# No. 88-605

# In the Supreme Court of the United States

**OCTOBER TERM, 1988**

WILLIAM L. WEBSTER, et al.,
*Appellants,*

vs.

REPRODUCTIVE HEALTH SERVICES, et al.,
*Appellees.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## BRIEF FOR APPELLANTS


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I

## QUESTIONS PRESENTED FOR REVIEW

1. Do physicians or other medical personnel have standing to contest the constitutionality of a state legislative preamble in an abortion statute?

2. Are legislative findings in the preamble to a state abortion bill that "the life of each human being begins at conception" and that "unborn children have protectable interests in life, health and well-being" facially unconstitutional? See RSMo 1.205.1(1), 1.205.1(2) (1986).

3. Where a statute requiring a determination of fetal viability when a physician "has reason to believe" that the fetus is "of twenty or more weeks gestational age" (LMP) has been held to be constitutional, is it facially unconstitutional to require that, in making this determination, the physician shall 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 . . . ."? See RSMo 188.029 (1986).

4. Is a state civil statute facially unconstitutional that makes it "unlawful for any public funds to be expended . . . for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life"? See RSMo 188.205 (1986).

5. Is a state civil statute facially unconstitutional that makes it "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"? See RSMo 188.210 (1986).

6. Is a state civil statute facially unconstitutional that makes it "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"? See RSMo 188.215 (1986).

7. Should the *Roe v. Wade,* 410 U.S. 113 (1973), trimester approach for selecting the test by which state regulation of abortion services is reviewed be reconsidered and discarded in favor of a rational basis test?

III

## PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the State of Missouri was a defendant in the district court and an appellant in the court of appeals; Planned Parenthood of Greater Kansas City, Howard I. Schwartz, M.D., Robert L. Blake, M.D., Carl C. Pearman, M.D., Carroll Metzger, and Mary L. Pemberton were plaintiffs in the district court and appellees in the court of appeals.

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The June 23, 1987, final judgment of the district court is reported at 662 F. Supp. 407 (W.D. Mo. 1987), superseding 655 F. Supp. 1300 (W.D. Mo. 1987), and is reproduced in the Jurisdictional Statement Appendix (hereinafter "J.S. App.") at A1-A55. The July 13, 1988, final judgment of the court of appeals is reported at 851 F.2d 1071 (8th Cir. 1988) and is reproduced at J.S. App. at A56-A84.

## JURISDICTION

On July 13, 1988, the United States Court of Appeals for the Eighth Circuit entered a final judgment, holding unconstitutional on their face the Missouri statutes challenged. On September 29, 1988, appellants filed a notice of appeal from the court's final judgment of July 13, 1988 (J.S. App. A85). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(2). The Jurisdictional Statement was filed on October 11, 1988. Probable jurisdiction was noted on January 9, 1989.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Art. III, § 2;

U.S. Const., Amend. I;

U.S. Const., Amend. XIV, § 1;

§ 1.140, RSMo 1986;

§ 1.205, RSMo 1986;

§ 188.010, RSMo 1986;

§ 188.029, RSMo 1986;

§ 188.200, RSMo 1986;

§ 188.205, RSMo 1986;

§ 188.210, RSMo 1986;

§ 188.215, RSMo 1986;

§ 188.220, RSMo 1986.

The pertinent text of each constitutional provision and statute is set forth in the Jurisdictional Statement Appendix at A87-A91, pursuant to Rule 15(f) and Rule 34(f) of the Supreme Court Rules.

## STATEMENT OF THE CASE

On June 26, 1986, the Governor of the State of Missouri signed into law Missouri Senate Committee Substitute for House Bill No. 1596. The effective date was to be August 13, 1986.

Five publicly employed doctors and nurses and two non-profit corporations filed this facial class action challenge on July 14, 1986, pursuant to 42 U.S.C. § 1983 (1982) and 42 U.S.C. § 1988 (1982). Jurisdiction was predicated on 28 U.S.C. § 1331 and 28 U.S.C. § 1343. Plaintiffs challenged § 1.205.1(1), a portion of the preamble to a section defining the rights of unborn children; § 188.025, which provides that abortions after sixteen weeks gestational age be performed in a hospital; § 188.029, which requires a physician to determine whether a fetus is viable before performing an abortion on a woman who the physician has reason to believe is twenty or more weeks pregnant and requires the doctor to perform and record "such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child"; § 188.039, an informed consent requirement; and §§ 188.205, 188.210, and 188.215, which forbid the expenditure of public funds or the use of public employees or public facilities 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.

Plaintiffs claimed that each statutory section was unconstitutional on its face because it violates the First,

Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution. (Complaint, ¶¶ 2, 19, 30-35, Joint Appendix (hereinafter "J.A.") at A9, A15, A18, A19).

Plaintiffs alleged that plaintiff Howard Schwartz, M.D., was a "public employee," as the term is defined in § 188.200(1), at Truman Medical Center, a "public facility" as that term is defined in § 188.200(2); that he "has occasion to encourage or to counsel said women to terminate pregnancies and on occasion to perform or to assist in the performance of abortions, although the same are not necessary to save the patients' lives on said occasions," and that "[o]n said occasions, Dr. Schwartz is paid for such services by 'public funds' as that term is defined by § 188.200(3) of the Act." (Complaint, ¶ 7, J.A. A10.) Virtually identical allegations were made by all individual plaintiffs and incorporated into the district court's opinion (J.S. App. A10).

On October 24, 1986, the plaintiffs requested leave to file a first amended complaint by interlineation in order to challenge the constitutionality of § 1.205.1(2), which states that unborn children have protectable interests in life, health, and well-being. The court addressed the constitutionality of this section in its final order.

The trial was conducted in the district court December 15 through December 18, 1986. Initially, the district court granted summary judgment declaring that § 188.039.1 was facially unconstitutional as a matter of law because it required a physician to personally provide information to the patient. The district court also granted plaintiffs' motion in limine prohibiting the defendants from presenting any testimony or evidence regarding the constitutionality of §§ 1.205.1(1) or 1.205.1

(2). Defendants later submitted as exhibits numerous medical articles regarding the subject matter of §§ 1.205.1 (1) and 1.205.1(2), which were admitted as offers of proof. See defendants' Exhibits A, B, C, D, E, F, G, H, I, R, S, and T (Tr. 4-2 - Tr. 4-4). (J.A. A60-A65.)

Numerous expert witnesses testified in support of or in opposition to those sections of the Act regarding which the court allowed testimony. Where appropriate in the argument portion of this brief, defendants set forth references to the factual record which relate to the specific statutes presently before this Court for review.

With regard to §§ 1.205.1(1) and 1.205.1(2), the district court cited *Roe v. Wade,* 410 U.S. 113 (1973), and concluded that "a state may not adopt one theory of when life begins to justify abortion regulation" and that it was "inappropriate for this Court to conduct an inquiry into such a difficult and philosophical question." Accordingly, the trial court held that the legislature's pronouncement conflicts with the essence of *Roe v. Wade,* and that it is "invalid as a matter of law." (J.S. App. A15.)

The district court invalidated § 188.025, which required that abortions at and after sixteen weeks gestation (LMP) be performed in a hospital. The court concluded that the state did not carry its burden of proving that the requirement was reasonably related to preserving maternal health (J.S. App. A30-A31).

The district court upheld as constitutional the first sentence of § 188.029, which requires a physician to determine whether a fetus is viable when the physician "has reason to believe" that the woman is twenty or more weeks pregnant (LMP), relying on *Colautti v. Franklin,* 439 U.S. 379 (1979), and *Planned Parenthood*

*v. Danforth,* 428 U.S. 52 (1976). However, the court proceeded to invalidate on its face the second sentence of § 188.029. The Court found that "tests to determine fetal weight are not only unreliable and inaccurate, but also add "$125.00 to $250.00 to the cost of abortion." (J.S. App. A36.) The court also found that "the only method to evaluate lung maturity is by amniocentesis, an expensive procedure which all witnesses agreed would be useless and contrary to accepted medical practice until at least twenty-eight to thirty weeks gestation." (J.S. App. A36.) Since the state failed to demonstrate that this provision was "narrowly tailored" to protect the state's interest in fetal life, the court severed the second sentence, and declared it invalid, relying on *Colautti.*

The district court also declared §§ 188.205, 188.210, and 188.215 unconstitutional. The court held that the "encouraging and counseling" language in each section "abut[s] upon First Amendment freedoms." (J.S. App. A45-A46.) Applying the "appropriate rigid standard," the court held that all three sections were "sufficiently vague to render them unconstitutional." The district court reasoned that this Court "disapproved of similar terms such as 'counsel,' 'advocate' and 'advise' in the loyalty oath cases of the 1960's because the language was 'not susceptible of objective measurement' and threatened to restrict free speech." (J.S. App. A45-A46.)

Besides holding that these three sections were void for vagueness, the court also held that §§ 188.205, 188.210, and 188.215 violated the First Amendment and the right of privacy under the Fourteenth Amendment. First, the court held that the "encouraging and counseling" language in §§ 188.205, 188.210, and 188.215 "impose[d] a significant barrier to a woman's right to consult with her physician and exercise her freedom of choice." This would

result in a situation where "[p]atients who fully pay for their services would be denied access to medical information . . . ." (J.S. App. A49-A50.) Second, the court held that the prohibition in § 188.215 on the use of public facilities was unconstitutional under *Nyberg v. City of Virginia*, 667 F.2d 754 (8th Cir. 1982), appeal dismissed for want of jurisdiction, cert. denied, 462 U.S. 1125 (1983), and that *Poelker v. Doe*, 432 U.S. 519 (1977) was not controlling "where there is no indication that 'public funds' would be expended." (J.S. App. A50-A51.)

Finally, the court held that the "performing or assisting" language, as applied to public funds or public employees, violated "the Eighth Amendment rights of Missouri inmates to receive medical care," relying on *Monmouth County Correctional Institution Inmates v. Lanzaro*, 643 F. Supp. 1217 (D. N.J. 1986), aff'd in part, modified in part, 834 F.2d 326 (3d Cir. 1987), cert. denied, 108 S.Ct. 1731 (1988). However, the court rejected plaintiffs' claims that these provisions violated "academic freedom" by affecting instruction in abortion procedure at state medical schools (J.S. App. A51-A54).

On March 25, 1987, plaintiffs filed a motion to amend the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. That motion was granted by the court on April 30, 1987. Defendants' notice of appeal was filed May 15, 1987.

Appellants appealed from all aspects of the district court's decision, except from the injunction against § 188.039, which related to informed consent. No cross appeal was taken from the district court's approval of the first sentence of § 188.029.

The court of appeals affirmed in part and reversed in part. The court of appeals affirmed the invalidation of § 188.025, regarding the performance of abortions in

a hospital at sixteen weeks gestation. The court also affirmed the invalidation of the second sentence of § 188.029, regarding tests to determine viability, relying on this Court's statement in *Colautti v. Franklin*, 439 U.S. 379 (1979), that "neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability—be it weeks of gestation or fetal weight or any other single factor." (J.S. App. A59.) The court rejected the State's argument that the statute did not require any particular tests but only those "necessary medical examinations so as to determine viability," concluding that the statute "plainly declares that in determining viability, doctors must perform tests to find gestational age, and fetal weight and lung maturity." (J.S. App. A60, n. 5.)

The court also affirmed the invalidation of the preamble findings of § 1.205.1. The court held that the plaintiffs had standing because the preamble did "exactly what the Supreme Court has declared it may not do: espouse a theory of when life begins as the foundation of the state's regulation of abortion" and "[n]o persons are better situated to attack the constitutionality of this endeavor than those parties who are directly affected by the state's abortion laws—laws that allegedly are based on and reflective of an impermissible theory of life." (J.S. App. A63.) The court invalidated the preamble as "simply an impermissible state adoption of a theory of when life begins to justify its abortion regulations." (J.S. App. A64.)

The court also affirmed the invalidation of §§ 188.205 (in part), 188.210, and 188.215 because the "encourage or counsel" language was "void for vagueness and violative of the right to privacy." Even though these provisions carry no criminal penalties, the court held that

a "strict scrutiny" standard applied in evaluating the vagueness challenge because the provisions "implicate[d] both first and fourteenth amendment rights of both physicians and their patients . . . ." (J.S. App. A67.) Rejecting the State's limiting construction that the "encouraging and counseling" language banned only "affirmative advocacy," the court concluded that the language was "much broader than the interpretation offered by the state" and was "vague because the word 'counsel' is fraught with ambiguity; its range is incapable of objective measurement." *Id.* Finally, the court agreed that the "encouraging and counseling" language of §§ 188.205, 188.210, and 188.215 constituted "an unacceptable infringement of the woman's fourteenth amendment right to choose an abortion after receiving the medical information necessary to exercise the right knowingly and intelligently." (J.S. App. A70.)

The appellate court affirmed the district court decision that the "performing or assisting" language of § 188.215 (public facilities) was contrary to *Nyberg v. City of Virginia, supra.* The court also decided that the "performing or assisting" language of § 188.210 (public employees) was equally invalid. However, the court of appeals reversed the lower court's order regarding the "performing or assisting" language of § 188.205 because it was inconsistent with *Poelker v. Doe, supra.* The court of appeals also rejected the district court's construction of the "performing or assisting" language and stated that the Eighth Amendment was not implicated.

Overall, the court of appeals affirmed the permanent injunction against all provisions appealed, except for the "performing or assisting" language of § 188.205 which was severed and declared facially constitutional.

In this appeal, the State of Missouri is contending that the court of appeals grievously erred in its review

of the state statutes in question and that the court should be reversed insofar as it declared unconstitutional §§ 1.205.1(1) and 1.205.1(2), the second half of § 188.029, the second half of § 188.205, and the first half of §§ 188.210 and 188.215. The remainder of the court of appeals' decision will not be challenged.

## SUMMARY OF THE ARGUMENT

### I.

Initially, this Court must consider the standard of review to be utilized in reviewing the Missouri Statutes struck by the courts below in accordance with *Roe v. Wade*. The State of Missouri maintains that the trimester approach established in *Roe v. Wade* is inherently flawed because the point of viability is arbitrary and the State has a compelling interest in protecting life through all stages of pregnancy. The textual, doctrinal, and historical basis for *Roe v. Wade* is flawed and is a source of such instability in the law that this Court should reconsider the decision, and on reconsideration abandon it and adopt the rational basis test for reviewing abortion regulation in accordance with *Bowers v. Hardwick*. Alternatively, if this Court continues to deem the abortion decision to be a fundamental right, state regulations should be upheld unless they unduly burden the abortion choice at any stage of pregnancy in accordance with *Maher v. Roe* and *Harris v. McRae*.

### II.

The State of Missouri maintains that the courts below erred in declaring §§ 1.205.1(1) and (2) unconstitutional as a matter of law because the stricken provisions are prefatory statements with no substantive effect. The plaintiffs lack standing to challenge the preamble provisions because the statute does not unduly burden the abortion decision or restrict or regulate the performance

of abortions. The stricken provisions are valid statements of fact and policy which justify the operative sections of the statute, wherein the State bestows rights on unborn children under Missouri law in non-abortion situations.

**III.**

Missouri maintains that the second provision of § 188.029 should have been upheld by the courts below because the statute does not require unnecessary or inappropriate tests to determine viability and because the State's requirement that a physician record his findings regarding the viability of an unborn child which he has reason to believe is twenty weeks gestational age furthers the State's compelling interest in preserving the life of a viable unborn child.

**IV.**

The courts below erred in declaring a provision of § 188.205 forbidding the expenditure of public funds for "the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life" to be in violation of a woman's right to privacy or void for vagueness. The State of Missouri does not violate a woman's right to obtain an abortion by refusing to allow public funds to be used for abortion counseling and services. Contrary to the court of appeals' decision, this Court's rulings in *Maher v. Roe, Harris v. McRae,* and *Poelker v. Doe* conclusively establish that a limitation on the expenditure of public funds does not constitute an obstacle in violation of a woman's right to obtain an abortion.

Section 188.205 does not implicate the First Amendment rights of any person. The court of appeals clearly erred in reviewing § 188.205 pursuant to a strict scrutiny standard. The statute has no criminal penalties and does

not forbid speech. An examination of the language declared vague by the courts below in its proper context indicates that the restriction is not so vague that a person of common intelligence must guess at its meaning. The provision provides a reasonable person fair notice of conduct which will not be subsidized by the State.

## V.

In §§ 188.210 and 188.215 the State of Missouri declared it 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 or 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. These provisions were declared to be unconstitutional under *Nyberg v. City of Virginia (Nyberg II)*. The appellants submit that the Eighth Circuit's decision to rely upon *Nyberg II* and declare the performing or assisting language in each of these two statutes to be unconstitutional is directly contrary to the reasoning of *Poelker v. Doe*. The court below erred in limiting the principles expressed in *Poelker v. Doe, Maher v. Roe,* and *Harris v. McRae* to mean merely that the government is not obligated to fund abortions. The State of Missouri submits that a refusal by the State to allow the use of public facilities or public employees for the performance of abortions not necessary to save the life of the mother does not constitute an undue burden or create an unlawful obstacle preventing a woman from effectuating her decision to obtain an abortion. A woman who desires an abortion continues as before to be dependent on private sources for the services she desires. Consequently, the courts below should have severed and upheld the performing or assisting language of §§ 188.210 and 188.215.

## ARGUMENT

### I. The Standards to Be Applied in the Review of Abortion-Related State Legislation Should Be Reconsidered and Modified.

#### A. A Determination of the Appropriate Standard of Review Is a Threshold Issue in This Appeal.

The first step in the judicial review of the Missouri statutes at issue is to determine the appropriate standard of review: strict scrutiny, rational basis, or some intermediate standard. In cases involving state regulation of abortion, this Court has consistently set forth the standard of review before considering the particular statutes at issue. In *Roe v. Wade*, 410 U.S. 113 (1973), the majority labored at great length over the appropriate constitutional analysis before striking down the Texas abortion statute. Subsequently, in every major abortion case reaching this Court, the standard of review has been a threshold issue.[1] The State of Missouri submits that this initial issue must again be addressed before directly confronting the specific statutes facially challenged by the plaintiffs and ordered enjoined by the courts below.

#### B. Missouri's Compelling Interest in Life Cannot Be Confined by a Shifting Point of Viability.

Six years ago, Justice O'Connor observed in her dissent in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 458 (1983), that:

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1. See *Doe v. Bolton*, 410 U.S. 179, 189, 195 (1973); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 60-61 (1976); *Maher v. Roe*, 432 U.S. 464, 470 (1977); *Colautti v. Franklin*, 439 U.S. 379, 386-387 (1979); *Belotti v. Baird (II)*, 443 U.S. 622, 633-642 (1979); *Harris v. McRae*, 448 U.S. 297, 311-318, 319-320, 322-323, 324 (1980); *H. L. v. Matheson*, 450 U.S. 398, 408-410 (1981); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 419-420, 426-431 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

> [t]he *Roe* framework . . . is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the state may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception. Moreover, it is clear that the trimester approach violates the fundamental aspiration of judicial decision-making through the application of neutral principles 'sufficiently absolute to give them roots throughout the community and continuity over significant periods of time . . . .' A. Cox, *The Role of the Supreme Court in American Government,* 114 (1976).

The evidence presented by the parties in this action dramatically demonstrates the accuracy of Justice O'Connor's prediction. The testimony of medical experts for both parties and the documentary evidence overwhelmingly established that a woman who appears to be carrying an unborn child of twenty weeks gestational age (LMP) may have a viable unborn child under 1986 medical technology (J.S. App. A33; n. 37, 38). The evidence regarding this was so persuasive that the plaintiffs did not challenge the district court's findings or conclusions regarding this question even though the court was focusing on a point during pregnancy two months prior to the third trimester line drawn in *Roe v. Wade.*

The facts established in this case make it very evident that the concept of viability is entirely arbitrary. It is simply a discretionary point which may shift because of the opinion of a physician requested to perform an abortion or due to the availability of medical facilities to preserve the life of a premature baby. Clearly, "[t]he choice of viability as the point at which the state in-

terest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward." *Akron*, 462 U.S. at 461 (O'Connor, J., dissenting).

The State of Missouri therefore submits that its compelling interest in protecting human life exists throughout pregnancy. The trimester approach of *Roe v. Wade* has been rendered impotent by advances in prenatal medicine and the arbitrariness of the lines drawn by the majority. See *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting); *Akron*, 462 U.S. at 461 (O'Connor, J., dissenting).

### C. Roe v. Wade Should Be Reconsidered Because Its Textual, Historical, and Doctrinal Basis Is Illegitimate.

The second reason for urging reconsideration of *Roe v. Wade* is the State of Missouri's belief that the textual, historical, and doctrinal basis for the abortion right created by *Roe v. Wade* is inherently flawed.

It has now been sixteen years since the Supreme Court decided *Roe v. Wade*. Criticism regarding the legitimacy of the right declared to be fundamental in *Roe v. Wade* continues unabated since the date of the decision.[2] An exhaustive and persuasive examination of

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2. A broad spectrum of constitutional scholars have repeatedly exposed the flaws which undermine the legitimacy of the decision. See, e.g., J. H. Ely, *Democracy and Distrust* 2-3, 248, n. 52 (1980); Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots, and Prospects*, 1979 Wash. U.L.Q. 817, 819; Burt, *The Constitution of the Family*, 1979 Sup. Ct. Rev. 329, 371-373; A. Bickel, *The Morality of Consent* 27-19 (1975); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159; Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudications*, 83 Yale L.J. 221, 297-311 (1973); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973); Coleman, *Roe v. Wade: A Retrospective Look at a Judicial Oxymoron*, 29 St. Louis U.L.J. 7 (1984).

the flaws of *Roe v. Wade* was presented by the Solicitor General in the United States' brief as amicus curiae in *Thornburgh v. American College of Obstetricians and Gynecologists, supra,* Nos. 84-495 and 84-1379. Consequently, appellants do not feel compelled to reiterate arguments quite familiar to this Court. However, the circumstances presented by this case, the fifteenth abortion case since *Roe v. Wade* and *Doe v. Bolton* to be considered by the Court, warrant a careful look at the path the Court has followed. Upon reconsideration, the appellants will urge this Court to overrule *Roe v. Wade* and return the law to the condition in which it was before the case was decided. As Justice White has observed, the liberty interest in abortion, unlike the Court's precedents involving childbearing, has no basis in liberty interests that are either "implicit in the concept of ordered liberty," *Thornburgh,* 476 U.S. at 792, or otherwise "deeply rooted in this Nation's history and tradition." *Id.* Only by reference to these two sources of fundamental rights is the Court able:

> . . . to identify some source of constitutional value that reflects not the philosophical predilections of individual judges, but basic choices made by the people themselves in constituting their system of government . . .

*Thornburgh,* 476 U.S. at 791 (White, J., dissenting).

It is Missouri's position that the values implicit in the Constitution do not compel recognition of abortion liberty as fundamental. As Justice White concluded in his *Thornburgh* dissent:

> The Court's opinion in *Roe* itself convincingly refutes the notion that the abortion liberty is deeply rooted in the history or tradition of our people, as does the continuing and deep division of the people themselves

> over the question of abortion. As for the notion that choice in the matter of abortion is implicit in the concept of ordered liberty, it seems apparent to me that a free, egalitarian, and democratic society does not presuppose any particular rule or set of rules with respect to abortion. And again, the fact that many men and women of good will and high commitment to constitutional government place themselves on both sides of the abortion controversy strengthens my own conviction that the values animating the Constitution do not compel recognition of the abortion liberty as fundamental. In so denominating that liberty, the Court engages not in constitutional interpretation, but in the unrestrained imposition of its own, extraconstitutional value preferences. (Footnotes omitted.)

*Id.* at 793-794.

**D. The Appropriate Standard of Review Is the Rational Basis Test.**

In *Bowers v. Hardwick,* 478 U.S. 186 (1986), the respondents sought to decriminalize homosexual conduct by arguing that the right to privacy encompassed sodomy as part of a fundamental right to decide to beget or bear a child. In support of this position, the respondents cited the Court's substantive due process cases dealing with child rearing and education, *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); *Meyer v. Nebraska,* 262 U.S. 390 (1923); family relationships, *Prince v. Mass.,* 321 U.S. 158 (1944); procreation, *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942); marriage, *Loving v. Virginia,* 388 U.S. 1 (1967); contraception, *Eisenstadt v. Baird,* 405 U.S. 438 (1972); *Griswold v. Connecticut,* 381 U.S. 479 (1965); and abortion, *Roe v. Wade.*

After considering the two basic tests used by the Court in identifying fundamental liberties, the *Bowers* Court completely rejects respondents' argument:

> It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. . . . Against this background, 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. (Citations and footnotes omitted.)

*Id.* at 192-194.

The Court's reasoning in *Bowers* constitutes a forceful basis for rejecting the philosophical underpinning of *Roe*. It cannot be seriously argued that a right to engage in abortion is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty." As the Court acknowledged in *Roe v. Wade*, 410 U.S. at 138-139, and as Justice Rehnquist emphasized in dissent (*id.* at 174-176, n. 1), state laws restricting abortion were widely in force throughout the nineteenth and twentieth centuries.[3]

In both *Akron* and *Thornburgh*, this Court reaffirmed *Roe* on grounds of *stare decisis*. *Akron*, 462 U.S. at 419-420, n. 1; *Thornburgh*, 476 U.S. at 747. Although the principle of *stare decisis* weighs against reconsidering precedents in order to promote the continuity and consistency of adjudication, the principle does not demand total obedience in constitutional litigation. See

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3. See Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Fordham L. Rev. 807 (1973); Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L.Rev. 359 (1979).

*Akron*, 462 U.S. at 420; *Glidden Company v. Zdanok*, 370 U.S. 530, 543 (1962). As Justice White has indicated in his *Thornburgh* dissent:

> But decisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people's authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation. For this reason, it is essential that this Court maintain the power to restore authority to its proper possessors by correcting constitutional decisions that, on reconsideration, are found to be mistaken.

476 U.S. at 787.

Where a judicial scheme affecting the allocation of constitutional powers has proven "unsound in principle and unworkable in practice," or where it "leads to inconsistent results at the same time that it disserves principles of democratic self-governance," this Court has not hesitated to reconsider a prior decision. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546-547 (1985). Consequently, the appellants submit that the doctrine of *stare decisis* should not deter this Court from altering a constitutional doctrine "when it has become apparent that a prior decision has departed from a proper understanding" of the Constitution. *Garcia*, 469 U.S. at 557.

In the event this Court decides to reconsider *Roe v. Wade* in light of the test set forth in *Bowers* to determine fundamental rights, it is evident that state legislation regulating abortion should be upheld so long as it has a rational basis and seeks to further a legitimate state interest, that is, the state's interest in protecting life. *Bowers*, 478 U.S. at 196.

**E. Alternatively, if the Court Continues to Deem the Abortion Decision to Be a Fundamental Right, State Regulations Should Be Upheld Unless They Unduly Burden the Abortion Choice at Any Stage of Pregnancy.**

In *Roe v. Wade,* the Court concluded that the "right of privacy" emanating from the Fourteenth Amendment's due process clause "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." However, the Court rejected the contention that "the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses." 410 U.S. at 153. The privacy right involved in an abortion decision, the Court concluded, "cannot be said to be absolute." *Id.* at 154. See, e.g., *Doe v. Bolton,* 410 U.S. 179, 208 (1973) (Burger, C.J., concurring) ("Plainly, the Court today rejects any claim that the Constitution requires abortions on demand").

Prior to *Thornburgh,*[4] this Court has repeatedly adopted an "unduly burdensome" analysis in the context of reviewing legislative enactments impacting upon the abortion decision. *Harris v. McRae,* 448 U.S. 297, 314 (1980); *Maher v. Roe,* 432 U.S. 464, 473-474 (1977); *Beal v. Doe,* 432 U.S. 438, 446 (1977). As the Court stated in *Maher,*

> The right in *Roe v. Wade* can be understood only by considering both the woman's interest and the nature of the state's interference with it. *Roe* did not declare an unqualified "constitutional right to an abor-

4. The majority's decision in *Thornburgh* has been characterized as an "attempt to discredit and preempt state abortion regulation regardless of the interests its serves and the impact it has." *Thornburgh,* 476 U.S. at 829 (O'Connor, J., dissenting).

> tion," as the district court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy.

432 U.S. at 473-474. See also *Belotti v. Baird*, 443 U.S. 622, 640 (1979) (*Belotti II*) (Opinion of Powell, J.) ("The question before the Court is whether a Massachusetts statute provides for parental notice and consent in a manner that does not unduly burden the right to seek an abortion"). Clearly, before *Thornburgh*, abortion regulations invalidated by the Court were not found objectionable merely because they impacted upon some unusually discrete zone of privacy, but rather because they resulted in an unduly burdensome interference with the abortion choice. See, e.g., *Harris v. McRae*, *supra*, 448 U.S. at 328 (White, J., concurring).

As Justice O'Connor has explained in her *Thornburgh* dissent:

> Under this Court's fundamental-rights jurisprudence, judicial scrutiny of state regulation of abortion should be limited to whether the state law bears a rational relationship to legitimate purposes such as the advancement of these compelling interests, with heightened scrutiny reserved for instances in which the State has imposed an "undue burden" on the abortion decision. *Akron* at 461-463 (O'CONNOR, J., dissenting). An undue burden will generally be found "in situations involving absolute obstacles or severe limitations on the abortion decision," not wherever a state regulation "may 'inhibit' abortions to some degree." *Id.* at 464 (O'CONNOR, J., dissenting).

*Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting).

In the remaining sections of this Argument, Missouri will consider the specific statutes in question pursuant

to the "undue burden" standard which was consistently followed by this Court prior to *Thornburgh*. Appellants will maintain that the statutory language should be declared constitutional, in accordance with that standard, and the decision of the court of appeals should be reversed.

**II. The State of Missouri May Make Legislative Findings That "the Life of Each Human Being Begins at Conception" and That "Unborn Children Have Protectable Interests in Life, Health, and Well-Being" Pursuant to a Public Policy of Protecting the Life and Health of Unborn Children to the Fullest Extent Possible in Tort, Criminal, Property, and Abortion Law.**

The court below held that §§ 1.205.1 (1) and 1.205.1 (2), RSMo 1986, were invalid because they conflicted with *Roe v. Wade*, 410 U.S. 113, 162 (1973), wherein the United States Supreme Court declared that a state could not adopt one theory of when life begins to justify abortion regulation. Prior to trial, the district court granted plaintiffs' motion in limine to exclude any evidence related to the provisions of § 1.205. Presumably, the subsections in question were struck solely because the content of the finding violates the privacy right to an abortion established in *Roe*.

Initially, one must note that the two subsections declared invalid are preamble or prefatory statements of fact and principle enacted in order to provide guidance in interpreting the operative language of § 1.205. Neither subsection does anything substantively.

It is well established that "preambles to statutes do not impose substantive rights, duties or obligations." *National Wildlife Federation v. Marsh*, 721 F.2d 767 (11th Cir. 1983). See *Association of American Railroads v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977); *Alexander*

*v. HUD*, 555 F.2d 166, 171 (7th Cir. 1977).[5] By declaring the Missouri General Assembly's findings to be in violation of the plaintiff class's right to privacy, the court of appeals had to decide that the preamble *did something* which is directly contrary to decisions in other circuits that preambles have no operative effect. *Association of American Railroads v. Costle, supra.*

The substantive language of § 1.205 expands existing state tort, property, and criminal law protection for unborn children. However, § 1.205 excludes legal abortion from its ambit by providing unborn children only those rights, privileges and immunities permitted by "the Constitution of the United States and decisional interpretations thereof by the United States Supreme Court and [not contrary to] specific provisions . . . in the statutes and constitution of this state." Section 1.205.2, RSMo. The statute also specifically provides that it does not create any cause of action against a pregnant woman with respect to the prenatal care of an unborn child. Section 1.205.4, RSMo.

**A. Legislative Findings Without Operative Effect Cannot Threaten Injury So As to Create a "Case or Controversy."**

The statute in question does not regulate any woman's constitutional right to choose abortion over childbirth. A different chapter of the Revised Statutes of Missouri regulates abortion. See Chapter 188, RSMo 1986. Section 1.205 defines the point at which unborn children

5. Congress frequently makes findings to justify new federal spending programs. Such findings have no substantive effect unless Congress intends for the language to have such effect. See, for example, the Bill of Rights provisions of the Developmentally Disabled Assistance and Bill of Rights (Act), 42 U.S.C. § 6010 (1976 ed. and Supp. III), as interpreted in *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1 (1981).

are entitled to the protections of Missouri law in circumstances other than those involved in abortion. The court's decision to strike the challenged preamble provisions of the statute does not diminish the statute's substantive impact on state law.

Since § 1.205 cannot infringe upon any judicially established right of any plaintiff class member who desires to obtain an abortion or perform an abortion, the plaintiffs in this action lack standing to challenge any provision of § 1.205, RSMo. The doctrine of standing requires that a plaintiff allege personal injury fairly traceable to a defendant's alleged unlawful conduct. Without standing, a litigant cannot meet the Article III "case and controversy" requirement of federal judicial power. *Allen v. Wright,* 468 U.S. 737, 754-758 (1984).

As the Court explained in *Allen*:

> The requirement of standing . . . has a core concept derived directly from the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.

*Id.* at 751 (citation omitted). The plaintiffs in the present case cannot demonstrate any injury traceable to sections 1.205.1(1)-(2), and thus have no standing to challenge these provisions. See also *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 473 (1982).

It is unclear on what basis the courts below could even speculate that a merely declaratory enactment could give rise to an injury in fact. Such a law has, by definition, no legal effect. At most, the Missouri preamble creates an ideological tension between the plaintiffs' philosophy of abortion and the declared policy of Missouri. This is, however, a plainly insufficient ground

for standing. The conscientious beliefs of plaintiffs in *Valley Forge* and *Allen* were all insufficient to give standing in those cases. Moreover, if the mere psychological effect of the *substantive* regulations at issue in those cases was too remote or speculative to create a case or controversy, then the psychic impact of the purely *declaratory* sections of the Missouri law must also be insufficient.

In the present case, plaintiffs lacked standing to challenge the declaratory sections of the Missouri law: they suffered no "injury in fact" from the mere existence of these provisions. Hence, the courts below lacked jurisdiction to consider the constitutionality of these sections. The order of the court of appeals should therefore be reversed.

**B. Roe v. Wade Does Not Prohibit a State From Making a Declaration That Life Begins at Conception and That the State Has Interests in All Human Life.**

The court below overturned the prefatory subsections of the Missouri law on the basis of a supposed conflict with *Roe v. Wade*. Neither *Roe* nor its progeny, however, forbid a state declaration that life begins at conception and has protectable interests from that moment.

Ignoring the unduly burdensome standard for judging legislation alleged to affect the right to privacy, the courts below based their decisions instead on specific language, taken out of context, from *Roe v. Wade*:

> When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus [when life begins] the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

*Roe v. Wade*, 410 U.S. at 159. The district court concluded that "the legislative pronouncement by the Missouri General Assembly clearly conflicts with the essence of *Roe v. Wade*. Consequently, §§ 1.205.1(1) and (2) are invalid as a matter of law." (J.S. App. A15.)

The court of appeals saw no point in addressing the factual validity of the State's findings and held the following:

> As a "prefatory" statement, as so insistently urged by the state, the declaration of when life begins can only have been intended as an introductory and foundational comment. To adopt the state's contention that the statute is "abortion-neutral" is to overlook that every remaining section of the bill save one regulates the performance of abortions. The only plausible inference is that the state intended its abortion regulations to be understood against the backdrop of its theory of life. Rather than being abortion-neutral, the statute is simply an impermissible state adoption of a theory of when life begins to justify its abortion regulations.

(J.S. App. A64.)

If *Roe v. Wade* actually stands for the principle espoused by the court of appeals, then *Roe* is even more flawed than previously recognized. *Roe* did not impose a judicial fiat against any law assuming or declaring a certain view of life. Such a sweeping declaration would forbid the numerous laws—regarding wrongful death, homicide, inheritance, and child custody—recognizing the existence of children prior to birth. Rather, this Court held that a state may not, "*by* adopting one theory of life . . . *override the rights* of the pregnant woman that are at stake." 410 U.S. at 162 (emphasis added). In other words, while a state may *assert* a given theory of

life, such assertion cannot, according to the Supreme Court, *justify restrictions* on abortion.

The prefatory Missouri sections make mere assertions, not restrictions, and thus cannot conflict with *Roe*. Indeed, *Roe* itself acknowledges that states have an "important and legitimate interest in protecting" children prior to birth, *id.* at 162, and *Maher* recognizes the authority of a state to "make a value judgment favoring childbirth over abortion," 432 U.S. at 474. Sections 1.205.1(1) and (2) do no more.

The courts below essentially imposed upon all state officials a duty to submit, not only in act but also in word, to an ideology favoring abortion. That holding must be reversed.

The first subsection struck by the courts below is a statement of fact. Although one can quibble over terminology, one cannot dispute the established biological fact that the life of an *individual* human being (or any mammal) begins at conception.[6] Of course, it is of no consequence whether a legislature or court pronounces as true or false a fact of nature. The Earth still moves around the sun, whether a government or a court recognizes that fact.

Nonetheless, it is not improper for a government or a court to recite findings in making or interpreting law. Although the members of a legislature cannot create a fact by pronouncement, they can recognize truth and acknowledge the existence of certain facts as a basis for action. Subsection (1) constitutes an effort by the General As-

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6. See, e.g., Defendant Exhibits A, B, C, D, E, F, G, H, I, R, S, and T (Tr. 4-2 - 4-4); see J.A. A60-A65 for titles; see also E. Blackschmidt, *The Beginning of Human Life*, 16-17 (1977); K. Moore, *The Developing Human: Clinically Oriented Embryology*, 1, 13 (3d ed. 1982).

sembly of Missouri to recognize a truth justifying the substantive legislation which follows.

The second subsection in the preamble is a statement of value and policy, not fact.

In Missouri, "the legislative power . . . is vested in the General Assembly . . . ." *State v. Green,* 470 S.W.2d 571, 573 (Mo. banc 1971). See Mo. Const., Art. III, § 1. This "legislative power is plenary and residual, subject only to the limits of the federal and state constitutions." *Penner v. King,* 695 S.W.2d 887, 889 (Mo. banc 1985). The Missouri General Assembly is therefore the proper governmental body to make legislative policy decisions for the State of Missouri. The declaration of policy set forth in subsection (2) is entirely consistent with Missouri's policy recognizing the sanctity of life.[7]

Traditionally, states have determined the point at which unborn children are entitled to the protections of state law . For example, most states provide children a cause of action in tort for prenatal injuries inflicted by a person other than the child's mother. See W. Prosser, *Handbook on The Law of Torts,* 337 § 55 (4th Ed. 1971) ("when actually faced with the issue for decision, almost all of the jurisdictions have allowed recovery even though injury occurred during the early weeks of pregnancy, when the child was neither viable nor quick"). *Kelly v. Gregory,* 282 App. Div. 542, 543-544, 125 N.Y.S.2d 696, 697 (1953) (child may recover for previability injuries in part because "what we now know makes it possible

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7. See § 188.010, RSMo 1986, which states:

It is the intention of the general assembly of the state of Missouri to grant the right to life to all humans, born and unborn, and to regulate abortion to the full extent permitted by the Constitution of the United States, decisions of the United States Supreme Court, and federal statutes.

See also *Cruzan by Cruzan v. Harmon,* 760 S.W.2d 408 (Mo. en banc 1988).

to demonstrate clearly that separability begins at conception.")

Many states also provide a cause of action to the parents for the wrongful death of their unborn children. For example, the Rhode Island Supreme Court held in *Presley v. Newport Hospital,* 117 R.I. 179, 365 A.2d 748 (1976) that the word "person" as used in the Rhode Island Wrongful Death Act includes unborn children. 117 R.I. at 188, 365 A.2d at 754. As recently as 1983, the Missouri Supreme Court held that the term "person" as used in Missouri's Wrongful Death Statute "includes the human fetus *en ventre sa mere*" stating that its conclusion was "supported by a strong positive trend among other jurisdictions holding that a fetus is a 'person,' 'minor' or 'minor child' within the meaning of their particular wrongful death statutes." *O'Grady v. Brown,* 654 S.W.2d 904, 910 (Mo. banc 1983).

Most states recognize in unborn children certain rights under property law. For example, the Uniform Probate Code provides that unborn children are to be treated as though born within the lifetime of the decedent. *Uniform Probate Code,* § 2-108; *Uniform Probate Code Practice Manual,* p. 11, § 1.11.

Finally, many states provide criminal sanctions for the intentional or criminally negligent killing of an unborn child. For example, a number of states impose criminal sanctions in the nature of manslaughter for the killing of a viable fetus or unborn quick child. See, *e.g.,* Ark. Stat. Ann. § 41-2553 (1947); Cal. Penal Code § 187 (West 1970); Fla. Stat. Ann. § 782.09 (West Supp. 1983); Mich. Comp. Laws Ann. § 750-322 (West Supp. 1983); Nev. Rev. Stat. §§ 200.210, 200.220 (Supp. 1983); Okla. Stat. Ann. titl. 21 §§ 713, 714 (West Supp. 1983). In fact, until Missouri's General Assembly enacted § 1.205, Missouri

also had such a law. See § 565.024.1(3), RSMo 1978 (amended by L. 1986, H.B. No. 1596, § A).

The foregoing examples amply demonstrate that the matters dealt with in § 1.205 have long been recognized as within the proper purview of state regulation and proper subjects for legislative enactments. In *Roe v. Wade,* this Court decided that women have a constitutionally protected right to choose abortion. However, the Court placed no limit on state legislation concerning unborn children where such legislation leaves unimpaired a woman's right to choose abortion. In fact, the *Roe* Court itself acknowledged that states have a valid and important interest in encouraging childbirth. It stated that states have an "important and legitimate interest in protecting the potentiality of human life." 410 U.S. at 162. The Court repeated its *Roe* language in *Beal v. Doe,* 432 U.S. 438 (1977), adding that a state's "strong and legitimate interest in encouraging normal childbirth" exists "throughout the course of the woman's pregnancy." 432 U.S. at 445-46.

In *Maher v. Roe,* 432 U.S. 464 (1977), the Supreme Court faced the question of whether a woman's "freedom of choice" included an entitlement to Medicaid payments for abortions that are not medically necessary. The Supreme Court stated that the district court failed to understand the scope of the right recognized in *Roe.* The *Roe* Court did not create an *absolute* right to abortion; rather, it protects a woman from "unduly burdensome interference" with her right to obtain an abortion. The Court emphasized that *Roe* "implies no limitation on the authority of a state to make a value judgment favoring childbirth over abortion . . . ." 432 U.S. at 471, 473-474.

The *Maher* Court emphasized that a state need not show a compelling interest for its policy choice favoring

normal childbirth. 432 U.S. at 477. A state statute need only comply with the less demanding test that the statute be rationally related to a "constitutionally permissible purpose." 432 U.S. at 78. The Court acknowledged the state's " 'strong and legitimate interest in encouraging normal childbirth' . . . an interest honored over the centuries" and held that the regulation rationally furthered that interest. See also *Harris v. McRae,* 448 U.S. 297, 325 (1980).

Section 1.205 clearly complies in its entirety with the pronouncements and guidelines of *Maher* and *McRae.* It does not create any "unduly burdensome interference" with the right to choose abortion, but, at most, indicates a "value judgment favoring childbirth over abortion . . . ." *Maher v. Roe, supra,* 432 U.S. at 471, 473-474. The findings and policy declarations made to justify this legislation are constitutional and the courts below erred by holding otherwise.

**III. The State of Missouri Has a Compelling Interest in Requiring a Physician Who Is About to Perform an Abortion to Make a Determination Whether the Unborn Child Is Viable, and in So Doing to Cause to Be Performed Such Examinations and Tests As Are Necessary to Make a Finding of the Gestational Age, Weight, and Lung Maturity of the Unborn Child.**

The district court and court of appeals correctly upheld the first sentence of § 188.029, which requires that before performing 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 . . . ." This holding was based on medical evidence by the plaintiffs' own witness, Dr. Maulik, and others, that showed that the twenty-week designation was reasonably related to

viability because there may be a four-week or greater error in estimating gestational age (J.S. App. A33; *supra*, n. 37, 38).

Despite this conclusion, the court below facially invalidated the second sentence of § 188.029. The court of appeals, relying on dictum in *Colautti v. Franklin*, 439 U.S. 379 (1979), that legislatures could not "proclaim one of the elements entering into the ascertainment of viability," concluded that "this is precisely what the Missouri legislature has attempted to proclaim." (J.S. App. A59.) The court of appeals also adopted the findings of the district court that the lung maturity provision required the use of amniocentesis, which was expensive and not rationally related to the determination of viability at twenty weeks (J.S. App. A60, n. 5).

The court of appeals' reliance on *Colautti* is misplaced. *Colautti* dealt with a state statute which subjected a physician to potential criminal liability if he failed to use a certain procedure "when the fetus 'is viable' or when there is 'sufficient reason to believe that the fetus may be viable.'" 439 U.S. at 381. There the Court stated, "[b]ecause this point may differ with each pregnancy, neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability—be it weeks of gestation or fetal weight or any other single factor—as the determinant of when the State has a compelling interest in the life or health of the fetus." *Id.* at 389. The Court struck down this provision, concluding that the term "may be viable" was unconstitutionally vague when stated in conjunction with the phrase "is viable" and because a "scienter requirement with respect to the finding of viability" was absent. *Id.* at 390.

Despite the fact that the court of appeals relied on the *Colautti* dictum that the legislature could not "pro-

claim one of the elements entering into the ascertainment of viability—be it weeks of gestation or fetal weight or any other single factor—as the determinant," that dictum is plainly not applicable to § 188.029. First, the General Assembly has not emphasized any "single factor," but instead has specified *three* factors—consistent with medical science—for which a finding must be made. Second, the legislature has not prejudged what those findings must be. Finally, the legislature has not made all or any of these factors "determinant" of viability. The determination of viability is left to the medical judgment of the attending physician. Although three objective factors medically consistent with a determination of viability are identified, none of these factors is made determinant and the physician may consider any other factors. For these reasons, *Colautti* does not warrant the striking of § 188.029.

Medical experts for both plaintiffs and defendants concurred during the trial that it is standard medical practice to perform an ultrasound examination to determine gestational age and viability of a fetus whenever it appears that a woman seeking an abortion is at least twenty weeks pregnant. The undisputed evidence further indicated that no current test other than measurements which can be performed with the use of ultrasound provide information necessary to determine viability prior to at least thirty weeks gestational age (Keenan Tr. 4-78; Maulik Tr. 1-55; Crist Tr. 1-98, 1-117; Pearman Tr. 1-139; Widdicombe Tr. 2-65).

The Court should note that the most important language of § 188.029 was ignored by the courts below during the process of construing the stricken provision. That vital language is contained in the first sentence, which was upheld by the district court. It states:

> . . . 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.

This crucial language imposes upon the physician a standard of care which would clearly forbid the performance of a medical examination or test which could not reveal anything or might unnecessarily increase the risk of harm to a mother or unborn child. The State of Missouri submits that § 188.029 cannot be construed as requiring a physician to perform examinations or tests contrary to the standard of care imposed upon a careful and prudent physician under similar circumstances. Yet the construction utilized by the courts below mandates actions by a physician contrary to the appropriate standard of care set forth in the statute.

The court's invalidation of the second sentence of § 188.029 because of the fetal weight and lung maturity language ignores normal principles of constitutional adjudication in a facial challenge. See *United States v. Salerno*, 107 S.Ct. 2095, 2100 (1987). The court of appeals misread the plain language of § 188.029 as a matter of law. The plain language provides that the physician shall cause to be performed such examinations and tests "as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child . . . ." The court read this language as saying that "doctors *must* perform tests to find gestational age, and fetal weight and lung maturity." (J.S. App. A60, n. 5.) But there is a significant difference between a requirement to perform "tests to find" and one to perform "such . . . tests as are necessary to make a finding."

The court read into the plain language specific tests which are not required by the statute on its face. The statutory language allows for the distinct possibility that no findings can be made, or that findings can be made by a single test, thereby making *unnecessary* the use of another test, or that a finding can be derived without an intrusive test. The statutory language provides flexibility that the court's construction excises.

This allowance for flexibility in obtaining a finding is directly relevant to the "lung maturity" language. The district court and the court of appeals would read the plain language as specifically requiring amniocentesis, despite the fact that the plain language specifies no tests, but refers more generally to "such . . . tests as are necessary to make a finding." The evidence provided by the medical experts at trial was that amniocentesis could make "no finding" of lung maturity at twenty weeks. Within the language of the statute, an amniocentesis test *cannot* be a "necessary" test to "make a finding" if it can provide no information.

The appellants submit that the only reasonable facial construction of § 188.029 is that the statute requires a physician to use ordinary care and utilize such medical examinations or tests as are necessary to make appropriate findings in the case before him. An unnecessary test should never be utilized and an examination or test which increases the risk to a mother or her unborn child should only be utilized if medically appropriate for the care of the mother or unborn child. Under all circumstances, however, the State has a compelling interest in requiring a physician to record his findings regarding viability and the findings derived from such tests as he deems necessary to render a decision. Statutes designed to further the State's compelling interest in preserving

life need not be drafted to "accommodate every conceivable contingency." *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 483, n. 7 (1983).

The court of appeals' analysis was erroneous as a matter of law. It was based on a misreading of the plain language and it employed an erroneously high standard of review. The court thus erred in facially invalidating the second sentence of § 188.029.

**IV. The State of Missouri May Constitutionally Refuse to Support Abortion Services by Declaring Unlawful the Expenditure of Public Funds for the Purpose of Encouraging or Counseling a Woman to Have an Abortion Not Necessary to Save Her Life.**

The court below reversed the district court's decision declaring the first part of § 188.205 to be unconstitutional because the trial court's order was contrary to the holdings of *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), which decided that a government may refuse to provide any public assistance for any abortion not necessary to save the life of the mother. The court felt bound to uphold the provision of § 188.205 which forbids the expenditure of public funds for the purpose of performing or assisting an abortion, not necessary to save the life of the mother. However, the court declared the remainder of § 188.205 to be facially invalid because the phrase "encouraging or counseling a woman to have an abortion not necessary to save her life" was unconstitutionally vague and because the ban constituted an obstacle to a woman's exercise of her right to privacy. Each rationale expressed by the court below is inconsistent with decisions rendered by this court regarding the subsidizing of constitutional rights and the standard for reviewing facial challenges to state statutes on the basis of vagueness.

**A. The State Is Not Required to Subsidize With Public Funds the Exercise of a Constitutional Right.**

As recently as March, 1988, this Court held that a government is not required to furnish funds in order for a person to maximize the exercise of a constitutional right. The Court stated in *Lyng v. International Union, UAW,* 108 S.Ct. 1184, 1190 (1988), that "'we have held in several contexts [including the first amendment] that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.' *Regan v. Taxation With Representation of Washington,* 461 U.S. 540, 549 (1983)." Clearly, with regard to § 188.205, the State of Missouri does not violate a woman's right to obtain an abortion by refusing to allow public funds to be used for abortion counselling services. Contrary to the court of appeals' decision, this Court's rulings in *Maher v. Roe, Harris v. McRae,* and *Poelker v. Doe,* 432 U.S. 519 (1977), conclusively establish that § 188.205, which is concerned expressly with the expenditure of public funds, does not constitute an obstacle in violation of a woman's right to privacy.

The court of appeals' decision that the right to privacy is violated by a refusal to fund abortion counseling would in another context mean that a parent has a right to have his or her child taught a particular foreign language in any free public school. The district court's reasoning would prohibit the state from restricting the content of its curriculum. Such reasoning has been explicitly rejected by the United States Supreme Court in *Maher v. Roe.* In that case the Court stated:

> [W]ere we to accept appellees' argument, an indigent parent could challenge the state policy of favoring public rather than private schools, or of preferring instruction in English rather than German, on grounds identical in principle to those advanced here. We

> think it abundantly clear that a state is not required to show a compelling interest for its policy choice to favor normal childbirth any more than a state must so justify its election to fund public but not private education.

*Id.*, 432 U.S. at 477; see also *Norwood v. Harrison*, 413 U.S. 455, 462 (1973).

Similarly, if a city may ban the performance of abortions and staff a hospital with physicians who refuse to perform abortions, as in *Poelker*, government may necessarily refuse to provide public counseling to have abortions not necessary to save the life of the mother. By doing so, it merely leaves the woman dependent on private funding.

This was confirmed by the Ninth Circuit in *Planned Parenthood of Central & Northern Arizona v. State of Arizona*, 718 F.2d 938 (9th Cir. 1983). Reviewing a state ban on public assistance for "counseling for abortion procedures," the Ninth Circuit held that the State of Arizona may not unreasonably interfere with the right of Planned Parenthood to engage in abortion or abortion-related speech, but the state need not support, monetarily or otherwise, those activities. 718 F.2d at 944. The appeal from this holding to the Supreme Court was dismissed. *Babbitt v. Planned Parenthood*, 479 U.S. 926 (No. 86-378) (1986). See also *Planned Parenthood Association-Chicago Area v. Kempiners*, 531 F. Supp. 320, 325 (N.D. Ill. 1981), vacated and remanded on other grounds, 700 F.2d 1115 (7th Cir. 1983).

This Court should note that the court of appeals did not separately focus on the "encouraging and counseling" language of § 188.205. Instead, it broadly held "that the ban on using public funds, employees and facilities to encourage or counsel a woman to have an abortion is an unacceptable infringement of the woman's fourteenth

amendment right to choose an abortion after receiving the medical information necessary to exercise the right knowingly and intelligently." (J.S. App. A70.) Clearly, the court below was primarily concerned with the more restrictive language contained in §§ 188.210 and 188.215, which sought to forbid speech by employees and in public facilities. Section 188.205 does not forbid speech; it is only concerned with the spending of public money. By refusing the use of public funds for the purpose of directly urging a woman to have an abortion not necessary to save her life, the State does not impose any obstacle on the right created by *Roe v. Wade*.

Consequently, it cannot be concluded that the language of § 188.205 facially violates a right to privacy. The court of appeals' broad condemnation is inapplicable to the limited restrictions of this statutory provision.

**B. First Amendment Rights Are Not Infringed by a Restriction on the Use of Public Funds.**

As indicated above, both *Regan v. Taxation With Representation,* 461 U.S. at 546, and *Lyng v. International Union,* 108 S.Ct. at 1190, "reject the notion that First Amendment rights are somehow not fully realized unless they are subsidized . . . ."

The language of § 188.205 directs officials not to expend public funds under their control for the purpose of performing abortion services, including encouraging or counseling a woman to have an abortion not necessary to save her life. It is well recognized that the First Amendment rights of public employees are only implicated when employees "comment on matters of 'public concern.'" *Rankin v. McPherson*, 107 S.Ct. 2891 (1987); *Connick v. Myers*, 461 U.S. 138, 140 (1983). The Supreme Court has permitted governments to place absolute restrictions on some First Amendment rights of public employees. See *United States Civil Service Commission*

*v. National Association of Letter Carriers,* 413 U.S. 548 (1973); *Broadrick v. Oklahoma,* 413 U.S. 601 (1973).

Obviously, the language of this statute does not forbid any discussion regarding abortion issues or any other type of public concern; nor does it reach any private speech or conduct. Thus, it would be inappropriate to conclude that the First Amendment was implicated by reliance upon cases reviewing criminal laws applied entirely to private persons or conduct, such as *Bigelow v. Virginia,* 421 U.S. 809 (1975).

Instead, the only question is whether a woman has a First Amendment right to publicly funded counseling services. Such a right is imaginary. The recent decision of a New York district court concerning the constitutionality of regulations setting standards under Title X of the Public Health Services Act of 1970, 42 U.S.C. 300, et seq., contains an appropriate comment:

> The point here, however, is that HHS's regulations, which merely withhold grants of federal funds from those who wish to counsel women about abortion, refer them to abortion providers, or advocate, encourage or promote abortion in other ways, do not violate the rights of either such persons or their patients. The regulations do not prohibit or compel speech. They grant money to support one view and not another; but that is quite different from infringing on free speech.

*New York v. Bowen,* 690 F. Supp. 1261, 1273-1274 (S.D. N.Y. 1988).[8]

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8. The constitutionality of the Title X regulations is currently before three courts of appeals. The regulations have been permanently enjoined by two district courts. *Massachusetts v. Bowen,* 679 F. Supp. 137 (D. Mass. 1988), appeal pending No. 88-1279 (1st Cir.); *Planned Parenthood Federation v. Bowen,* 680 F. Supp. 1465 (D. Colo. 1988), appeal docketed, No. 88-2251 (10th Cir.). They have been upheld by one district court. *New York v. Bowen, supra.*

The State of Missouri submits that § 188.205 does not implicate or infringe upon any First Amendment rights.

**C. The Phrase "for the Purpose of Encouraging or Counseling a Woman to Have an Abortion . . ." Is Not Vague.**

In its eagerness to declare the encouraging and counseling language used by the General Assembly of the State of Missouri to be vague, the court of appeals ignored not only the appropriate standard for review but also the "well-established principle that statutes will be interpreted to avoid constitutional difficulties [citations omitted]. *Frisby v. Schultz*, 108 S.Ct. 2495, 2501 (1988). In reaching its decision regarding the second half of § 188.205, the court below decided that the language implicated First Amendment rights, rejected a narrow interpretation offered by the Missouri Attorney General's Office, and ignored the most accepted definitions of the words it declared vague.

Initially, as discussed above, this Court should note that § 188.205 does not explicitly implicate the First Amendment rights of any person. The court of appeals clearly erred in reviewing § 188.205 pursuant to a strict scrutiny standard. The statute has no criminal penalties, and does not forbid anyone from freely discussing abortion.

Reviewing courts have frequently "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 498-499 (1982). Although the district court in this case acknowledged that "it is clear that these sections do not impose criminal penalties . . . ," *Id.* at 1317, n. 48, each court below concluded that strict judicial scrutiny was warranted in its review of § 188.205

because First Amendment freedoms of expression were "clearly involved."

Since First Amendment freedoms are not implicated here, the court erred in not applying a less restrictive standard of vagueness to determine the validity of this provision regarding the expenditure of public funds. As this Court recently observed, "Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis." *Maynard v. Cartwright*, 108 S.Ct. 1853, 1858 (1988). Thus, plaintiff's facial challenge is inappropriate.

Even if First Amendment freedoms are somehow implicated, a "strict scrutiny" review of vagueness is not applicable. In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), and *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), First Amendment freedoms were "implicated." Yet this Court did not apply any "strict scrutiny" test. Likewise, *Village of Hoffman Estates v. Flipside, supra*, does not establish that civil regulations "implicating" free speech are subject to such a standard. Rather, *Flipside*, in dictum, implied merely that *criminal* laws that "interfere with the right of free speech" are subject to "a more stringent vagueness test." 455 U.S. at 499. For this proposition, the court cited *Grayned*, 408 U.S. at 109, involving a *criminal* statute, in which the court did not apply any "strict scrutiny" test.

The State submits that § 188.205 is constitutional and it "delineate[s] [its] reach in words of common understanding." *Grayned*, 408 U.S. at 112. When the Ninth Circuit Court of Appeals examined similar but less specific language, it concluded that the term "counseling for abortion procedures" was not so vague that a reasonable person would not understand what abortion-related

activities Arizona had legislatively decided not to fund. See *Planned Parenthood of Central and Northern Arizona v. State of Arizona*, 718 F.2d 938, 948-949 (9th Cir. 1983), appeal after remand, 789 F.2d 1348 (9th Cir. 1986), aff'd, *Babbitt v. Planned Parenthood*, 107 S.Ct. 391 (1986).

The language which must be examined is "[f]or the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life." In *Black's Law Dictionary* "encourage" is defined as follows:

> In criminal law. To instigate; to incite to action; to give courage to; to inspirit; to embolden; to raise confidence; to make confident; to help; to forward; to advise.

*Black's Law Dictionary*, 620 (4th ed. 1957). "Counseling" is defined as:

> 3. Advice given by one person to another in regard to a proposed line of conduct . . . .

*Id.* at 418.

When one reads the terms "counseling" and "encouraging" in the context of the rest of the sentence, it is clear that the statute has a much narrower and specific reach than suggested by the court of appeals. The courts below read the terms as though they referred to " 'encouraging or counseling' women about abortions" generally. The Attorney General of Missouri submits that this restriction is clearly designed to prohibit the expenditure of public funds for the identified *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.

Contrary to the reasoning of the court of appeals, appellants do not argue that "encouraging" or "coun-

seling" have the same meaning. Obviously, one can encourage an action without the formality normally associated with a counseling session. However, both "encouraging" and "counseling" refer to advocacy in the context of the statute.

Section 188.205 is not directed at the conduct of any physician or health care provider, private or public. Instead, it is directed solely at those persons responsible for expending public funds. Under Missouri law, funds cannot be expended unless appropriated by law for that purpose. See §§ 33.170 and 21.260, RSMo 1986. Section 188.205 directs public officials and governing bodies not to expend funds under their control for the purpose of performing abortion services, including counseling women to have elective abortions.

The statute does not forbid *incidental* conduct or the incidental use of funds for counseling, so long as the expenditure has a legitimate *public purpose*. The section refers to "encouraging" and "counseling" for a particular line of proposed conduct. The section is not vague on this score. The purpose of this statute is one which may not be desired by the plaintiffs, but there is nothing vague about it and it provides a reasonable person fair notice of the conduct which will not be subsidized by the state.

A statute is not vague because there exists a potential for a difference of opinion regarding the scope of the statute. See *Arizona,* 718 F.2d at 948. Although there may be disputes regarding the meaning of terms and phrases, one must acknowledge, as this Court has, that "there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising

ordinary common sense can sufficiently understand and comply with without sacrifice to the public interest." *Broadrick v. Oklahoma,* 413 U.S. at 608.

The court below mistakenly relies upon one of the Supreme Court loyalty-oath cases of the 1960's which the court understood to establish that the word "counsel" is "fraught with ambiguity." (J.S. App. A68.) *Baggett v. Bullitt,* 377 U.S. 360, 367 (1964), quotes *Cramp v. Board of Public Instruction,* 368 U.S. 278, 286 (1961), which invalidated an oath for teachers. The oath in *Cramp* was very different from the Missouri law because it required an employee to swear that he "has not lent aid, advice, counsel and the like to the Communist Party." 368 U.S. at 285. That language—lent aid, advice, counsel —was very broad *in its context* because the oath takers were required to swear "that they have not in the unending past ever knowingly lent" such aid. *Id.* at 286. In contrast, § 188.205 does not refer to "counsel" in the abstract, as the *Cramp* oath did, but rather "counseling" for a very specific purpose—"to have" a particular type of abortion—one "not necessary to save the life of the mother."

In sum, the State submits that the plain language of § 188.205 forbids the expenditure of public money for the purpose of advising a woman to have an elective abortion. Because the statute "delineates its reach in words of common understanding," § 188.205 is not void for vagueness. *Grayned,* 408 U.S. at 112.

**V. The Court of Appeals Erred in Holding That Civil Statutes Forbidding the Performance of Abortion Services by a Public Employee or in a Public Facility Violate a Woman's Right to Privacy Because This Court Previously Held in Poelker v. Doe, 432 U.S. 519 (1977), That a Public Hospital Need Not Provide Abortion Services.**

In §§ 188.210 and 188.215, the State of Missouri provided in part that it should 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 or 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. These provisions were declared to be unconstitutional under *Nyberg v. City of Virginia* (*Nyberg II*), 667 F.2d 754 (8th Cir. 1982), a two-to-one decision of the Eighth Circuit Court of Appeals in which the court refused to remove an injunction previously issued against a municipality entered because of an ordinance prohibiting the performance of abortion in a community hospital.[9]

The Eighth Circuit's decision to rely upon *Nyberg* and declare the performing or assisting language in each of these two statutes to be unconstitutional is contrary to the superior authority of *Poelker v. Doe*, 432 U.S. 519 (1977), wherein this Court upheld a mayor's "directive," *id.* at 550, applicable to both of the two city-owned hospitals in St. Louis, *id.* at 519, which totally "prohibited the performance of abortions in the city hospitals

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9. The *Nyberg* decision has created considerable confusion in the law since 1983. It contributes to a recent trend by federal courts to ignore the holding of *Poelker v. Doe*, 432 U.S. 519 (1977), and to force public hospitals and public programs to support abortion services. See, e.g., *Commonwealth of Massachusetts v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988) (permanently enjoining federal regulations at 53 Fed. Reg. 1922 (Feb. 2, 1988) that preclude federally funded projects from providing abortion counseling or referral); *Planned Parenthood Federation of America v. Bowen*, 680 F. Supp. 1465 (D. Colo. 1988) (same); *Roe v. City of Owensboro and Daviess County*, No. 88-0097 (W.D. Ky. June 22, 1988) (temporary restraining order entered against enforcement of Ky. Ref. Stat. 311.800(1), prohibiting use of pubic facilities to perform abortions). See, contra, *New York v. Bowen*, No. 88-0701 (S.D. N.Y. June 30, 1988) (upholding regulations at 53 Fed. Reg. 2922); *County Executive of Prince George County v. Doe*, 300 Md. 445, 479 A.2d 352 (1984) (challenge to order prohibiting abortions in public hospitals did not raise substantial federal claim).

except when there was a threat of grave physiological injury or death to the mother." *Id.* at 520. This Court also upheld a staffing practice whereby one city hospital used doctors only from "a Jesuit-operated institution opposed to abortion." *Id.*[10]

The court of appeals' decision is also in conflict with several decisions of this Court which have broadly held that government may refuse to provide any public assistance for any abortion not necessary to save the life of the mother. In *Maher v. Roe,* 432 U.S. 464 (1977), this Court limited benefits for abortions "to those that are medically necessary," *id.* at 466, because it placed "no obstacle—absolute or otherwise—in the pregnant woman's path . . . she continues as before to be dependent on private sources for the service she desires." *Id.* at 474. It "imposed no restriction on access to abortions that was not already there" (i.e., the dependency on private sources). *Id.* The court held that the policy was constitutional, even if it made it "impossible" for a woman to have an abortion that was not "medically necessary." *Id.* at 466, 474.

Most recently, in *Harris v. McRae,* 448 U.S. 297 (1980), this Court upheld "the most restrictive version of the Hyde Amendment," *id.* at 325, n. 27, which withheld funds for abortion "except where the life of the mother would be endangered if the fetus were carried to term." *Id.* at 325, n. 27. Citing *Maher,* the Court held that the most restrictive Hyde Amendment was constitutional even if it made it "impossible" for a woman to obtain an abortion in a case where "the life of the mother would [not] be endangered if the fetus were

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10. The dissent of Judge Heaney in *Nyberg II* describes the serious conflicts between the language of *Poelker* and the majority decision of the Eighth Circuit panel. 667 F.2d 759-760 (Heaney, J., dissenting).

carried to term." *Id.* at 315-316, n. 27. See also *Williams v. Zbaraz,* 448 U.S. 358 (1980).

In applying these controlling precedents, the courts below erroneously limited their broad principle to mean merely that the government is not obligated to *fund* abortions. They found *Poelker* uncontrolling where no public funds would be expended. This is a misconstruction. The directive upheld in *Poelker* was not a narrow restriction on "funding" abortions but broadly prohibited "the *performance* of abortions in the city hospitals." 432 U.S. at 520 (emphasis added). As the dissent emphasized, the directive made no exceptions for "paid" abortions, for doctors who "would willingly perform them," or for small communities "where the public hospital is the only health care facility." *Id.* at 523-524 (Brennan, J., dissenting). The court did not require such exceptions, but broadly held that St. Louis could elect "as a policy choice, to provide *publicly financed hospital services* for childbirth without providing corresponding services for nontherapeutic abortions." *Id.* at 521 (emphasis added).

The decision by the court of appeals that the abortion right of a paying customer is violated by a statute forbidding a public medical facility from performing an abortion not necessary to save the life of the paying customer means that every public medical facility must provide abortion services. Clearly, if a state cannot direct a public facility to not provide elective abortion services, the public facility cannot refuse such services of its own accord. In essence, the court below held that the abortion right established in *Roe v. Wade,* requires the State to provide the services of its employees to perform abortions in any existing medical facility to someone willing to pay for the cost of the service.

The court of appeals accepted plaintiffs' reasoning that since *one* public hospital in the State of Missouri purports to charge enough to cover the full expense of an abortion, then the performance of the operation is not being provided as a public service (J.S. App. A76-A78, n. 14). Apparently, the services of a public facility cannot be withheld in compliance with the will of the public if a large enough fee is offered. The error of plaintiffs' contention and the decisions below becomes obvious when one realizes that a service provided by the public to the public remains a public service, no matter how the government derives the funds to build a facility, maintain a facility, or compensate the public employees who work at a facility.[11] Whether the funds come from state taxes, local taxes, or user fees, the public nature of the service does not undergo any fundamental metamorphosis. Thus, this Court was entirely correct when it decided in *Poelker v. Doe* that "the constitutional question presented here is identical in principle with that presented . . . in *Maher v. Roe*." *Id.* 432 U.S. at 521.

The misapplication of *Poelker* by the courts below was particularly egregious because *Poelker* challenged the local policy as it was applied to a particular woman denied an abortion in St. Louis' public hospitals, whereas

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11. A concurring opinion by Circuit Judge Clark in *Greco v. Orange Memorial Hospital Corporation,* 513 F.2d 873 (5th Cir. 1975), cert. denied, 423 U.S. 1000 (1975), succinctly addresses the issue:

> *Doe* and *Roe* teach that a state cannot forbid certain types of abortions but they do not create any duty on Orange County's part to furnish facilities for such operations. Just as the Eagle Coffee Shop in Wilmington's parking garage could not have been forced to furnish kosher food or serve fish on Friday, so the Orange County Hospital cannot be compelled to allow its facilities to be used for elective abortions. 513 F.2d at 883.

plaintiffs' is merely a facial challenge. See *United States v. Salerno,* ..... U.S. ....., 107 S.Ct. 2095, 2100 (1987).

Plaintiffs simply cannot persuasively argue that §§ 188.210 and 188.215 impose any obstacle which would substantially burden the effectuation of a woman's decision to obtain an abortion.[12] Since this Court's decision in *Poelker v. Doe,* and the affirmance by the Eighth Circuit of the district court's decision upholding the Mayor's directive, there have been no public hospitals providing abortions in the City of St. Louis. Despite the unavailability of such public services, there is no evidence whatsoever that any St. Louis woman has been unable to effectuate her decision through the private abortion providers in the St. Louis area, including Reproductive Health Services, Inc.[13]

The appellants respectfully submit that the court of appeals' decision regarding the "performing or assisting" language in §§ 188.210 and 188.215 was erroneous as explained in this section of the argument. Federal courts are obligated to separate constitutional provisions from unconstitutional provisions in a statute "and to maintain the act in so far as it is valid." *Regan v. Time, Inc.,* 468 U.S. 641, 652 (1984). Missouri has a general severability clause in its statutes. Section 1.140, RSMo 1986.

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12. Only three hospitals in Missouri provide abortions on a regular basis (an average of one per week) (Plf. Exh. 19, Tr. 2-76). Only one of those three hospitals is a public facility, Truman Medical Center in Kansas City, Missouri. No evidence was introduced indicating that any other type of *public* medical facility, i.e. a *public* ambulatory surgical center, provides abortions in the State.

13. Reproductive Health Services, Inc., provided 8,000 abortions in 1985 and projected a total of 7,800 in 1986 (Widdecombe Tr. 2-59 - 2-60). A total of ten private clinics regularly provided abortions during 1988 in the State of Missouri (per Dr. Vicky Pierson, Missouri Department of Health, 1988 health statistics).

The district court relied on this severability clause to sever and uphold the first sentence of § 188.029, and the court of appeals severed and upheld the first sentence of § 188.205. The court of appeals should have likewise severed and upheld the "performing or assisting" language of §§ 188.210 and 188.215. Consequently, the judgment of the court of appeals should be reversed.

## CONCLUSION

In conclusion, the courts below were in error when they rendered their decisions. The judgment of the court of appeals, insofar as it invalidated §§ 1.205.1(1) and 1.205.1(2), the second half of § 188.029, the second half of § 188.205, and the first half of §§ 188.210 and 188.215, should be reversed and the injunctions dissolved.

Respectfully submitted,

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