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 CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## BRIEF AMICUS CURIAE OF THE NATIONAL RIGHT TO LIFE COMMITTEE, INC. IN SUPPORT OF APPELLANTS

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February 23, 1989

## QUESTIONS PRESENTED HEREIN

1. WHETHER ESTABLISHING THE APPROPRIATE STANDARD OF REVIEW IS NECESSARY TO DETERMINING THE CONSTITUTIONALITY OF THE MISSOURI STATUTES.
2. WHETHER THE ABORTION PRIVACY ANALYSIS SET FORTH IN *ROE V. WADE* SHOULD BE APPLIED IN THE PRESENT CASE.

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## INTEREST OF AMICUS[1]

The National Right to Life Committee, Inc. is a nonprofit organization whose purpose is to promote respect for the worth and dignity of all human life, including the life of the unborn child from the moment of conception. The National Right to Life Committee, Inc. is comprised of a Board of Directors representing 51 state affiliate organizations and more than

[1]This Brief Amicus Curiae is filed with the consent of all parties to this appeal. A letter from each attorney stating this consent has been filed herewith with the Clerk of this Court.

2,000 local chapters made up of individuals from every race, denomination, ethnic background, and political belief. It engages in various political, legislative, legal, and educational activities to protect and promote the concept of the sanctity of innocent human life.

The members of the National Right to Life Committee, Inc. have been the prime supporters of laws restricting abortion on demand to only those instances in which the mother's life is in danger. Since *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), the members of the National Right to Life Committee, Inc. have supported legislation to protect unborn human life within these guidelines. The Missouri legislation at issue herein is the result of lobbying, in great part, by the members of the National Right to Life Committee, Inc. and its affiliate, Missouri Citizens for Life. By means of this brief, the National Right to Life Committee, Inc. seeks to advance these interests by supporting the Missouri regulations at issue herein.

## SUMMARY OF ARGUMENT

The necessary first step in the judicial review of the Missouri statutes at issue herein is to determine the appropriate standard of review. Without resolution of this threshold issue, the Court will be uncertain what constitutional analysis to employ, whether a low level of scrutiny, strict scrutiny, or some intermediate standard.

This Court should not merely assume, without confronting, the continued viability of *Roe v. Wade*. To so consider the statutes, while avoiding the underlying issue of the correctness of *Roe's* right to choose abortion and its trimester framework, would be to depart from the precedents of this Court. Such avoidance would also lead to untoward results.

The Court should confront directly the necessary threshold issue of the standard of review. In doing so, the Court should be guided by the analysis of *Bowers v. Hardwick*, 106 S.Ct. 2841 (1986), and find that there is no constitutional right to abortion. Thus, the standard of review to be employed herein should be

the rational basis test. An attempt to establish an intermediate standard of review would also result in undesirable results. The only lasting resolution of the matter is to overrule *Roe* completely and allow the states to resolve the matter through the mechanisms of the democratic process.

## ARGUMENT

### I. ESTABLISHING THE APPLICABLE CONSTITUTIONAL ANALYSIS IS THE NECESSARY THRESHOLD ISSUE IN THE REVIEW OF THIS CASE.

The first step in any judicial review of state statutes is to determine the standard of review. Until a system of measurement is established, be it cubits, yards, or meters, declaring the measure of an object is meaningless. Likewise, an evaluation of the constitutional dimensions of Missouri's legislative handiwork is meaningless unless the Court reveals the character of its measuring rod. Therefore, the Court should begin its analysis in this case by reappraising *Roe's* abortion right and trimester scheme.

#### A. THIS COURT HAS CONSISTENTLY BEGUN CONSTITUTIONAL REVIEW WITH THE THRESHOLD ISSUE OF DETERMINING THE APPROPRIATE STANDARD OF REVIEW.

It is the consistent practice of this Court to begin its constitutional review of a case by setting forth the standard of review to be applied and the elements of the applicable analysis. This consistent pattern may be seen in the following examples.

##### 1. THIS THRESHOLD DETERMINATION IS EVIDENT IN THE CASES REGARDING THE REGULATION OF ABORTION.

In cases involving state regulation of abortion, this Court has consistently set forth the standard of review before considering the particular statutes at issue. This may be seen from the seminal case of *Roe* through the most recent case decided with analysis, *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S.Ct. 2169 (1986).

In *Roe v. Wade*, 410 U.S. 113, the *Roe* majority labored over the appropriate constitutional analysis, for more than thirty pages of the official reporter, before striking down the Texas abortion statute in a brief paragraph. The result was a trimester scheme built upon a claimed fundamental right — with stages of compelling interests adhered to movable points of medical technology — all perched upon a substantive due process analysis. As unlikely as the resulting analysis may be, the *Roe* majority did not ignore the threshold step of establishing the standard by which the statute would be reviewed.

In subsequent abortion cases of this Court, this pattern (of establishing the standard of review as a threshold matter) is clearly evidenced, in cases such as the following:

1. *Doe v. Bolton*, 410 U.S. at 189, 195 (cross- references to *Roe* regarding the appropriate analysis).
2. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 60-61 (1976) (set out *Roe* analysis in detail).
3. *Maher v. Roe*, 432 U.S. 464, 470 (1977) (began by setting forth equal protection analysis).
4. *Colautti v. Franklin*, 439 U.S. 379, 386-87 (1979) (reviewed the *Roe* standard of review before considering the statutes).
5. *Bellotti v. Baird (II)*, 443 U.S.622, 633-42 (1979) (extensive discussion of *Roe*, *Danforth*, and other precedent setting forth the proper analysis).
6. *Harris v. McRae*, 448 U.S. 297, 311-18 (carefully reviewing the abortion privacy right analysis), 319-20 (setting forth the establishment clause tests), 322-23 (establishing the equal protection analysis), 324 (settling on the rational basis test as the applicable standard of review)(1980).
7. *H.L. v. Matheson*, 450 U.S. 398, 408-10 (1981) (review of controlling precedent and standards).
8. *Akron v. Akron Center for Reproductive Health*, 426 U.S. 416, 419-20 (reaffirming *Roe* as setting forth the controlling analysis), 426-31 (extensive restatement of the trimester scheme prior to consideration of the Ohio statutes) (1983).

9. *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S.Ct. at 2178, 2184 (preliminary and concluding reaffirmation of *Roe* as containing the appropriate analysis).

Particularly crucial to the present discussion are the cases of *Akron v. Akron Center for Reproductive Health* and *Thornburgh v. American College of Obstetricians and Gynecologists*. In *Akron v. Akron Center for Reproductive Health*, 426 U.S. 416, with *Roe* under attack — by a growing Court dissent, in the state legislatures, and in the academic world — the *Akron* majority considered the continued viability of *Roe* as the threshold issue of its analysis. *Id.* at 419-20.

Likewise, in *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S.Ct. 2169, with *Roe* still under attack by a larger Court dissent, with states still struggling to constitutionally assert their supposedly compelling interests, and with an undiminished assault by legal academics, a narrow majority of this Court again stopped at the threshold to establish the standard of review before applying the analysis to the latest set of statutes. *Id.* at 2178. Once again, the viability of *Roe* was considered as the necessary preliminary consideration.

### 2. THIS THRESHOLD DETERMINATION IS EVIDENT IN THE CASES REGARDING THE PUBLIC FUNDING OF ABORTION.

In both *Maher v. Roe*, 448 U.S. 297, and *Harris v. McRae*, 448 U.S. 297, abortion funding cases, this Court considered the necessary first step of the standard of review before dealing with the constitutionality of the legislation before it. Especially noteworthy in this respect is *Harris v. McRae*, where this Court considered carefully whether the abortion privacy right, or any other constitutional protection, entitled indigent women to public funding of abortion. After carefully reviewing the constitutional protections and analyses, this Court concluded that the rational basis test was the controlling standard of

review. *Id.* at 324. Under this standard, the Court then determined that the Hyde Amendment, limiting funding for abortions under federally financed programs to situations where the life of the mother was at risk, had a rational basis.

### 3. THIS THRESHOLD DETERMINATION IS EVIDENT IN THE PRIVACY ANALYSIS IN *BOWERS v. HARDWICK*.

In privacy cases outside the abortion realm, this Court has also found it essential to pause at the threshold to determine the standard of review. The recent case of *Bowers v. Hardwick*, 106 S.Ct. 2841, stands as a perfect example. In *Bowers*, as in the abortion cases, it was asserted that a substantive-due-process privacy right encompassed the activity at issue. This Court first considered the appropriate analysis, as described more fully below, *see infra* at III (A), and determined that there was no constitutional right to homosexual sodomy. For present purposes, the key element is the threshold consideration of the proper constitutional analysis. The *Bowers* majority noted that, before a right could be declared fundamental under a substantive due process analysis, as urged by the respondent, a certain standard must be met.

> Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In *Palko v. Connecticut*, 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*, where they are characterized as those liberties that are 'deeply rooted in this Nation's history and tradition.'

*Id.* at 2844 (citations omitted).

Thus, this Court first set forth the standard of review, then applied the appropriate standard to the issues at hand.

## B. THERE IS NO PRINCIPLED WAY TO AVOID THE ISSUE OF THE APPLICABILITY OF *ROE v. WADE* TO THIS CASE.

It will be argued by some that the judicial review of this case need not include a consideration of the continued viability of *Roe v. Wade* — that this Court may simply assume, without considering, the standards set forth by *Roe*, and uphold the Missouri statutes as within the scope of permissible abortion regulation under *Roe* and its progeny. While this might have a perceived advantage, i.e., postponing the inevitable confrontation with *Roe's* faulty analysis, any perceived advantage is illusory. This is evident for several reasons.

First among the reasons for confronting the issue now is the lack of any truly principled way to avoid the issue. As noted above, this Court has consistently established the standard of review as the necessary first step in its analysis. To do otherwise now would be to abandon this Court's usual method of review. The question would certainly be raised as to why, in this case and by this Court, the usual analysis was abandoned.

Of course, this Court has a long-standing principle of avoiding constitutional issues where a case may be decided on some other ground. Justice Brandeis, in his famous concurrence to *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (joined by Stone, Roberts, and Cardozo, JJ.), summed up the seven rules comprising the avoidance principle:

> First, "[t]he Court will not pass upon the constitutionality of legislation in a friendly non-adversary proceeding. . . ." *Id.* at 346.
>
> Second, "[t]he Court will not 'anticipate a question of law in advance of the necessity of deciding it.'" *Id.* (citations omitted).
>
> Third, "[t]he Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation." *Id.* at 347.

Fourth, "[t]he Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits." *Id.* at 348.

Fifth, "[t]he Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is applied.'" *Id.* (citations omitted).

Sixth, "[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Id.* at 347.

Seventh, "'[w]hen the validity of an act of the Congress[2] is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Id.* (citation omitted).

These rules, based on considerations of policy, developed by this Court, and on Article III of the United States Constitution, were quoted in *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947), where this Court stated that the rules were employed to "avoid[] passing upon a large part of all the constitutional questions pressed upon it for decision . . . , notwithstanding conceded jurisdiction, until necessity compel[led] it in the performance of constitutional duty." *Id.* at 569. "Like the case and controversy limitation itself and the policy against entertaining political questions," the Court declared, the avoidance principle "is one of the rules basic to the federal system and this Court's appropriate place within that structure." *Id.* at 570.

This avoidance principle has been reflected in "numerous cases and over a long period." *Poe v. Ullman*, 367 U.S. 497, 503

[2]This principle applies to acts of state legislatures as well. *See, e.g., Thornburgh*, 737 F.2d 283, 294 (3d Cir. 1984).

(1961)(Frankfurter, J., plurality opinion).[3] It has been repeated by this Court in relation to review of state abortion laws. See, e.g., *Singleton v. Wulff*, 428 U.S. 106, 114 (1976). However, in keeping with the usual abortion distortion factor (apparent where any area of the law touches on abortion)[4] the principle has not been scrupulously followed in abortion cases.[5]

In *Thornburgh*, 106 S.Ct. 2169, Justice White observed the majority's eagerness to strike down abortion legislation at the expense of the *Ashwander* avoidance principle and summarized the matter well in response to the majority's refusal to find an emergency exception in the two-physician requirement for postviability abortions:

> The Court's rejection of a perfectly plausible reading of the statute flies in the face of the principle — which until today I had thought applicable to abortion statutes as well as to other legislative enactments — that '[w]here fairly possible, courts should construe a statute to avoid a danger of unconstitutionality.' [citation omitted] The Court's reading is obviously based on an entirely different principle: that in cases involving abortion, a permissible reading of a statute is to be avoided at all costs.

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[3]There has been controversy over particular applications of the principle, but not the principle itself. *See, e.g., Mattiello v. Connecticut*, 4 Conn. Cir. Ct. 55, 225 A.2d 507, *appeal dismissed*, 395 U.S. 209 (1969); *Naim v. Naim*, 197 Va. 80, 87 S.E.2d 749, *vacated*, 350 U.S. 891 (1955) (per curiam); A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962); Gunther, *The Subtle Vices of the "Passive Virtues" — A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1 (1964).

[4]*See infra* II (B). For a fuller discussion of the abortion distortion factor in general and the failure of this Court to follow the *Ashwander* avoidance principle in particular, in cases such as, *inter alia*, *Roe v. Wade*, 410 U.S. 113, *Colautti v. Franklin*, 439 U.S. 379 (1979), *Planned Parenthood Association of Kansas City v. Ashcroft*, 462 U.S. 476 (1983), *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S.Ct. 2169, see Bopp & Coleson, *The Right to Abortion: Absolute, Anomalous, and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. 191 (1989) (The anticipated publication date is April, 1989. Page references — other than the initial page number — employed herein are to the unpublished manuscript, which has been provided to the Clerk of this Court.).

[5]*Id.*

> cases involving abortion, a permissible reading of a statute is to be avoided at all costs.

*Thornburgh*, 106 S.Ct. at 2205.

It is not surprising to find the avoidance principle itself avoided, as was done in *Thornburgh* and other abortion cases, because the precedent for failure to follow the usual rules in abortion cases was set in *Roe* itself. *Roe v. Wade* was widely criticized for violation of this avoidance principle. For example, now Chief Justice Rehnquist, in his dissent to *Roe*, declared, "[T]he Court departs from the longstanding admonition that it should never 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Roe*, 410 U.S. at 171-72 (Rehnquist, J., dissenting) (citation omitted).

The distortion worked on the law where it touches on abortion should not be continued in the present case by failure to reach the threshold issue of the standard of review. While it is appropriate and laudable for courts to avoid reaching issues not essential to the determination of the case before them, the standard of review is not one of the issues which may be avoided, provided that the constitutional issues are reached. It is a necessary threshold determination.

Nowhere in the list of avoidance rules of this Court is there one which says that, when the constitutionality of a state statute is at issue, this Court will bypass the determination of the appropriate standard of review. Indeed the precedents require otherwise. Therefore, sound adjudication requires that adjudicatory principles be followed consistently, whether or not a case touches on abortion. In this case, that requires this Court to determine the viability of *Roe* — to state the standard by which it will review abortion statutes — as the necessary threshold issue in the review of the Missouri statutes for constitutionality.

## II. FAILURE TO DETERMINE THE APPLICABLE STANDARD OF REVIEW WHILE UPHOLDING THE MISSOURI STATUTE WOULD LEAD TO UNTOWARD RESULTS.

Failure to confront the issue of *Roe's* viability would lead to untoward results, including continued, interminable litigation of the subject of abortion in this and lower courts. This ongoing litigation would cause the lower courts to continue making legislative policy choices, leading to further distortion of abortion jurisprudence. The courts would be forced to fashion social policy with even less guidance than before. Likewise, this Court would be faced with the need to draw ever-finer legislative policy lines.

### A. LITIGATION WOULD CONTINUE CONCERNING THE CONSTITUTIONALITY OF STATE STATUTES UNDER THE STANDARD OF REVIEW ESTABLISHED IN *ROE*.

In the sixteen years since *Roe* was decided, there have been numerous cases concerning abortion brought in state and federal courts and taken on appeal. As of 1980, just seven years after *Roe*, there were one hundred thirteen federal district court opinions, forty-five federal appellate court decisions, and fourteen cases in this Court relating to abortion. L. Wardle, *The Abortion Privacy Doctrine* Tables A-C (1980). In the subsequent nine years, the flow has not abated. Including the present case, twenty-two abortion cases have been reviewed by this Court, and many more have been brought but not granted review or have been dealt with summarily. *Abortion and the Constitution*, Appendix One (D. Horan, E. Grant & P. Cunningham eds. 1987)(listing twenty cases up to and including *Thornburgh*); *Hartigan v. Zbaraz*, 108 S.Ct. 479 (1987). *See, e.g., Conn v. Conn*, 525 N.E.2d 612 (Ind. Ct. App. 1988), *aff'd and opinion of app. ct. adopted by order*, No. 73S01-8807-CV-631 (Ind. July 15, 1988), *cert. denied*, 57 U.S.L.W. 3347 (U.S. Nov. 14, 1988) (No. 88-347); *Gary-Northwest Indiana Women's Services v. Orr*, 451 U.S. 934 (1982), *summarily aff'g*

*Gary-Northwest Indiana Women's Services v. Bowen*, 96 F. Supp. 894 (N.D. Ind. 1980).

As observed by Justice White in *Thornburgh*, such a flood of litigation is in no way evidence of any evil intent by the states; rather, it is inherent in the nature of the right and analysis declared in *Roe* and in this Court's subsequent changing of the rules[6] set up in *Roe:*

> The majority's opinion evinces no deference toward the state's legitimate policy. Rather, the majority makes it clear from the outset that it simply disapproves of any attempt by Pennsylvania to legislate in this area. The history of the state legislature's decade-long effort to pass a constitutional abortion statute is recounted as if it were evidence of some sinister conspiracy. . . . In fact, of course, the legislature's past failure to predict the evolution of the right first recognized in *Roe v. Wade* is understandable and is in itself no ground for condemnation. Moreover, the legislature's willingness to pursue permissible policies through means that go to the limits allowed by existing precedents is no sign of *mens rea*. The majority, however, seems to find it necessary to respond by changing the rules to invalidate what before would have seemed permissible.

*Thornburgh*, 106 S.Ct. at 2198 (White, J., dissenting).

The flood of litigation shows no signs of abating. Failure to consider the continued viability of *Roe* would do nothing to abate the flood. Rather, the uncertainty created by such a decision would cause the flood to swell, further inundating the courts.

[6]For an analysis of how this Court has failed to follow the principle of stare decisis, by gutting *Roe* of virtually all content except the bare right to choose abortion, see Bopp & Coleson, *supra* note 4, at 12-42.

## B. FURTHER LITIGATION WOULD FORCE THE COURTS TO CONTINUE MAKING LEGISLATIVE POLICY CHOICES AND DRAWING EVER-FINER LINES, LEADING TO FURTHER CONFUSION IN ABORTION JURISPRUDENCE.

To avoid the issue of *Roe's* viability would leave the lower courts as well as state and federal legislators in disarray, uncertain as to the status of abortion jurisprudence — especially given the shifting balance of this Court on abortion matters, which is evident in the progression from *Roe*, 410 U.S. 113 (seven to two majority), to *Akron*, 426 U.S. 416 (six to three majority), to *Thornburgh*, 106 S.Ct. 2169 (five to four majority), to *Hartigan v. Zbaraz*, 108 S.Ct. 479 (1987) (evenly divided court).

Moreover, the courts would need to draw ever-finer lines, in matters more properly considered legislative policy choices, with increasingly blurred guidelines. As noted below, *see infra* II(C), this Court has been unable to give the lower courts clear guidelines for analyzing abortion statutes.

The need to draw finer and finer lines without clear guidelines is well illustrated by the situation in the lower federal courts with regard to waiting periods for minors. Seven cases to date have engaged this Court in attempting to fine-tune the permissible regulation of minors seeking to abort. *Danforth*, 428 U.S. 52; *Bellotti v. Baird (I)*, 428 U.S. 132 (1976); *Bellotti v. Baird (II)*, 443 U.S. 622; *H.L. v. Matheson*, 450 U.S. 398; *Akron*, 462 U.S. 416; *Ashcroft*, 462 U.S. 476; and *Thornburgh*, 106 S.Ct.2169.

Despite this series of cases, the lower courts are currently wrestling with the regulation of abortion for minors, including the constitutionality of a mandatory waiting period. The circuits have split. In *Hodgson v. Minnesota*, No. 86-5423, slip op. (8th Cir. Aug. 8, 1988)(en banc), the Eighth Circuit upheld a forty-eight hour waiting period. However, the Sixth Circuit struck down a twenty-four hour waiting period for minors in

*Akron Center for Reproductive Health v. Slaby*, No. 86-3664, slip op. (6th Cir. Aug. 12, 1988), *appeal filed sub nom. Ohio v. Akron Center for Reproductive Health*, 57 U.S.L.W. 3378 (U.S. Nov. 10, 1988)(No. 88-805).

No change in the need for continued judicial hair-splitting appears imminent. As noted in the following subsection, this is a job traditionally entrusted to legislatures and to which they are more adequately suited than courts.

### C. THIS COURT WOULD CONTINUE TO BE FACED WITH LEGISLATIVE POLICY CHOICES ON ABORTION, LEADING TO FURTHER DISTORTION OF THE LAW WHERE IT TOUCHES ON ABORTION, AND THE NECESSITY OF RESOLVING ISSUES DECIDED DIFFERENTLY IN THE LOWER COURTS.

Rather than making the rules of abortion jurisprudence clearer, the decisions of this Court have made the "bright lines" of *Roe* "blurred." *Akron*, 462 U.S. at 455 (O'Connor, J., dissenting). The result is that, with the continued flood of abortion cases, abortion jurisprudence is becoming more obscure, unpredictable, and difficult for the legislatures and lower courts to follow. Justice O'Connor, in *Akron*, noted the failure of this Court to apply "neutral principles" and its reliance on an analytical framework that "varies according to the 'stages' of pregnancy" and "the level of medical technology available when a particular challenge to state regulation occurs." *Id.* at 452 (O'Connor, J., dissenting). She observed that "[t]he *Roe* framework . . . was clearly on a collision course with itself." *Id.* at 458. The result of such blurring of the guidelines would be more hair-splitting cases for this Court to resolve, taking it ever deeper into the morass of minutiae, and ever further from the grand sweep of timeless, neutral principles of the Constitution to the consideration of which it is best suited by its granted powers and august position.

The sort of nit-picking detail required of this Court by present abortion jurisprudence is better suited to legislatures.

Justice O'Connor commented on the basically legislative[7] work of the Court in its review of the legislation at issue in *Akron:*

> It is . . . difficult to believe that this Court, without the resources available to those bodies entrusted with making legislative choices, believes itself competent to make these inquiries and to revise these standards every time the American College of Obstetricians and Gynecologists (ACOG) or similar group revises its views about what is and what is not appropriate medical procedure in this area.

*Id.* at 456.

Legislatures have historically been entrusted with making the sort of social policy decisions performed by this Court in its abortion decisions. They are not bound by "case or controversy" requirements or rules of evidence and procedure. They may hold hearings, appoint advisory panels, employ researchers, experiment, and revise their views without concerns of stare decisis.

John Hart Ely wrote shortly after *Roe* was decided: "[P]recisely because the claims involved are difficult to evaluate, I would not want to entrust to the judiciary authority to guess about them — certainly not under the guise of enforcing the Constitution." Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920, 935 n.89 (1973). Similarly, Justice Frankfurter, some four decades before *Roe*, criticized

[7]Memoranda by members of the *Roe* majority, found in papers of Justice Douglas and recently released by the Library of Congress, reveal an acknowledgment of the legislative nature of the *Roe* majority's handiwork in *Roe*. There is discussion of concern that much of the decision constituted "dicta" and "about the desirability of the dicta being quite so inflexibly 'legislative.'" The memoranda reveal the author of *Roe* acknowledging that the opinion contained dictum and that the lines drawn were "arbitrary." Noticeably absent is discussion of the requirements of the Constitution; rather, the exchanges read like negotiations among members of a legislative conference committee seeking to hammer out compromise legislation. Woodward, *The Abortion Papers*, The Washington Post, Jan. 22, 1989, at D1, col. 1. The memoranda help put in context Justice White's charge that the *Roe* and *Bolton* majority was engaged in an exercise of "raw" judicial power." *Bolton*, 410 U.S. at 222 (White, J., dissenting).

> the imposition by judges of their private notions of social policy [on the states] because it so often turns on the fortuitous circumstances which determine a majority decision and shelters the fallible judgment of individual Justices, in matter of fact and opinion not particularly within the special competence of judges, behind the impersonal dooms of the Constitution.

F. Frankfurter, *The Public and Its Government* 49-51 (1930).

*Roe v. Wade* has been criticized by Archibald Cox as "read[ing] like a set of hospital rules and regulations, whose validity is good enough this week but will be destroyed with new statistics." A. Cox, *The Role of the Supreme Court in America* 113-14 (1976). This has proven to be the case. His oracle has proved sound, and the lower courts are left in disarray by changes in medical technology, even where this Court has seemingly set down a bright line. *See* Bopp & Coleson, *supra* note 4, at 25-42. It would be left to this Court to seek to extricate the lower courts from the morass of confusion, to resolve their disagreements, and to attempt to give guidance for the future, knowing that, under the current scheme, the guidelines would become worthless with the next pronouncement of ACOG.

Finally, the inherent flaws in *Roe*, coupled with the efforts of the Court majority seeking to preserve it, have wrought a profound distortion in the law where it touches on the subject of abortion. As a result, while the pro-*Roe* majority in previous cases cried "stare decisis," it ignored the doctrine in subsequent cases, gutting *Roe* of all content but the bare right to have an abortion — virtually on demand. Bopp & Coleson, *supra* note 4, at 5-42. While the prochoice majority declared the right to abortion to be based on the right to privacy, it treated the abortion privacy right differently from any other privacy right and failed to provide the nexus between the declared fundamental right and American history and tradition. *Id.* at 43-76. While the defenders of *Roe* stripped the unborn of rights, classifying them as less than persons, examination of the rest of the law reveals a quantum leap in fetal

rights with the recognition of the separateness of the unborn from their mothers and their personhood for a host of other purposes. *Id.* at 77-118. While the authors of *Roe's* progeny discussed the abortion right as a medical procedure, they treated it differently than any other medical procedure, restricting the traditional role of the states in regulating medical matters, even to the point of striking down reasonable informed consent statutes — thereby reversing the whole modern trend of informed consent law. *Id.* at 119-138. And, when the champions of *Roe* dealt with procedural and adjudicatory matters, it became evident that there were two sets of rules: general rules and special, abortion rules. *Id.* at 139-196. As elsewhere, the abortion distortion effect is evident in this area, making the right to abortion more anomalous and absolute.

Failure of this Court to confront the necessary threshold issue of the viability of *Roe* would leave this massive flaw in the law intact, forcing this Court to employ ever-finer distinctions and increasingly arbitrary divisions upon an interminable series of cases in an attempt to repair the irreparable.

## III. THE ABORTION PRIVACY ANALYSIS OF *ROE* SHOULD BE ABANDONED IN FAVOR OF A RATIONAL BASIS TEST FOR ABORTION LEGISLATION.

The only cure for such a tangent from the norm of constitutional law is a correction, namely, the reversal of *Roe*. Only such a correction can repair the profound distortion worked by (and required by) abortion jurisprudence. This Court should reverse *Roe* and abandon any notion of a fundamental constitutional right to abortion and, with it, any requirement of compelling state interests. The only appropriate standard for reviewing abortion legislation is the rational basis test.

## A. UNDER THE PRIVACY ANALYSIS OF *BOWERS*, THE RIGHT OF PRIVACY DOES NOT EXTEND TO ABORTION.

In *Bowers v. Hardwick*, 106 S.Ct. 2841, this Court, employing an evaluation of the history of Western attitudes toward homosexual sodomy, concluded that there was no fundamental privacy right to engage in such activity under either the test of *Palko v. Connecticut*, 302 U.S. 319 (1937), or *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977). Yet, the historical case for the fundamentality of abortion is no more convincing than the historical case for sodomy.[8] Some comparisons of the two analyses indicates the discrepancies between the usual privacy analysis and the relaxed form applied to abortion by the *Roe* majority.

The *Roe* majority cited Plato's *Republic* as evidence of abortion's deep roots in our cultural traditions. 410 U.S. at 131. By contrast, the *Bowers* majority did not apparently see such evidence as worthwhile, for no mention is made to the numerous allusions in Plato's writings to the practice of homosexual sodomy among the ancients. *See*, Plato, *Phaedrus*.

The *Roe* approach suggested that a shift of opinion, in favor of abortion, among selected elites and in a few states, was

[8]Justice Blackmun, in *Roe*, relied primarily on an article by Cyril Means for his history of abortion. *See, e.g.*, 410 U.S. at 135; Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335 (1971). Although the article's scholarship was questionable at the time, for the non-sequiter conclusions it drew, it has since been effectively refuted with respect to the validity of its history and analysis. *See, e.g.*, Destro, *Abortion and the Constitution: The Need for a Life Protective Amendment*, 63 Calif. L. Rev. 1250, 1267-92 (1975); Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359, 379-89 (1979); Horan & Balch, "*Roe v. Wade*: No Justification in History, Law or Logic," Connery, "The Ancients and the Medievals on Abortion: The Consensus the Court Ignored," Dellapenna, "Abortion and the Law: Blackmun's Distortion of the Historical Record," and Arbagi, "*Roe* and the Hippocratic Oath," in *Abortion and the Constitution* (D. Horan, E. Grant & P. Cunningham eds. 1987).

constitutionally significant. By contrast, the *Bowers* opinion saw little constitutional significance in the lack of enforcement of sodomy laws in general and the repeal of such laws in many states. 106 S.Ct. at 2845. These trends did not make a constitutional right.

The *Bowers* analysis was more rigorous than that of *Roe*. There was no grasping at historical straws in *Bowers*, such as occurred in *Roe*. While the *Bowers* historical sketch was not exhaustive, it was, unlike *Roe's*, not glaringly inaccurate. Nor did it have to be complete, for it needed only to show that the practice of homosexual sodomy was not rooted in the traditions of this nation nor essential to a scheme or ordered liberty — a task it did in a simple, straightforward manner. The comparison of the historical analysis employed in *Roe* with that used in *Bowers* indicates that, if the Texas abortion law challenged in *Roe* were subjected to the same analysis as the Georgia sodomy statute in *Bowers*, the abortion law would have been upheld. *See* Bopp & Coleson, *supra* note 4, at 45-76 (a detailed evaluation of *Roe* as a privacy right, in comparison to other privacy rights, and further analysis of the *Roe/Bowers* analytical dichotomy).

Application of the analysis employed in *Bowers* to the issues of *Roe* reveals that, under a proper constitutional analysis, there is no fundamental right to abortion. Therefore, the strict standard of scrutiny employed for fundamental rights should be abandoned and the abortion legislation of the states, including the Missouri statutes at issue herein, should be evaluated by the rational basis standard of review.

### B. PRESERVING AN ABORTION PRIVACY RIGHT WHILE RECOGNIZING A COMPELLING STATE INTEREST IN UNBORN HUMAN LIFE THROUGHOUT PREGNANCY WOULD LEAD TO SUBSTANTIAL DIFFICULTIES.

It may be argues by some that the issue of whether there is a fundamental right to abortion need not be reached, for this Court may simply declare that there is a compelling interest in

unborn human life throughout all stages of pregnancy. Under such a holding, the state, in asserting and protecting that compelling interest, could then limit abortion practice. However, such an approach would lead to substantial difficulties.

1. LITIGATION WOULD CONTINUE CONCERNING THE PROPER ADVANCEMENT OF STATE INTERESTS AND WHETHER LEGISLATION IS NARROWLY TAILORED TO MEET THOSE INTERESTS.

Maintaining a fundamental right to abortion while finding the states' interest in unborn human life to be compelling would do nothing to stanch the flow of abortion litigation — only the emphasis would be shifted. Questions would be raised in case after case concerning whether the state interests were advanced properly by certain legislation and whether the legislation was narrowly tailored to meet those interests. The fundamental rights analysis itself generates litigation in the field of abortion jurisprudence. By maintaining that analysis and finding a compelling interest in unborn human life, this Court would contribute little to ending the interminable litigation of this matter in the courts.

2. THE CONTINUING LITIGATION WOULD FORCE UPON THE COURTS THE NEED TO CONTINUE MAKING POLICY CHOICES, MORE PROPERLY SUITED TO LEGISLATIVE BODIES, WHICH HAS LEAD TO A SUBSTANTIAL DISTORTION IN THE LAW WHERE IT TOUCHES ABORTION.

If the fundamental rights analysis is maintained, the need for the courts to make policy choices, as discussed supra, would continue unabated. These policy choices are more properly and effectively made by legislatures. Maintaining the fundamental rights analysis would do little to repair the distortion wrought by courts bending over backward to protect the abortion liberty at all costs. The predictable result would be even greater distortion if the abortion liberty continues to enjoy the imprimatur of this Court.

### 3. THIS COURT WOULD BE FORCED TO CONTINUE MAKING EVER-EXPANDING POLICY CHOICES.

Likewise, by maintaining a fundamental rights analysis, this Court would be required to continue acting as the nation's medical review board, making ever-expanding policy choices on ever-finer points of social policy. Only a return of the matter to the political arena and the democratic process, designed to resolve such difficult matters of social policy, will put an end to the interminable imploring of this Court to play a role for which it was not created and is ill-suited.

### 4. THIS COURT'S OWN EXPERIENCE WITH THE DECLARED COMPELLING INTERESTS IN MATERNAL HEALTH AND "POTENTIAL LIFE" AFTER VIABILITY SHOWS THE INHERENT PROBLEMS WITH DECLARING A COMPELLING INTEREST IN UNBORN LIFE WHILE MAINTAINING THE ABORTION PRIVACY RIGHT.

Declaring a compelling interest in human life throughout pregnancy would only cause further complications for this Court, as evidenced by its experience with prior interests declared compelling in the abortion context. In *Roe*, this Court declared that the state had a compelling interest in maternal health, from the end of the first trimester on, and in "potential" unborn life from viability to term. 410 U.S. at 163.

In practice, the fundamental liberty right of the mother has consumed the supposedly compelling interests of the state. *See* Bopp & Coleson, *supra* note 4, at 12-42. Some examples will illustrate the voracious appetite of the abortion right, under the control of justices unwilling to abide by stare decisis.

The doctrine of stare decisis was developed as an essential corollary to the rule of law, a corner stone of our system of constitutional government. This rule-of-law doctrine allows obedience to and stability in the law. The observance of stare

decisis normally yields a degree of predictability in the law. Despite invocation of *Roe* as a polestar for creating and reviewing abortion regulation, abortion law has been marked by instability and uncertainty. This Court's pronouncements have been far from clear, and there have been changes of the rules in the middle of the game.

It is ironic that, while claiming to follow *Roe*, this Court has systematically gutted *Roe* to allow the current desired result. The doctrine of stare decisis presupposes a precedent with content to be followed. By emptying *Roe* of content, the Court's appeal to stare decisis is to the skeletal concept that a woman may have an abortion whenever she desires, for whatever reason.

This Court has indicated this to be the core and substance of the precedent it follows by striking down any meaningful attempt to assert the interests it has declared as "compelling" in *Roe* and by abandoning key elements of the *Roe* formula when convenient. It is clear, then, that while the pro-*Roe* majority has raised the cry of stare decisis, it has not in fact followed its own precedent, except in the most skeletal fashion.

For example, *Roe* said that a state had a compelling interest in maternal health, beginning at the end of the first trimester, which would allow it to, *inter alia*, regulate "as to the facility in which the procedure is to be performed, that is, *whether it must be a hospital . . .*" 410 U.S. at 163-64 (emphasis added). An Indiana district court in *Gary-Northwest Indiana Women's Services v. Bowen*, adhered to this precedent and upheld a statute requiring hospitalization for post-first-trimester abortions. 496 F. Supp. 894 (N.D. Ind. 1980). The plaintiffs had argued that dilation and evacuation abortions had become so safe that hospitalization should not be required, at least during the first half of the second trimester (to eighteen weeks). *Id.* at 896-97. The district court, adhering to precedent, quoted the passage from *Roe* allowing the state to require hospitalization after the first trimester and declared, "The express language of *Roe* mandates that Indiana's hospitalization requirement be found by this Court to be constitutional." 496 F. Supp. at 899.

The district court also rejected the attempt to subdivide the trimesters, by allowing state regulation of "abortions more dangerous than childbirth," rather than treating "second trimester" abortions as a unit, holding that "[t]his Court must respect *Roe's* specific ultimate rulings. If this Court does not respect the specific ultimate rulings in *Roe*, those rulings will lose their usefulness . . . [and s]tates will be hard pressed to pursue their legitimate, compelling interests in protecting maternal health." *Id.* at 900. The district court further noted the impracticability of abandoning the trimester framework in favor of a case-by-case determination, and the fact that it was "the policy of the United States Supreme Court to avoid, if possible, the creation of rules of law which increase litigation." *Id.* at 900-01.

This Court summarily affirmed this case on appeal, leading to the widespread perception that this Court had adopted a bright-line approach and meant what it said about state interests being compelling. *Sub nom. Gary-Northwest Indiana Women's Services v. Orr*, 451 U.S. 934 (1982).[9]

However, when faced with a similar hospitalization provision, enacted by the city of Akron, the pro-*Roe* majority abandoned stare decisis in reviewing the ordinance. The district and circuit courts had considered the hospitalization requirement as constitutional and firmly controlled by this Court's precedents. *Akron Center for Reproductive Health v. Akron*, 479 F. Supp. 1172 (N.D. Ohio 1979); 651 F.2d 1198 (6th Cir. 1981).

The *Akron* majority, on this Court, chose to follow medical precedent rather than its own. The American College of Obstetricians and Gynecologists had decided that clinic abortions were safe into the second trimester, and this Court

[9]Twenty-three states enacted hospitalization requirements for abortions after the first trimester. *Akron*, 462 U.S. at 426 n.9 (citing Brief for Americans United for Life as Amicus Curiae at 4 n.1, *Simopoulos v. Virginia*, 462 U.S. 506 (1983)). *Cf. Planned Parenthood Association of Kansas City v. Ashcroft*, 655 F.2d 848 (8th Cir. 1981) (invalidating hospital requirement) *with Simopolous v. Commonwealth*, 221 Va. 1059, 277 S.E.2d 194 (1981) (upholding hospital requirement).

struck down the hospitalization requirement, holding that abortion regulations may not "depart from accepted medical practice." *Id.* at 434.

In the words of Justice O'Connor, the Court had abandoned its "bright-line" approach. Henceforth, legislators would be required to track the changing trends of medical technology, rather than follow the precedents of this Court. *See* Bopp & Coleson, *supra* note 4, at 25-30 (a fuller analysis of this failure of stare decisis).

A second key concept of *Roe* was the woman's right to make the abortion decision "in consultation" with her physician. 410 U.S. at 163. However, in *Akron*, 462 U.S. at 449, the pro-*Roe* majority again abandoned stare decisis, holding that a woman need not even speak with her physician about her abortion. *See* Bopp & Coleson, *supra* note 4, at 30-34 (a fuller discussion of this point).

Former Chief Justice Burger, in *Thornburgh*, observed how the state interests, declared in *Roe*, had been ignored. Despite the declared "compelling" interest in maternal health, "the Court astonishingly goes so far as to say that the State may not require that a woman contemplating an abortion be provided with accurate medical information concerning the risks inherent in the medical procedure . . . " 106 S.Ct. at 2190 (Burger, C.J., dissenting). He further noted that the *Thornburgh* majority's willingness to strike down a second physician requirement (to care for viable, aborted children) made of *Roe*'s declared "compelling" interest in unborn life "mere shallow rhetoric." *Id.* at 2191. He added, "Undoubtedly the Pennsylvania Legislature added the . . . requirement on the mistaken assumption that this Court meant what it said in *Roe* concerning the 'compelling interest' of the states . . ." *Id.*

Chief Justice Burger concluded that the Court had left its original consensus against abortion on demand — perhaps the greatest example of the abandonment of stare decisis in abortion law — and, thereby, had left him behind. *Id.* at 2190-91. He declared that "[t]he soundness of our holdings must

be tested by the decisions that purport to follow them," and, finding that *Roe* had failed such a test, called for the reexamination of *Roe*. *Id.* at 2190, 2192.

The result of the continued neglect of the "compelling" interests, declared in *Roe*, by the *Thornburgh* majority was to create a climate of instability, unpredictability, inconsistency, unworkability, and unfairness — the antithesis of the values sought to be promoted by stare decisis and the rule of law. *See* Bopp & Coleson, *supra* note 4, at 12-23, 34-42 (a more detailed analysis of the shortcomings of *Thornburgh* in light of the principles underlying stare decisis and the rule of law). In view of the failure of the pro-*Roe* majority to follow stare decisis in abortion jurisprudence, it is ironic that in *Akron*, faced with calls for the reversal of *Roe*, the majority trumpeted stare decisis and claimed to be following *Roe*. 462 U.S. at 420 n.1.[10]

Thus, to declare a compelling interest in unborn human life throughout pregnancy may not yield the result intended. As seen in the record of past cases, compelling interests have suffered catastrophic erosion when subject to an abortion right. It is likely that a new declaration of a compelling state interest in unborn life from the time of conception would suffer a similar fate.

[10]While it is beyond the scope of this brief to discuss the doctrine of stare decisis at length, the amicus curiae notes briefly that there is a difference between giving lip-service to the doctrine with alleged adherence to *Roe*, while ignoring inconvenient aspects of it at will, and honestly confronting a past mistake of this Court. The former is to be condemned; precedent not overruled ought to be followed. The latter is an essential aspect of constitutional adjudicaton and, where necessarily done, should be applauded; precedent seen to be erroneous from the perspective of time, experience, and expanded scholarship must be corrected. *Roe v. Wade* is a precedent that requires reversal and stare decisis demands, rather than forbids such reversal. *See* Bopp & Coleson, *supra* note 4, generally and at 197-04; Pfeifer, "Abandoning Eror: Self-Correction by the Supreme Court," in *Abortion and the Constitution* 3-22; Wardle, *Rethinking* Roe v. Wade, 1985 B.Y.U. L. Rev. 231, 251-57.

## CONCLUSION

Abortion jurisprudence needs resolution after sixteen year of turmoil. This Court attempted to resolve the matter in 1973. Time has proven the effort a failure. This Court is now confronted with the opportunity to restore a proper interpretation to the Constitution, returning this volatile matter of social policy to the proper fora — the state legislatures.

Objective application of the tests of fundamentality established by this Court reveals that there is no fundamental right to abortion apart from judicial fiat. By confronting this fact, as the threshold issue in this case, this Court can fulfill its duty to adjudicate consistent with its precedents and, most importantly, in faithfulness to the Constitution. Because the abortion liberty fails to rise to the level of a fundamental right, the rational basis test should be employed. Given the states' historic interest in preserving life from the time of conception (an interest firmly rooted in the history and conscience of our nation), there is clearly a rational basis to uphold the Missouri statutes at issue herein.

Respectfully submitted,

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