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 OF THE CENTER FOR JUDICIAL STUDIES AND CERTAIN MEMBERS OF CONGRESS IN SUPPORT OF APPELLANTS

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BRIEF AMICUS CURIAE OF THE CENTER FOR JUDICIAL STUDIES AND CERTAIN MEMBERS OF CONGRESS IN SUPPORT OF APPELLANTS

INTEREST OF THE AMICI CURIAE

The Center for Judicial Studies, Cumberland, VA 23040, is a tax-exempt, public policy institution founded in 1982 for the purpose of promoting judicial and legal reform. The Director of the Center is Dr. James McClellan. The Center is the only educational and public policy organization in the United States that focuses exclusively on the problem of judicial activism. The Center seeks to confine the power of the federal judiciary

to the bounds envisioned by the Framers of the Constitution and of the fourteenth amendment.

Individual Amici are members of the Congress of the United States. They are concerned about the fact that *Roe v. Wade* has expanded federal judicial powers into areas that are within the rightful legislative domain of Congress and the states. This expansion has adversely affected the constitutional allocation of powers between the judicial and legislative branches and between the states and the federal government. It has effectively prevented both the Congress and the states from implementing sound legislative solutions to abortion issues. And it has introduced into this important area an atmosphere of capriciousness that has arisen from the unpredictable character of state and federal court decisions that have vainly sought to apply the elusive criteria of *Roe v. Wade* in a coherent manner.

This case involves the efforts of a state legislature to regulate abortion. Congress, too, has enacted legislation affecting that area, *see* 42 U.S.C. § 300a-6 (1982), and may do so again. The lower court decisions in this case, holding unconstitutional various provisions of Missouri law affecting the use of state funds, raise issues similar to those involved in litigation now pending with respect to federal regulations of abortion funding. This Court's efforts to define the scope of permissible abortion regulation directly affects the ability of elected representatives —both state and federal—to deal with this important and controversial question. These are matters of immediate interest to the Center for Judicial Studies and to the Members of Congress who are Amici herein.

SUMMARY OF THE ARGUMENT

The abortion decisions of 1973, *Roe v. Wade* and *Doe v. Bolton*, sharply restricted the powers of the states to regulate abortion. Under the trimester scheme therein adopted, the states cannot prohibit abortion until the third trimester. Even in the third trimester, the states are prohibited from forbidding an abortion that is sought for the mother's "mental or physical health." The unlimited elasticity of that vague criterion, when combined with the requirement that state restrictions on abortion be justified by a compelling state interest, in effect makes *Roe v. Wade* a mandate for abortion on request at all stages of pregnancy.

Since 1973, this Court has reaffirmed *Roe v. Wade*'s mandate. State and lower federal courts have interpreted that mandate strictly against the states. One result is that the states are effectively forbidden not only to prohibit abortion but also to regulate it in any significant way. Even the power of the states and the Congress to withhold public funding of abortion, a power that this Court has explicitly sanctioned, has been eroded by state and lower federal courts that appear hostile to any restrictions on free access to abortion.

The case herein illustrates the confusion that has prevailed in the state and lower federal courts. That confusion is traceable to the internal incoherence of *Roe v. Wade* as constitutional doctrine, and to the lack of any principled foundation for the asserted constitutional right to abortion.

The inadequacies of *Roe v. Wade* are not susceptible of any merely cosmetic remedy. Rather, those inadequacies are so basic that they can be eliminated only by abandoning *Roe* and by restoring to the states and to the Congress their rightful powers to legislate on the subject of abortion.

ARGUMENT

I. THIS CASE ILLUSTRATES THE TENDENCY OF STATE AND LOWER FEDERAL COURTS TO NULLIFY THE RIGHTFUL POWER OF THE STATES TO ENACT REASONABLE LEGISLATION ON THE IMPORTANT SUBJECT OF ABORTION.

In *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179, (1973), this Court restricted the states' regulatory powers over abortion according to the trimesters of gestation. During the first trimester, the states may not prohibit abortion and their power to regulate it is minimal. From the end of the first trimester until viability, which *Roe* defined as "the capability of meaningful life outside the mother's womb," 410 U.S. at 163, the states may not prohibit abortion but may regulate it "in ways that are reasonably related to maternal health." *Id.* at 164. From viability until birth, the states may regulate and even prohibit abortion, except where it is necessary, "in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.* The health of the mother includes "psychological as well as physical well-being" and "the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being" of the mother. *Doe*, 410 U.S. at 191-92. At all stages of gestation, state regulations limiting abortion will be upheld only if they are justified by a "compelling state interest" and are "narrowly drawn to express only the legitimate state interest at stake." *Roe*, 410 U.S. at 155; *see also id.* at 156-64.

Since 1973, this Court has reaffirmed the mandate of *Roe v. Wade*, making it more restrictive in the process. In so doing, the Court has effectively left no room for state prohibitions of abortion and very little room for state regulations of the subject. *See, e.g., Thornburgh v. American College of Obstets. & Gynecs.*, 476 U.S. 747 (1986); *City of Akron v. Akron Center for Reprod.*

Health, Inc., 462 U.S. 416 (1983); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976).

This Court has, to be sure, approved legislation denying public funding and the use of public facilities for abortion, thereby upholding the rightful prerogatives of Congress and the states in this one area. *Harris v. McRae*, 448 U.S. 297 (1980); *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977). But decisions of some lower courts have tended to undercut even these approved congressional and state prerogatives. *See, e.g., Nyberg v. City of Virginia*, 667 F.2d 754 (8th Cir. 1982), *appeal dismissed, cert. denied*, 462 U.S. 1125 (1983); *Massachusetts v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988). Other decisions have tended to be hostile to all state efforts to legislate in this area. *See, e.g., Planned Parenthood Ass'n of Cincinnati v. Cincinnati*, 822 F.2d 1390 (6th Cir. 1987); *Charles v. Daley*, 749 F.2d 452 (7th Cir. 1984), *prob. juris. noted sub nom., Diamond v. Charles*, 471 U.S. 1115 (1985) *appeal dismissed*, 476 U.S. 54 (1986); *Haskell v. Washington Twp.*, 635 F. Supp. 550 (S.D. Ohio 1986). These decisions substantiate the claim of Appellants that "the lower federal courts do no apply normal principles of constitutional adjudication to abortion cases." Jurisdiction Statement (J.S.) at App. 11.

The decisions of the courts below in this case exemplify this tendency of judicial hostility. For example, the Court of Appeals for the Eighth Circuit dismissed Missouri's statutory definition of life[1] as "simply an im-

[1] Mo. Rev. Stat. § 1.205 (1986) provides:

1. The general assembly of this state finds that:

(1) The life of each human being begins at conception;

permissible adoption of a theory of when life begins to justify [the state's] abortion regulations." *Reproductive Health Serv. v. Webster*, 851 F.2d 1071, 1076 (8th Cir. 1988), *prob. juris. noted*, 109 S.Ct. 780 (1989). The court of appeals offered no justification for this conclusion. Missouri's declaration that the life of a human being begins "at conception" is supported by abundant scientific evidence. *See generally The Human Life Bill, 1981: Hearings on S. 158 Before the Subcomm. on the Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. *passim* (1981). Moreover, this statutory definition is explicitly made subject to "the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court." Mo. Rev. Stat. § 1.205.2 (1986). The court of appeals dismissed this saving clause on the ground that, "A recitation that state laws must be compatible with the United States Constitution is simply a restatement of the postulate contained in article VI of the Constitution." *Web-*

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(2) Unborn children have protectable interests in life, health and well-being.

(3) The natural parents of unborn children have protectable interests in the life, health and well-being of their unborn child.

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

3. As used in this section, the term "unborn children" or "unborn child" shall include all unborn child or children or the offspring of human beings from the moment of conception until birth at every state of biological development.

4. Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.

ster, 851 F.2d at 1077. The statute, however, makes itself subject not only to the Constitution but also to "decisional interpretations thereof" by this Court. Mo. Rev. Stat. § 1.205.2. If, as the court of appeals concluded, this Court's decisions mean that such a definition of life can have no effect on the abortion area, then the clear meaning of the saving clause is that the definition has no effect in that area because, as Appellants contend, the definition "simply defines the point at which unborn children are entitled to the protection of Missouri law in circumstances other than those involved in abortion." J.S. at App. 16. If the court of appeals interpretation of this Court's decisions is correct, then the Missouri statutory definition of life simply does not do anything at all with respect to abortion and therefore should have been upheld. The court of appeals did not explain how such a definition, which has nothing to do with abortion, infringes the right of privacy with respect to abortion.

A similar disposition to undercut legitimate state authority can be seen in the treatment of Missouri's viability-testing requirement.[2] As the courts below recognized, the states have a compelling interest in preserving the life of a fetus once the point of viability is reached. Yet those courts deprived Missouri of a reasonable and

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[2] Mo. Rev. Stat. § 188.029 (1986) provides:

> Before a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable by using and exercising that degree of care, skill and proficiency commonly exercised by the ordinarily skillful, careful and prudent physician engaged in similar practice under the same or similar conditions. In making this determination of viability, the physician shall perform or cause to be performed such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child and shall enter such findings and determination of viability in the medical record of the mother.

indeed necessary means of advancing that interest through the statutory requirement that a determination as to viability be made in an appropriate case before the abortion is performed. The statute does not make any particular test mandatory or determinative. It simply requires, when the physician has "reason to believe" that the child is twenty or more weeks' gestational age—i.e., may be viable, that "such medical examination and tests" shall be performed "as are necessary to make a finding of gestational age, weight, and lung maturity," all of which are indicia of viability. Mo. Rev. Stat. § 188.029 (1986). Contrary to the apparent view of the courts below, this statute does not improperly intrude upon medical judgment. It allows the physician to make the required findings through whatever examinations or tests are necessary. The statute leaves the decision as to the necessity of any particular test to the judgment of the physician. The statute does not require the physician to perform any particular tests. He may rely upon whatever examinations are necessary to make the required findings, findings that are relevant to the determination of viability.

The diminished prerogatives of the states in the abortion area can be seen with special clarity in the lower courts' invalidation of the Missouri statutes that forbid the use of public funds for "encouraging or counselling" abortion, Mo. Rev. Stat. § 188.205 (1986), and that forbid the performance or assistance of abortion by public employees or through public facilities.[3] The first thing

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[3] Mo. Rev. Stat. § 188.200 (1986) provides:

> As used in sections 188.200 to 188.220, the following terms mean:
>
> (1) "Public employee", any person employed by this state or any agency political subdivision thereof;
>
> (2) "Public facility", any public institution, public facility, public equipment, or any physical asset owned, leased, or con-

to remember here is that this Court has extensively and firmly upheld the right of the Congress and the states to deny public funding of abortion and the use of public medical facilities for abortion. *Harris v. McRae*, 448 U.S. 297 (1980); *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 646 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977).

The court of appeals subjected the "encouraging or counselling" provision, Mo. Rev. Stat. § 188.205, to "a proportionately greater increase in scrutiny" because it

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trolled by this state or any agency or political subdivisions thereof;

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

Mo. Rev. Stat. § 188.205 (1986) provides:

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

Mo. Rev. Stat. § 188.210 (1986) provides:

It shall be unlawful for any public employee within the scope of his employment to perform or assist an abortion not necessary to save the life of the mother. It shall be unlawful for a doctor, nurse or other health care personnel, a social worker, a counselor or persons of similar occupation who is 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. Rev. Stat. § 188.215 (1986) provides:

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

threatens to "inhibit the exercise of constitutional rights . . . of both physicians and their patients: the right to disseminate and receive information about abortion, and the right to knowingly and intelligently choose an abortion after consulting a physician." *Webster*, 851 F.2d at 1078. The court of appeals went on to hold the provision unconstitutionally vague. But as Appellant argues, this is not a prohibition of such constitutional rights but merely a prohibition of public funding of abortion that is in full accord with this Court's decisions that permit the states to deny such funding. The restriction, in the words of Appellant, prohibits only "the expenditure of public funds for the sole purpose of affirmatively advocating to a particular woman that she undertake an abortion procedure not necessary to save her life. The statute does not prohibit the use of public funds to provide information regarding abortions or to inform a woman of the options she may have to cope with an unwanted pregnancy." J.S. App. 25. Further, the provision is not unconstitutionally vague. Rather, "it provides a reasonable person fair notice of the conduct which will not be subsidized by the state." *Id.*

The hypercritical judicial attitude toward the acknowledged state power to restrict abortion funding is manifested also in the court of appeals' treatment of the Missouri statutes restricting the performance or assistance of abortion by public employees or public facilities. Mo. Rev. Stat. §§ 188.210, 188.215 (1986). These statutes are well within the authority recognized by the abortion funding decisions of this Court and especially by *Poelker v. Doe*, 432 U.S. 519 (1977). In *Poelker*, this Court upheld a prohibition of "the performance of abortions" in city hospitals even where no net expenditure of public funds was involved. The court of appeals, however, said *Poelker* involved "an indigent who sought a free abortion at the expense of the city." *Webster*, 851

F.2d at 1081. And the court of appeals held that the Missouri prohibition of the use of public employees is unconstitutional because it applies even where the women pay for the abortions at no cost to the public, so that "even women who can afford abortions cannot obtain them through the assistance of public employees." *Id.* at 1083. The court of appeals' analysis involves a radical misreading of *Poelker*, in which this Court upheld a prohibition not only of funding but of "the performance of abortion in the city hospitals," *Poelker*, 432 U.S. at 520, even though the prohibition made no exceptions for paying patients or even for small communities where no other facility is available. *See id.* at 523-24 (Brennan, J., dissenting).

The court of appeals bypassed the *Poelker* precedent of this Court and instead placed its reliance on *Nyberg v. City of Virginia*, 667 F.2d 754 (8th Cir. 1982), *appeal dismissed, cert. denied*, 462 U.S. 1125 (1983). This misplaced reliance on *Nyberg* instead of on *Poelker* is particularly objectionable because *Poelker* upheld the prohibition as applied while this case presents a facial challenge to the Missouri statutes. A facial challenge "must establish that no set of circumstances exists under which the Act would be valid. The fact that the . . . [Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *United States v. Salerno*, 107 S.Ct. 2095, 2100 (1987).

The decisions below in this case illustrate a process of erosion of legitimate state powers that is especially indefensible because it relates to such an important area of law and policy.

II. THE CONFUSION IN STATE AND LOWER FEDERAL COURTS AND THE EROSION OF STATE POWER IN THE ABORTION AREA ARE ATTRIBUTABLE TO THE INTERNAL INCOHERENCE OF *ROE v. WADE* AND TO THE LACK OF ANY PRINCIPLED FOUNDATION FOR THE ASSERTED CONSTITUTIONAL RIGHT TO ABORTION.

Roe v. Wade assumed or declared at various points that the Constitution guarantees a right to abortion, without ever identifying the basis of that right in a way that would guide its subsequent application. Although *Roe v. Wade* acknowledged that "[t]he Constitution does not explicitly mention any right of privacy," 410 U.S. at 152, it did not provide any specific reasons why the right to privacy included a right to abortion. Indeed, when one person demands access, free of governmental regulation, to a surgical procedure that is to be performed by another person—whether an abortion, a vasectomy, or a sex change operation—interference with the former's "privacy" is not an idea that comes readily to mind. Typically a failure to declare the constitutional basis of a holding would simply impede efforts by lower courts and public officials to gauge the scope, meaning, and future course of decisions. As to *Roe v. Wade*, however, the fact that the constitutional right declared was therefore utterly unknown, and that the abortion laws of approximately two thirds of the states were at odds with it, *see id.* at 139-40, made its principled application impossible from the outset.

Although this Court traditionally decides whether a constitutional challenge has any legal basis before it imposes on the states the burden of justifying their laws, *Roe v. Wade* took a different route. Rather than determining first the merit of Appellant Roe's attempt "to discover [an abortion] right in the concept of personal 'liberty' embodied in the Fourteenth Amendment," the privacy rights "said to be protected by the Bill of Rights

or its penumbras . . .," and the "rights reserved to the people by the Ninth Amendment," *see id.* at 129, *Roe* instead gathered various medical and moral justifications for abortion laws, *id.* at 129-47, and held them inadequate.

Canvassing their long history, *Roe* found "[t]hree reasons [that] have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence." *Id.* at 147. The first justification was "that these laws were the product of a Victorian social concern to discourage illicit sexual conduct," a justification not advanced by Texas in *Roe*, never "taken seriously" by any court or commentator, and attacked by "appellants and *amici*" as "not a proper state purpose at all." *Id.* at 148. Second, "[w]hen most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman," *id.*, a situation which "[m]odern medical techniques have altered." *Id.* at 149. Finally, "the third reason [was] the States' interest—some phrase it in terms of duty—in protecting prenatal life," *id.* at 150, although there is an "absence of legislative history to support the contention" that an original purpose of abortion laws "was to protect prenatal life," *id.* at 151, and there is "some scholarly" and state court support for the view that "most state laws were designed solely to protect the woman." *Id.* Thus, without explaining whether the Appellant's claim had any constitutional basis, *Roe* announced that "[it] is with these interests, and the weight to be attached to them, that the case is concerned." *Id.* at 152.

The rest of the *Roe* opinion described a balancing mechanism that weighs the states' regulatory interests against the abortion right, but did not explain with any specificity either the source, content, and scope of that right, or the reasons why it outweighed certain state interests. It offered no foundation for its newly announced abortion right beyond citing "a line of decisions

. . . going back perhaps as far as *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891), [in which] the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Id.*

But those cases are not a "line of decisions" that might be logically extended to reach new circumstances. They are rather widely disparate and unrelated precedents. They concern rules of evidence,[4] freedom of speech,[5] criminal procedure and punishment,[6] contraception,[7], education,[8] and interracial marriage,[9] and child labor.[10] None of those decisions explained why, or suggested how, the Constitution guarantees a right to abortion. Except for *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Griswold v. Connecticut*, 381 U.S. 479 (1965), they do not purport to rest on a constitutional right of privacy as such, and they do not cite each other in support of such a right. Indeed, *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250 (1891), the case cited as the origin of the constitutional right of privacy, concerned a common law right which was not constitutional, which merely protected tort plaintiffs from court-ordered examinations of their alleged

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[4] *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

[5] *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

[6] *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968); *Katz v. United States*, 389 U.S. 347, 350 (1967); *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *Boyd v. United States*, 116 U.S. 616 (1886).

[7] *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965); *id.* at 486 (Goldberg, J., concurring).

[8] *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

[9] *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

[10] *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

physical injuries, and which in any event permitted English courts to order examinations of pregnant women to ascertain "whether a woman convicted of a capital crime was quick with child . . . in order to guard against the taking of the life of an unborn child for the crime of the mother." *Id.* at 253.

The flow of *Roe v. Wade*'s reasoning from the right of privacy to the abortion right is as cryptic as is its definition of privacy. *Roe v. Wade* simply announced the abortion right and confessed a degree of ambivalence about its constitutional basis: "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe*, 410 U.S. at 153.

The internal incoherence of *Roe* becomes especially obvious at this point. The majority opinion cited *Buck v. Bell*, 274 U.S. 200 (1927), with approval. 410 U.S. at 154. *Buck v. Bell* uphold the constitutionality of a statute that provided for compulsory sterilzation by surgery. One would have supposed that a compelled and unconsented surgical intrusion into a person's body would have been the classical illustration of a government's unconstitutional invasion of that person's privacy. But after *Roe*, state and federal legislatures and courts were confronted with the task of trying to comprehend the astounding conclusion that restricting access to a desired surgical procedure is somehow an invasion of privacy whereas compelling an unwilling person to undergo a surgical procedure is not.

Once it concluded that a constitutional right to abortion existed, *Roe* took only modest steps to define that right. It expressed skepticism of "the claim asserted by some *amici* that one has an unlimited right to do with one's

body as one pleases." *id.* at 154, and doubted whether such a claim "bears a close relationship to the right to privacy previously articulated in the Court's decisions." *Id.* It also cautioned that "this right is not unqualified and must be considered against important state interests in regulation." *Id.* *Roe* thus concluded that the "right to privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant." *Id.* at 155. And, it suggested that the limitations on the right to abortion would result from balancing the new "fundamental right" against "compelling state interests." *Id.* at 155-56.

In attempting to strike that balance, *Roe* again chose not to clarify the nature of the "fundamental right" involved. Instead, it devised a balancing mechanism that hinges on the weights accorded to the regulatory interests of the state. The first regulatory interest *Roe* identified, the "Victorian social concern to discourage illicit sexual conduct," *id.* at 148, was accorded little weight, while the state's interests in the protection of life, whether maternal or fetal, were deemed more weighty: "As we intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved." *Id.* at 159. *Roe* did not explain the criteria whereby it determined that certain regulatory interests are "reasonable and appropriate" while others are not, nor whether those criteria emanated from the privacy right.

Being "reasonable and appropriate" nevertheless does not suffice, according to *Roe*, for a regulatory interest to tilt the balance in favor of the state. A "compelling" interest is required. *Id.* at 162-63. "With respect to the State's important and legitimate interest in the health

of the mother, the 'compelling' point, in light of present medical knowledge, is at approximately the end of the first trimester . . . because of the now-established medical fact . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth." *Id.* at 163. The decision does not explain the conditions under which those medical data were gathered; why the state could not seek to protect the health of individual women who run a greater risk of complications from abortion than the "average" woman; or what would happen to constitutional law as medical understanding evolved.[11]

To protect "potential life," however, medical considerations inexplicably are not controlling. As a matter of medical fact, the embryo or fetus is obviously alive throughout pregnancy, but "the 'compelling' point is at viability . . . because the fetus then presumably has the capacity of meaningful life outside the mother's womb." *Id.* The significance and origin of the term "meaningful life" are to this day unknown. Further, *Roe*'s explanation of the significance of viability suggests a view of the abortion right expressly contradicted elsewhere in its opinion. The abortion right here seems to consist of the mother's right to sever any bodily tie she may have to the fetus, but not to destroy it if doing so is unnecessary to sever that connection. But elsewhere in the opinion *Roe* cautioned that "the right of privacy previously articulated in the Court's decisions" does not "bear[] a close relationship" to any "unlimited right to do with one's body as one pleases." *Id.* at 152. Indeed, in defining the right of privacy, *Roe* vacillated between

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[11] Indeed, evolving medical knowledge now opens to question whether any medical basis ever existed for dividing pregnancy into trimesters, in spite of the fact that medical journals in the decade preceding *Roe v. Wade* stressed that division. *See* Cates & Grimes, The Trimester Threshold for Pregnancy Terminations: Myth or Truth?, in *Second Trimester Pregnancy Termination* 50 (M. Keirse & B. Gravenhorst ed. 1982).

calling it "a right of personal privacy," *id.*, which suggests a right of personal autonomy, and describing it as "a guarantee of certain areas or zones of privacy," *id.*, which implies a limited area of protections from state intrusion.

Roe v. Wade, moreover, left unanswered the question whether "the State has a compelling interest in protecting that life from and after conception" rather than merely in the third trimester. *Id.* at 159. That question, of course, is crucial if not dispositive. But *Roe* considered the question "of when life begins" a "difficult question" that "[w]e need not resolve" because "[w]hen those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." *Id.* That statement is perhaps the most difficult of all to understand. *Roe* had resorted to a lengthy discussion of medicine, philosophy, and theology to identify other regulatory interests that, unlike the interest of protecting life from conception, it considered reasonable and appropriate. *Id.* at 129-52. But when the issue became whether the victim of abortion is a living human being, *Roe* abstained. The decision, in effect, that the fetus may be killed whether or not a human being is the same in principle as a decision that an acknowledged human being may be killed. And it is fair to ask why, if *Roe* were in doubt, it did not give the benefit of that doubt to innocent life.

In light of the internal incoherence of *Roe v. Wade* itself, it is not surprising that the decision has fostered arbitrary judicial decisions in which practically the only prediction that can safely be made is that the ruling will be hostile to whatever state regulation of abortion happens to be at issue. *See* Uddo, *A Wink from the Bench: The Federal Courts and Abortion*, 53 Tul. L. Rev. 398 (1979). Indeed, even at the Supreme Court level, it is

"painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion." *Thornburgh v. American College of Obstets. & Gynecs.*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting). With good reason it was said that *Thornburgh* "finds no justification in the Court's previous holdings, departs from sound principles of constitutional and statutory interpretation, and unduly limits the state's power to implement the legitimate (and in some circumstances compelling) policy of encouraging normal childbirth in preference to abortion." *Id.* at 798 (White, J., dissenting).

III. THE SOLUTION TO THE PROBLEMS CREATED BY *ROE v. WADE* IS TO ABANDON THE RESTRICTIONS IMPOSED BY THAT CASE AND TO RESTORE TO THE STATES AND CONGRESS THEIR RIGHTFUL POWERS TO LEGISLATE ON THE SUBJECT OF ABORTION.

The confusion and instability manifested in abortion decisions since 1973 by state and lower federal courts as well as by this Court are attributable to *Roe v. Wade* itself. By proclaiming as fundamental a privacy right to abortion that is devoid of any linkage to the text or history of the Constitution, as well as any linkage to the common meaning of the word "privacy," *Roe* virtually guaranteed that the implementation of that right would be as arbitrary as was its creation.

From its inception, *Roe v. Wade* could not have been based on anything other than uniquely controversial moral judgments that the Constitution does not make. Making them calls for a competence and democratic legitimacy that federal courts lack by design. As a result, it is not surprising that *Roe v. Wade*'s sixteen-year journey through our system of justice has left a trail of unprincipled decisions and legislative confusion, which, un-

less ended, bode more of the same for the future. It is a journey that will place this Court ever more sharply at odds with firmly established limits on the role of courts in our society; with the idea of law itself as a set of binding principles that rise above the personal opinions of the men and women who enforce it; and with the democratice power of the states and their local subdivisions to order private and public life according to the different moral visions of their respective communities. "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986).

In the interest of the orderly adjudication of constitutional cases, the solution should go to the source of the problem. Fortunately, this case presents an opportunity to resolve this problem by applying the principles this Court recently announced in *Bowers*. In holding that the right of privacy does not include a constitutional right to engage in sodomy, the Court identified "the nature of the rights qualifying for heightened judicial protection. In *Palko v. Connecticut*, 302 U.S. 319, 325, 326 . . . (1937), it was said that this category includes those fundamental liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if (they) were sacrificed.' A different description of fundamental liberties appeared in *Moore v. East Cleveland*, 431 U.S. 494, 503 . . . . (1977) (opinion of Powell, J.), where they are characterized as those liberties that are 'deeply rooted in this Nation's history and tradition.' " *Id.* at 191-92.

Measured by these criteria the asserted right to abortion ought to fail the test for inclusion in the list of fundamental liberties. As the Court said of sodomy in *Bowers*, "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition'

or 'implicit in the concept of ordered liberty' is, at best, facetious." *Id.* at 186.

It is past time to abandon the regime of heightened judicial scrutiny mandated by *Roe v. Wade* and to return to the tested formulation urged by Justice Rehnquist in his dissent in that case: "The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective." *Roe*, 410 U.S. at 173. A return to this principled standard will restore to the states and to the Congress their rightful powers to deal with this vital subject of abortion.

CONCLUSION

For the foregoing reasons, Amici Curiae submit that the judgment of the court of appeals from which this appeal is taken should be reversed, that the Missouri statutes involved should be upheld as constitutional, and the rule of *Roe v. Wade* should be abandoned.

Respectfully submitted,

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