of Religious Views About Abortion.*

Abortion is undoubtedly one of the most hotly debated issues in this country; the debate reveals profound religious disagreement. Views range from the belief that abortion is a sin forbidden by divine authority to the view that abortion may be a religious obligation if needed to preserve the life or well-being

of the pregnant woman. Still another view maintains that promotion of responsible parenthood and preservation of the health and well-being of existing, living persons rank among the highest, religiously commanded obligations. The issue of abortion obviously raises fundamental questions of sincere religious belief and intense religious differences.

Over 200 diverse religious groups in the United States[3] espouse starkly different and mutually inconsistent views about abortion.[4] For example, the official doctrine of the Roman Catholic church declares abortion to be immoral and asserts that life must be safeguarded from conception.[5] Some Roman Catholics, however, have explored and advocated religious views that tolerate abortion under some circumstances.[6]

Among the Baptist Churches, denominational pronouncements reflect the views and guidance of elected representatives, but are non-binding in matters of conscience. Historically, abortion has been treated generally as a matter for individual conscience in keeping with the religion's foundation in indi-

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[3] See Constant Jacquet, ed., Yearbook of American and Canadian Churches 238 (1984) (describing 219 religious bodies in the United States).

[4] This summary draws in part on testimony relied on by the district court in *McRae* v. *Califano,* 491 F. Supp. 630, 697-698 (E.D.N.Y. 1980). Although this Court reversed the decision in that case, and upheld the Hyde Amendment forbidding the use of federal Medicaid funds for abortion except where the woman's life would be endangered, the Court relied on a defect in party standing and did not pass on the free exercise claim for which the district court's opinion is cited here. This Court has also indicated that a special concern for burdens on free exercise of religion are raised where government funds are conditioned upon restrictions on abortion. *Maher* v. *Roe,* 432 U.S. 464, 474 n.8 (1977).

[5] The Declaration on Abortion of the Sacred Congregation for the Doctrine of Faith (1974), cited in *McRae* v. *Califano,* 491 F. Supp. 630, 693 (E.D.N.Y. 1980).

[6] See, e.g., Baum, Abortion: An Ecumenical Dilemma, Commonweal 231 (Nov. 30, 1973); Segers, Abortion and the Culture, in Abortion 229 (S. Callahan & D. Callahan, eds., 1984). See also L. Pfeffer, Religion, State, and the Burger Court 240-241 (1984) (describing Catholic groups for private choice over abortion).

vidual voluntary baptism and commitment to responsible families and parenthood. See *McRae* v. *Califano*, 491 F. Supp. 630, 697-698 (E.D.N.Y. 1980) (citing testimony of Dr. James Wood, Executive Director of the Baptist Joint Committee on Public Affairs). In 1967, the American Baptist Churches, USA, adopted a resolution to support legalization of abortion to protect the physical and mental health of the mother, to provide choices for women whose pregnancies resulted from rape, incest, or failed contraception or other unwanted circumstances. *Id.* at 699. The General Board of American Baptist Churches, USA, opposed the efforts of the National Conference of Catholic Bishops to use secular law to prohibit abortion, and resolved that ". . . we believe that the present effort of the National Conference of Catholic Bishops in the U.S.A. to coerce the conscience and personal freedom of our citizens through the power of public law in matters of human reproduction constitutes a serious threat to that moral and religious liberty so highly prized by Baptists." *Id.* at 699. Some Baptists have dissented from this view and organized religious groups against abortion. The denomination's stand was changed in 1988 to reflect the diversity of theological beliefs about abortion present within its membership.

The Episcopal Church USA reaffirmed in its 1988 General Convention its support for women's rights over their own bodies through a resolution first passed in 1967. That resolution states: "Resolved: The position of this Church, stated at the 62nd General Convention of the Church in Seattle in 1967, which declared support for the 'termination of pregnancy' particularly in those cases where 'the physical and mental health of the mother is threatened seriously, or where there is substantial reason to believe that the child would be badly deformed in mind or body, or where the pregnancy has resulted from rape or incest' is reaffirmed. Termination of pregnancy for these reasons is permissible." Letter from Ann Smith, Office

of the Presiding Bishop and the Executive Council of the General Convention, The Episcopal Church Center (March 6, 1989). Authorities for the Church note that this position has been consistent and unchanging, and that the Church stands firm in its resolve both to be pastorally supportive of women in their choices and to work to maintain a society where they do indeed have constitutionally guaranteed choices.

Similarly, the General Synod of the United Church of Christ resolved in 1979 to reaffirm full freedom of choice for the persons concerned in making decisions regarding pregnancy, to affirm "the fact that, since life is less than perfect and the choices that people have to make are difficult, abortion may sometimes be considered," and to affirm that "God calls us when making choices, especially as these relate to abortion, to act faithfully." United Church of Christ, Abortion: A Resolution of the 12th General Synod of the United Church of Christ, 1979 (Public Policy Pamphlet 12GS-12).

Some organized religious groups adhere to basic respect for individual conscience about abortion precisely because of the variety of views held by members of those groups. Thus, the policy statement contained in Covenant and Creation: Theological Reflections on Contraception and Abortion, adopted by the 195th General Assembly of the Presbyterian Church (1983), states that "The Presbyterian Church exists within a very pluralistic environment. Its own members hold a variety of views. It is exactly this plurality of beliefs that leads us to the conviction that the decision regarding abortion must remain with the individual, to be made on the basis of conscience and personal religious principles, free from governmental interference." Just as the decision to become a parent requires a responsible exercise of stewardship, reflecting moral and religious concerns, so does the decision to not become a parent. Moreover, this Presbyterian approach emphasizes that God alone is Lord of the conscience, and that God gives each indi-

vidual faced with a moral choice arising from sexual activity the power and the freedom to make moral choices regarding even the most serious questions. *Id.* at 49.

In addition, through its General Assembly, the Presbyterian Church (U.S.A.) by James E. Andrews as Stated Clerk of General Assembly has stated that any decision concerning an abortion should be made as early as possible, generally within the first trimester of pregnancy, for reasons of a woman's health and safety. It affirms, however, that abortions should not be used as a method of birth control; it also maintains that abortions later in pregnancy should be an option, particularly in the case of women of menopausal age who do not discover they are pregnant until the second trimester, women who discover through fetal diagnosis that they are carrying a fetus with a grave genetic disorder, or women who did not seek or have access to medical care during the first trimester. This Presbyterian statement adds that at the point of fetal viability, abortions should be available only in the rarest of instances involving, for example, the late diagnosis of grievous genetic disorders.

Other Protestant Churches have declared their support for a woman's choice regarding abortion because of potential risks to the life or physical or mental health of the mother, because of concerns about the social situation in which the infant might be born, and because of instances of severe deformity of the fetus. *McRae* v. *Califano*, 491 F. Supp. 630, 700 (E.D.N.Y. 1980) (citing testimony of Reverend John Wogaman, United Methodist minister). As a matter of religious belief, many Protestant theologians maintain that "human personhood . . . does not exist in the earlier phases of pregnancy." *Id.* at 701 (testimony of Reverend John Wogaman). The United Methodist Church, for example, resolved in 1976 to affirm the " 'principle of responsible parenthood' and the right and duty of married persons prayerfully and responsibly to control conception according to their circumstances." *Id.* at 701. In contrast, repre-

sentatives of the Lutheran Church-Missouri Synod testified before a Senate subcommittee that in their religion, human life begins with fertilization, but any threat to the life of the pregnant woman must be resolved in her favor. *Id.* at 695. That Church also supports private decisions to terminate pregnancies under some other circumstances. *Id.* at 696.

Within the Jewish tradition, there is considerable agreement that the fetus is not a person before birth and that abortion therefore is not murder, and may be permitted, and indeed required in situations where the life of the mother is threatened. D. Feldman, Marital Relations, Birth Control, and Abortion in Jewish Law 271-284 (1974); R. Zwerin and R. Shapiro, Judaism & Abortion 1-4 (1987). See also Rabbi Hayim Halevy Donin, To Be a Jew: A Guide to Jewish Observance in Contemporary Life Selected and Compiled from the Shulhan Arukh and Responsa Literature and Providing a Rationale for the Laws and Traditions 140-141 (1972) ("All halakhic scholars agree that therapeutic abortions — namely, abortions performed in order to preserve the life of the mother — are not only permissible but mandatory.") Beyond these points of virtual consensus, however, different branches of Judaism, and different groups within each branch, hold divergent views about the legal and moral status of abortion and about the circumstances under which it is permitted.

Within the different strands of Orthodox Judaism, for example, there is vehement disagreement as to whether a nontherapeutic abortion is akin to homicide, whether avoiding severe mental anguish of the mother is an adequate basis for permitting an abortion of a fetus with severe defects, and whether it is permissible to include in the choice of an abortion consideration of the potential suffering of a severely disabled fetus carried to term. See D. Feldman, Marital Relations, Birth Control, and Abortion in Jewish Law 284-294 (1974); I. Jacobovits, Jewish Views of Abortion in F. Rosner and J.D.

Bleich, Jewish Bioethics 118 (1979); J.D. Bleich, Abortion in Halachic Literature, in F. Rosner and J.D. Bleich, Jewish Bioethics 134 (1979). See generally F. Rosner, Modern Medicine and Jewish Ethics (1986). It is hardly surprising that there is vigorous disagreement among contemporary Orthodox rabbis, since the great sages such as Maimonides and Rashi expressed contrasting fundamental assumptions concerning abortion.

Conservative, Reform, and Reconstructionist branches of Judaism — and some orthodox groups — share a more liberal approach to abortion in contrast to most Orthodox views, and have endorsed the existing rules set forth in *Roe* v. *Wade* in order to assure that individual women may treat an abortion decision in light of their own religious and moral views. See Statement of Interest of National Jewish Community Relations Advisory Council (Appendix A). Even in these branches, however, authorities differ considerably about the circumstances under which abortion is permitted or required. Many consider abortion to be a religious duty, a duty resembling obligations to observe religious rituals, when a pregnancy threatens a woman's life or health. Some would protect a woman's choice to abort simply as a matter of her entitlement to control her own destiny. M. Bial, Liberal Judaism at Home: The Practices of Modern Reform Judaism 12-13 (Rev. ed. 1971). See also Testimony of Rabbi Balfour Brickner, Statement of the Religious Coalition for Abortion Rights Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, U.S. House of Representatives (March 24, 1976). Others emphasize the risks to a woman's physical, psychological, and emotional well-being that may be presented by a pregnancy as critical reasons for permitting abortion. The different positions taken in the debates about the Jewish position on abortion reflect not personal preferences, but instead the divergent religious sources, for rabbinic *responsa* — the

answers written by leading rabbis to disputes about observance since the tenth century — permit multiple, conflicting interpretations of the Jewish position on abortion.

Given the contrasting views about abortion within and across religious groups, it is obvious that many strongly held religious beliefs directly clash with the Missouri law.[7] That law interferes with the religious lives of those who are adherents to these beliefs, just as interference with religious beliefs would arise if a state were to adopt a law mandating abortion under specified circumstances. Adjudicating among diverse religious beliefs is precisely what the government must not do under the constitution. Political contests animated by the contrasting views of religious groups over religious practices are precisely what the Free Exercise Clause sought to seal off from governmental purview. The government must not intervene to try to settle the critically important, vociferous, multi-sided religious argument. As this Court announced in *United States* v. *Ballard,* 322 U.S. 78, 87 (1944): "The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them and of the lack any one religious creed on which all men would agree. They

[7] This is not a claim, under the Establishment Clause, that the government may not adopt one religious view over others if, as this Court decided *Harris* v. *McRae,* that the law happens to coincide with the religious views of some. 448 U.S. 297, 319-320 (1980). Instead, the objection here is that certain topics require protection against state regulation if the free exercise of religion is to mean anything. Basic decisions about procreation and termination of pregnancies epitomize such topics, in light of the massive and deep disagreement among religions over these issues. We do not argue here for religious exemptions to Missouri's law not only because that would be impracticable, given the large numbers of people whose religious beliefs are burdened by the law. Even more importantly, any process providing for exemptions would be insufficient protection of religious freedom, given the intrusion any process for considering exemption would itself place on the individuals facing intimate decisions involving procreation and termination of pregnancy. This Court's rulings on the dangers of government entanglement with religion would apply in any case-by-case evaluation of religious beliefs about abortion. See *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971).

fashioned a charter of government which envisaged the widest possible toleration of conflicting views."[8]

For vast numbers of people, abortion raises issues of religious belief and individual conscience. Regulation of abortion by the states — regulations like Missouri's ban against abortion in public facilities, and its ban against counseling about abortion by public employees, invade religious liberty and freedom of conscience.[9] That people disagree intensely over abortion is no reason for this Court to fail to protect religious liberty here. As this Court announced in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642 (1943), the Free Exercise Clause most importantly protects views over which people vehemently disagree: "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." See also *Wooley* v. *Maynard*, 430 U.S. 705 (1977).

Nor can the Missouri statute avoid challenge because it makes no mention of religion or because organized religious groups themselves disagree about abortion. This Court has held, time and time again, that a facially neutral statute may

[8] The opinion continued, "Man's relation to God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views," *id.*, and, given the presence of Edna Ballard as one of the respondents in that case, "man" here was obviously meant to include women whose religious views and private decisions are of prime significance in this case.

[9] For some people, decisions about procreation and abortion are fundamentally matters of personal conscience. For them, no less than for those who cite religious belief, the First Amendment guarantees protection. Religious freedom belongs with freedom of speech together in the First Amendment because "[t]he First Amendment gives freedom of mind the same security as freedom of conscience." *Thomas* v. *Collins*, 323 U.S. 516, 531 (1945). See also *Prince* v. *Massachusetts*, 321 U.S. 158, 164-165 (1944). Both for pregnant women contemplating abortion and for governmental health care professionals who deal with pregnant patients, Missouri's statute presents untenable restrictions on the mere discussion of the possibility of terminating a pregnancy.

offend the Free Exercise Clause, *Hobbie* v. *Unemployment Appeals Comm'n,* 480 U.S. 136 (1987); *Wisconsin* v. *Yoder,* 406 U.S. 205, 220 (1972). See also *Bowen* v. *Roy,* 476 U.S. 693, 728-732 (1986) (O'Connor, J., concurring in part and dissenting in part) (rejecting argument that any facially neutral and uniformly applied governmental requirement can withstand challenge under the Free Exercise Clause if it is a reasonable means of promoting a legitimate public interest). A person's religious beliefs that diverge from views held by others within a given faith have long been, and must be protected by the Free Exercise Clause, for it to be a guarantee of *individual* religious liberty. See *Thomas* v. *Review Board of the Indiana Employment Sec. Division,* 450 U.S. 707, 715 (1981). Cf. *United States* v. *Seeger,* 380 U.S. 163, 176 (1965) (interpreting statutory exemption from military draft to encompass not only religious belief in a Higher Being but also "A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption").

The Free Exercise Clause of the First Amendment should control this case. Missouri cannot claim that the Free Exercise Clause guarantees only people's freedom to hold pro-choice views, but not their freedom to obtain an abortion in any public facility, to discuss the matter with any public employee, or to act contrary to a state law declaring that human life begins at conception. The Free Exercise Clause guards much religiously inspired conduct, not just religious views. *Wisconsin* v. *Yoder,* 406 U.S. 205, 219-220 (1972); *Cantwell* v. *Connecticut,* 310 U.S. 296, 303-304 (1940). In the context of religious freedoms, this constitutional protection applies where the government withholds a benefit as much as when it imposes a penalty. *Sherbert* v. *Verner,* 374 U.S. 398, 404 (1963); *Bowen* v. *Roy,* 476 U.S. 693, 726-733 (1986) (O'Connor, J., concurring in part and dissenting in part). Finally, Missouri cannot justify

the burdens on religious belief imposed by its law by referring to its preamble, deeming the fertilized egg a human life, as the kind of compelling state interest required by this Court to overcome the demands of the Free Exercise clause. This Court rejected the idea that "when life begins" can be treated as a factual question, *Roe* v. *Wade*, 410 U.S. 113 (1973). As a matter of faith, the question thus falls within the sphere guarded from public orthodoxy by the Free Exercise Clause.[10]

II. The Free Exercise Clause Withdraws Subjects of Religious Conscience from the Vicissitudes of Political Controversy and Is Never More Important than when Heated and Hostile Political Debate Endangers Religious Freedom.

If this Court were now to overturn its consistent position and to invite state legislation like Missouri's statute, or even more punitive prohibitions of abortion, the result would be extensive and disturbing governmental entanglement with matters of private religious conscience. Religiously-inspired proponents on all sides of this issue would besiege state legislators. State legislatures, in turn, will unavoidably become embroiled in the enormous divisions between and even within religious groups on the issue of abortion. It is just these dangers that the Free Exercise Clause was meant to avoid.

This Court's vital statement is especially apt at this time: "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 estab-

[10] The Missouri law's preamble bears no resemblance to a plausible recognition that changing technology and medical science may alter the timing of viability. Instead, the definition of human life at conception raises the spectre of state regulation of contraception as an alleged interference with human life.

lish 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 vote; they depend on the outcome of no election." *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 638 (1943).

This Court's role in preserving space for the free exercise of religion is never more crucial than when there is massive public turmoil surrounding the subject. Otherwise, majorities, or even effectively mobilized minorities, can invoke the power of the state to curb the religious freedoms of those they do not like; otherwise, we risk escalating intolerance not only toward isolated groups on specific issues, but toward anyone who does not abide by the religiously inspired views pursuing the instruments of state power. History tells us that such intolerance often simmers just beneath the surface; the destruction of the churches of Jehovah's Witnesses who declined to salute the flag [11] and contemporary public violence at abortion clinics provide vivid examples. Vehement public ferment on the subject of abortion is bound to emerge if this Court allows the interference with free exercise represented by the Missouri statute. [12]

The Free Exercise Clause of the First Amendment makes explicit a courageous and unparalleled American vision of tolerance for differences which includes, by necessity, gov-

[11] Rotmem & Folsom, Recent Restraints on Religious Liberty, 36 Am. Pol. Sci. Rev. 1053, 1061-62 (1942).

[12] Withdrawing abortion from the hot lights of politics would not prevent anyone from working for political solutions to the desperate need many women find for a solution to a pregnancy they cannot manage. Efforts to promote contraception, and adoption, to control rape and incest, to enable women to say no to unwanted sexual encounters, and to provide economic security to permit women to bear and raise children would all remain available and potentially effective measures. Giving women choices not to become pregnant before they already are or means to protect the child after birth would reduce, if not eliminate, the place of abortion in private decision-making.

ernmental restraint. " 'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.' " *Wallace* v. *Jaffree*, 472 U.S. 38, 55 (1985) (quoting *West Virginia State Board of Education* v. *Barnette*, 319 U.S. at 642). This Court has long been the eloquent defender and enforcer of this vision, and adherence to that role has never been more important than at this time.

Conclusion.

For the foregoing reasons, the decision for the Court of Appeals should be affirmed.

Respectfully submitted,

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