No. 88-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

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

v.

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

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE NATIONAL COALITION AGAINST DOMESTIC VIOLENCE AS AMICUS CURIAE SUPPORTING APPELLEES

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QUESTION PRESENTED

The National Coalition Against Domestic Violence will address the following question:

Whether *Roe v. Wade*, 410 U.S. 113 (1973), should be reconsidered and, upon reconsideration, overruled.

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BRIEF FOR THE NATIONAL COALITION AGAINST DOMESTIC VIOLENCE AS AMICUS CURIAE SUPPORTING APPELLEES

INTEREST OF THE *AMICUS CURIAE*

The National Coalition Against Domestic Violence (NCADV) is an organization dedicated to sheltering battered women and their children and to eliminating family violence against women and children. NCADV represents a network of more than 1,200 domestic violence shelters and counseling programs. It is the only nationwide organization of shelters and support services for battered women and their children.

It is not uncommon for battered women to become pregnant as the result of sexual assault and coercion in domestic situations. For a number of reasons—marital exemptions in rape laws; difficulties of proof; and, most important, the fear of further violence—it is often impossible to show that these pregnancies are the result of rape or abuse. At the same time, a battered woman who is required to bear a child is forced into a position of greater economic dependence on the perpetrator of violence, and the child is brought into an abusive situation where he or she is also likely to become a victim of violence. For many battered women, the right to an abortion means the difference between being trapped permanently in a violent and abusive situation that victimizes herself and her children, and having a chance to begin a new life.

In this case appellants and the federal government have asked the Court to overrule *Roe v. Wade.* Because the National Coalition Against Domestic Violence believes that such an action would seriously harm the interests of battered women, we offer this brief to assist the Court in its deliberations.*

SUMMARY OF ARGUMENT

Roe v. Wade was decided on the basis of the Due Process Clause of the Fourteenth Amendment. Since *Roe* was decided, however, a substantial body of scholarly opinion has developed suggesting that the Equal Protection Clause would also support the holding of *Roe.* See, *e.g.,* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C.L. Rev. 375 (1985). The Court should not overrule a precedent of the significance of *Roe* without considering all the substantial arguments that can be made on its behalf.

*** Letters from the parties consenting to the filing of this brief have been lodged with the Clerk.**

The existence of an Equal Protection Clause argument, which is more than substantial, at the very least counsels against reconsidering *Roe* in this case.

A. Restrictions on abortion constitute gender-based classifications. The direct impact of such restrictions falls exclusively on women. A law disabling "all women" from obtaining abortions would unquestionably be based on gender; a measure that simply forbids abortions is exactly equivalent, and should be treated no differently. Indeed, the capacity to become pregnant, and therefore to undergo an abortion, is a biological correlate of being female. The fact that men cannot become pregnant does not mean that restrictions on abortion are gender-neutral: when a statute is targeted at women alone, the fact that men and women are not similarly situated is relevant to the question of justification, not to the question whether the statute classifies on the basis of gender.

It is true that many laws forbidding abortion outlaw only the performance of an abortion and do not apply to the woman who undergoes the abortion. But this does not alter the conclusion that such measures are based on gender. A statute that forbade women from working in certain occupations would be a clear gender-based classification even if it imposed criminal sanctions only on the employer.

B. Because a prohibition against abortion is a gender-based classification and burdens the fundamental interest in reproductive freedom, it may be sustained against Equal Protection attack only if it can survive the most searching form of judicial review, closely linking the particular means to a compelling governmental objective. Even a cursory examination of the data shows that there is only an attenuated connection between the means of prohibiting abortion and the ends that such prohibitions are alleged to secure.

Before *Roe*, between 20% and 30% of all pregnancies in the United States ended in abortions. Since *Roe*, the rate has been between 27% and 30%. Prohibitions against abortion have therefore been essentially ineffective in achieving the interest advanced in their support—the protection of fetal life.

The principal effect of prohibitions against abortion is to cause women who seek abortions to obtain them illegally. The evidence is clear that illegal abortions are vastly more dangerous to women. Before *Roe*, as many as 5,000 to 10,000 women died each year as a result of illegal abortions. A significant percentage—perhaps one-third—of illegal abortions produced injuries severe enough to require hospitalization. Since *Roe*, abortion-related deaths have dropped by 90%.

Finally, there is substantial reason to believe that the impetus behind restrictions on abortion is the same as that behind other gender-based restrictions that the Court has invalidated—" 'the role-typing society has long imposed' on women" (*Califano v. Webster*, 430 U.S. 313, 317 (1977), quoting *Stanton v. Stanton*, 421 U.S. 7, 15 (1975)). Antiabortion laws were principally the product of a period in the late nineteenth century when gender stereotyping was at its height. There is evidence that support for restrictions on abortion is rooted in a desire to prevent women from adopting roles different from the traditional ones centered on the bearing and rearing of children.

ARGUMENT

ROE v. WADE SHOULD NOT BE OVERRULED BECAUSE MEASURES FORBIDDING ABORTION ARE INCONSISTENT WITH THE EQUAL PROTECTION CLAUSE

A series of decisions beginning with *Reed v. Reed*, 404 U.S. 71 (1971), has established that measures classifying on the basis of gender are unconstitutional unless the party supporting the measure can "carry the burden of showing an 'exceedingly persuasive justification' for the classification." *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982), quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981). But in 1973, when *Roe v. Wade*, 410 U.S. 113, was decided, this body of law was in its earliest stages. At that time, *Reed v. Reed* was the only decision suggesting that gender-based classifications might be subject to something other than the most highly deferential review (see, *e.g.*, *Hoyt v. Florida*, 368 U.S. 57 (1961)). Moreover, *Reed* was not decided until six months after the Court noted probable jurisdiction in *Roe v. Wade* (see 402 U.S. 941 (May 3, 1971)). And *Reed* did not clearly adumbrate the heightened scrutiny approach that the Court subsequently adopted: *Reed* used the language of "rational relationship" review. See 404 U.S. at 76.

It is therefore not surprising that the Court has never considered whether laws forbidding abortion constitute impermissible discrimination on the basis of gender in violation of the Equal Protection Clause. But in the years since *Roe* was decided, a substantial body of scholarly opinion has developed in support of the position that measures forbidding abortion are unconstitutional for this reason. See, *e.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C.L. Rev. 375 (1985); Laurence Tribe, American Constitutional Law 1353-56 (2d ed. 1988); Robert Goldstein, Mother-Love and Abortion (1988);

Frederick Schauer, *Easy Cases*, 58 S. Cal. L. Rev. 399, 431-32 n.83 (1985); Kenneth Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 Harv. L. Rev. 1, 53-59 (1977); Catharine MacKinnon, Feminism Unmodified ch. 8 (1987); Sylvia Law, *Rethinking Sex and The Constitution*, 132 U. Pa. L. Rev. 955 (1984).

Indeed, some have suggested that the holding in *Roe* could be more satisfactorily supported on Equal Protection grounds. Judge Ginsburg, for example, concluded that *Roe* "is weakened . . . by the opinion's concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective." R.B. Ginsburg, *supra*, at 386.

We recognize that no Equal Protection Clause argument was passed upon in the lower courts in this case. For that reason, we do not urge it as the basis for the Court's decision on the specific Missouri statutory provisions at issue here. But appellant and the government have asked the Court to overrule *Roe*. It would be improvident for the Court to overrule a precedent of such significance before considering all of the substantial arguments that can be advanced in its support. As we demonstrate below, the Equal Protection Clause argument advanced by Judge Ginsburg and many others is more than substantial.

A. Measures Restricting Abortion Constitute Gender-Based Classifications

When a measure is challenged on the ground that it constitutes impermissible gender discrimination, the Court undertakes a two-step process. First, the Court determines whether the measure in fact classifies on the basis of gender or should otherwise be treated as a gender-based classification. See, *e.g.*, *Personnel Administrator v. Feeney*, 442 U.S. 256, 274-75 (1979). If the measure is to be treated as a gender-based classification, the second step is to determine whether it can survive

under the applicable standard of review. See *Mississippi University for Women v. Hogan,* 458 U.S. 718, 724 (1982).

In our view, there is no question that measures restricting abortion must be treated as gender-based classifications. Whether such measures can be sufficiently justified is a question of greater complexity. But that question, which we address below, should not be confused with the straightforward issue of whether such measures must be treated as gender-based classifications. See *Mississippi University for Women,* 458 U.S. at 724 n.9 ("[T]he analysis and level of scrutiny applied to determine the validity of [a] classification do not vary simply because the objective [sought by the classification] appears acceptable").

1. The direct impact of a measure restricting abortion falls on a class of people that consists exclusively of women. See *Michael M. v. Sonoma County Superior Court,* 450 U.S. 464, 473 (1981) (plurality opinion) ("[V]irtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female"). Only women can undergo abortions. Only women will bear children if abortions are prohibited. A statute that provided that "no woman" may obtain an abortion (or that no abortion may be provided to "any woman") would obviously be based on gender; a statute that prohibits abortion without using the words "woman" or "female" is exactly equivalent to such a measure and should be treated no differently.

The fact that some statutes outlawing abortion forbade only the performance of an abortion, and did not make it a crime to undergo an abortion, does not affect this conclusion. Laws prohibiting women from working more than a certain number of hours each day in certain business establishments (see, *e.g., Muller v. Oregon,* 208 U.S. 412 (1908))—or barring women from certain forms

of employment entirely (see, *e.g.*, *Goesart v. Cleary*, 335 U.S. 464 (1948))—are classic examples of gender-based classifications, even if only the employer, and not the female employee, could be prosecuted for a violation.[1] See *Mississippi University for Women*, 458 U.S. at 725 n.10. Indeed, *Muller* was a prosecution brought against a male employer, not against a woman. Such laws are gender-based because they necessarily disable women alone from performing certain work. Similarly, a prohibition against abortion, however phrased, necessarily and indeed as a matter of biology disables women alone from obtaining abortions.

For similar reasons, the fact that men will often be indirectly affected by the availability of abortions does not alter the gender-based character of measures restricting abortion. Gender-based classifications often have an indirect effect on men. The restrictions on employment at issue in *Muller* and *Goesart* affected men who were members of the same family as women who sought that form of employment, or who were otherwise economically dependent on such women. See also *Michael M. v. Sonoma County*, *supra* (treating a statutory rape law as a gender-based classification disadvantaging men even though women could be prosecuted for aiding and abetting (see 450 U.S. at 477 & n.5 (Stewart, J., concurring)).

2. Measures restricting abortion differ from the usual form of gender-based classification because they do not always contain such words as "female" or "woman." But the phrasing of a prohibition cannot be the decisive factor in determining whether it is to be treated as gender-based. As a matter of biology, only women possess the capacity to undergo an abortion. Indeed, the capacity to

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[1] **Similarly, a measure requiring racial segregation would not escape strict scrutiny even if it were enforced only against whites who sought to bring about integration. Cf. *Berea College v. Kentucky*, 211 U.S. 45 (1908).**

become pregnant is a defining characteristic of being a woman. If a measure classifies on the basis of a trait that, as a matter of biology, only one gender possesses, that measure must be treated as gender-based.

Michael M. v. Sonoma County Superior Court, supra, establishes this proposition. In *Michael M.*, the Court unhesitatingly treated a statutory rape law as a "gender-based classification[]" (450 U.S. at 468 (plurality opinion); see *id.* at 483 (Blackmun, J., concurring)) that affected "men alone" (*id.* at 466 (plurality opinion)). But the statute at issue in *Michael M.* did not literally refer to "men" or "males." It prohibited "sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years." Cal. Penal Code Ann. S 261.5 (West Supp. 1981), quoted at 450 U.S. at 466. Because only men can "accomplish" "sexual intercourse . . . with a female," the Court treated the statute as a gender-based measure. Similarly, because only women can undergo an abortion, a restriction on abortion is gender-based, even if the statute imposing such a restriction does not explicitly refer to "women."

Indeed, it would be mischievous to permit a measure to evade searching scrutiny simply by avoiding any mention of the words "women" or "men" and classifying instead on the basis of a defining characteristic of one or the other sex. Such an approach would create troubling possibilities of abuse and pretext in the context of both sex and race, since it would not be difficult for a state that wished covertly to classify on the basis of sex or race to identfy biological correlates of either of those traits. A measure based on the defining characteristics of gender should receive the same treatment as a measure based on gender itself; for constitutional purposes, the two measures are one and the same thing.

3. It would be erroneous to suggest that because men and women are not "similarly situated" with respect to

the objectives of abortion laws—that is, because men cannot become pregnant—restrictions on abortion are not gender-based. As the Court has made clear, the claim that men and women are not "similarly situated" in some respect (biological or otherwise) may provide a possible justification for a measure that classifies men and women differently. See, *e.g.*, *Michael M.*, *supra*, 450 U.S. at 469 (citing cases). But such a claim is not relevant to the question whether a measure targeted at women alone should be treated as gender-based, and therefore subject to heightened scrutiny, in the first place.

Similarly, the fact that some women are not burdened by measures outlawing abortion is immaterial. A law that burdens some but not all women—for example, all women over the age of thirty—is gender-based even though many women are unaffected. See, e.g., *Califano v. Goldfarb*, 430 U.S. 199 (1977).

Finally, because restrictions on abortion classify on the basis of a biological correlate and a defining characteristic of gender, they are not comparable to facially neutral laws like the veterans' preference upheld in *Personnel Administrator v. Feeney*, *supra.* The measure at issue in *Feeney* disadvantaged a class that was not defined by gender (or any biological correlate) and that, while consisting disproportionately of women, contained a large number of men as well (see 442 U.S. at 275; *id.* at 281 (Stevens, J., concurring)). A measure restricting abortion not only directly affects a class consisting exclusively of women but also classifies on the basis of a characteristic that is biologically linked to one gender alone. *Feeney* upheld the veterans' preference because it was not discriminatory on its face and had not been shown to be impermissibly motivated. But where, as here, a measure is gender-based, the Court's decisions make clear that there is no requirement of "a particularized inquiry into motivation." *Washington v. Seattle School District No. 1*, 458 U.S. 457, 485 (1982); see also *Feeney*, 442 U.S. at 271-74.

4. This reasoning is not inconsistent with the holding of *Geduldig v. Aiello*, 417 U.S. 484 (1974). *Geduldig* sustained the constitutionality of a state disability insurance program that excluded from coverage certain disabilities resulting from pregnancy. Most of the opinion in *Geduldig* is devoted to the justification for excluding pregnancy from insurance coverage, not to the question whether the classification should be viewed as based on gender. The discussion of the latter issue is confined to a cursory footnote (417 U.S. at 496 n.20), presumably because *Geduldig*, too, was decided at a time when the current Equal Protection law governing gender discrimination was in its early stages. Because the Court in *Geduldig* found ample justification for the classification at issue in that case, the holding of *Geduldig* is not inconsistent with the conclusion that a restriction on abortion constitutes gender-based legislation.[2]

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[2] The view that measures classifying on the basis of pregnancy are not gender-based was specifically rejected by Congress in connection with Title VII. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, amending 42 U.S.C. 2000e. See *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983) (Pregnancy Discrimination Act "unambiguously expressed [Congress's] disapproval of both the holding and the reasoning of the Court in . . . [*General Electric Co. v.*] *Gilbert*", 429 U.S. 125 (1976), which followed the logic of *Geduldig*). Both *Gilbert* and *Geduldig* were widely criticized by commentators. See the collection of several dozen citations in Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 984 nn. 107-09 (1984).

In *Harris v. McRae*, 448 U.S. 297 (1980), and *Maher v. Roe*, 432 U.S. 464 (1977), the Court did not confront the question whether a prohibition of abortion amounted to discrimination on the basis of gender. Instead the Court concluded that "financial need alone [does not] identif[y] a suspect class" (*Maher*, 432 U.S. at 471) and that the Constitution does not require a governmental subsidy for abortions (*Harris*, 448 U.S. at 316-17), noting in the process that "teenage women desiring medically necessary abortions" should not be considered a suspect class in light of the fact that the statute under attack was "facially neutral as to age." *Harris*, 448 U.S. at 323-24 n.26.

In addition, the Court in *Geduldig* emphasized that it was reviewing a "social welfare program[]" (417 U.S. at 495) that is subject to only the most lenient scrutiny (*ibid.*). By contrast, a prohibition against abortion is a direct coercive measure; such measures have not historically received the degree of deference given to complex social welfare schemes. See *Schweiker v. Wilson*, 450 U.S. 221, 238-39 (1981). For that reason, the appropriate precedent for restrictions on abortion may be not *Geduldig* but *Cleveland Bd. of Education v. LaFleur*, 414 U.S. 632 (1974). *LaFleur* invalidated a school board regulation that required pregnant school teachers to take unpaid maternity leave five months before childbirth. *LaFleur* relied on the Due Process Clause, holding that the regulations rested on "unwarranted conclusive presumptions" (*id.* at 651). But Justice Powell noted in a concurring opinion that the decision could more soundly be rested on the Equal Protection Clause. See *id.* at 652. And in *Craig v. Boren*, 429 U.S. 190 (1976), the Court analogized *LaFleur* to the cases establishing that gender-based classifications receive heightened scrutiny. See 429 U.S. at 199. Moreover, *Geduldig*, unlike *LaFleur*, involved a "noncontractual claim to receive funds from the public treasury." See *Weinberger v. Salfi*, 422 U.S. 749, 772 (1975).

A restriction on abortion resembles the measure invalidated in *LaFleur* far more closely than it resembles the insurance scheme of *Geduldig*. A restriction on abortion, like the regulations invalidated in *LaFleur*, subjects pregnant women to a direct disadvantage that men do not suffer. By contrast, the Court in *Geduldig* emphasized that the "aggregate risk protection" received by women was not less than that received by men. 417 U.S. at 496-97. It is inconceivable, for example, that the Court would apply deferential review to a law that forbade "pregnant persons" from holding gainful employment, or, to give a more extreme example, from appear-

ing in public, whether or not such measures might survive deferential review.

B. A Prohibition Against Abortion Is Not Supported By A Sufficiently Persuasive Justification

1. *Introduction*

a. In the ordinary case, a gender-based classification is unconstitutional unless its proponents "carry the burden of showing an 'exceedingly persuasive justification' " (*Mississippi University for Women,* 458 U.S. at 724, quoting *Kirchberg,* 450 U.S. at 461). In assessing the justifications offered for gender-based measures, the Court undertakes a "searching analysis" (*Mississippi University for Women,* 458 U.S. at 728) of whether the restriction is, in fact, "substantially related to the statutory objective" (*Craig v. Boren,* 429 U.S. 190, 204 (1976)).

As the Court has explained, a "searching analysis" is required because gender-based measures are often the product not of "reasoned analysis" (*Mississippi University for Women,* 458 U.S. at 726) and careful investigation of the relevant facts and considerations. Rather, measures that single out one gender for special disadvantages often reflect the "mechanical application" (*ibid.*) of " 'old notions' and 'archaic and overbroad' generalizations." *Califano v. Goldfarb,* 430 U.S. 199, 211 (1977) (plurality opinion), quoting *Stanton v. Stanton,* 421 U.S. 7, 14 (1975), and *Schlesinger v. Ballard,* 419 U.S. 498, 508 (1975).

For a statute prohibiting abortion, the appropriate standard of review under the Equal Protection Clause is the careful scrutiny adopted in *Roe* itself. Legislation prohibiting abortion represents a form of gender discrimination that intrudes on basic interests in bodily integrity; self-management and self-direction during and after pregnancy; health; and sometimes life itself. When challenged on Equal Protection grounds, gender-based leg-

islation classifying in the area of such interests may be upheld only if it survives the most searching kind of review. See *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (applying strict scrutiny under Equal Protection Clause to compulsory sterilization law); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (applying strict scrutiny under Equal Protection Clause to law forbidding marriage).

b. Appellant and the government seek to have *Roe v. Wade* overruled on the ground that it does not give the states sufficient latitude to "reach an accommodation" between "a woman's interest in procreative choice" and "the State's interest in protecting the life of an unborn child and promoting respect for life generally." U.S. Am. Br. 16; see, *e.g.*, Appellant's Br. 18.

The state's asserted interest in protecting fetal life is itself problematic in many ways. There is deep disagreement in society about the moral status of fetal life; the claim (enacted into law by Missouri in this case) that life begins at conception has highly theological overtones; and as we explain below, there is an inextricable connection between that claim and constitutionally illegitimate stereotypes about women's appropriate role. In light of these considerations, a decision to accord substantial weight to that interest risks running afoul of Justice Harlan's admonition: "[T]he mere assertion that the action of the State finds justification in the controversial realm of morals cannot justify alone any and every restriction it imposes." *Poe v. Ullman*, 367 U.S. 497, 545 (1961) (dissenting opinion).

Even more important, however, the notion that a state law prohibiting abortions would constitute a reasonable accommodation of these interests rests not "reasoned analysis" but on precisely the kind of "simplistic, outdated assumption[s]" (*Mississippi University for Women*,

458 U.S. at 726) that the Court has consistently disapproved in this area. Specifically, as we explain below, the principal fallacy of appellants' argument for overruling *Roe* lies in the proposition that the constitutional controversy presents a stark choice—to be resolved in the abstract—between the state's interest in fetal life and the reproductive freedom of pregnant women. In this case, it is unnecessary to decide any such question.[3] Even a cursory review of the relevant data reveals that a prohibition against abortion, far from "promoting respect for life generally," would in all likelihood fail to promote the state's interest in protecting fetal life. Instead of significantly reducing the number of abortions, such legislation would cause women to undergo abortions in circumstances that are far more threatening to their lives and well-being. Moreover, overruling *Roe v. Wade* would produce intolerable intrusions into the lives of women who become pregnant as the result of rape, incest, and other forms of abuse.

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[3] Several aspects of laws forbidding abortion combine to undermine the claim that abortion laws are based on the concern for fetal life. Cf. *Mississippi University for Women*, 458 U.S. at 730. Often prohibitions against abortion were enacted to protect women, not the fetus; and in any case they did not make criminal the conduct of the women who obtained the abortion. See *Roe*, 410 U.S. at 151. Prohibitions against abortion often contain exceptions for medical need—a highly discretionary standard that places the physician in a crucial position (see K. Luker, Abortion and the Politics of Motherhood 32-35 (1984))—and for pregnancies that result from, for example, rape or incest.

While such exemptions may be desirable, they are inconsistent with the claim that the state places fetal life on a par with human life. They thus undermine the most dramatic interest asserted by appellant as a basis for prohibiting abortion. The pattern of half-hearted, inconsistent, or ineffectual enforcement revealed by the pre-*Roe* abortion statistics further suggests that the interests that in fact prompt restrictions on abortion are different from the interests that states assert, and that such restrictions are in fact the product of a desire to maintain traditional or stereotyped roles.

c. There is no indication in the briefs of appellant and the government that either has attempted to come to grips with these difficulties. Although we have not undertaken a systematic search, we are not aware that any legislature that has enacted a statute attempting to restrict aborions has addressed these concerns. Rather, the effort to overrule *Roe*, like many other measures uniquely disadvantaging women that the Court has invalidated, rests on "casual assumptions" (*Califano v. Webster*, 430 U.S. 313, 317 (1977))—in this case, the casual and simplistic assumption that a restriction on abortion reflects a simple choice in favor of fetal life. A gender-based measure that rests on such mechanical and reflexive thinking, and that shows so fragile a connection between statutory means and ends, should not be upheld.

When fundamental rights or classifications requiring exacting scrutiny are involved, there is no requirement that the Court accept at face value a state's assertion that a measure will have the deterrent effect that the state intends. The state must show that statutory means will in fact promote statutory ends. See, *e.g.*, *Moore v. City of East Cleveland*, 431 U.S. 494, 499-500 (1977) (plurality opinion of Powell, J.); *Carey v. Population Services International*, 431 U.S. 678, 695-96 (1977) (plurality opinion); *Griswold v. Connecticut*, 381 U.S. 479, 505-06 (1965); cf. *Craig v. Boren*, 429 U.S. 190, 199-204 (1977). Unless the Court undertakes a "searching analysis" (*Mississippi University for Women*, 458 U.S. at 728) of the actual evidence, a state will be free to invoke worthy objectives to justify a measure that actually reflects outmoded or impermissible conceptions. This danger is particularly acute in the case of a prohibition against abortion—a gender-based measure that may reflect not a genuine, informed concern with the interests of both pregnant women and potential life but

rather a reflexive or symbolic effort to confirm the status of women as people whose primary role is to bear children.

2. *Laws Prohibiting Abortion Are Ineffective In Preventing Abortion.*

The effect of *Roe v. Wade* on the number of abortions in the United States is far less than might casually be thought. There is good reason to believe that in the early 1960s, there were between 1.0 and 1.5 million abortions in the United States each year. That is, at least 20% and perhaps as many as 30% of all pregnancies ended in abortion. See, *e.g.*, L. Lader, Abortion 2 (1966) (referring to the "recent" estimate of 1.5 million); J. van der Tak, Abortion, Fertility, and Changing Legislation: An International Review 72-73 (1974) (referring to "the wide acceptance of a round figure of 1 million induced abortions per year (for which only an estimated 8,000 were legal), corresponding to . . . an abortion ratio of almost 30 per 100 live births"); Whittemore, *The Availability of Non-Hospital Abortions*, in Abortion in a Changing World 217 (P. Hall ed. 1970) ("the oft-quoted figure of one million criminal abortions in the United States is a fairly reasonable estimate"); R. Schwarz, Septic Abortion 7 (1968) (in the late 1960s, over 20% of pregnancies terminated in illegal abortions, resulting in approximately 1.2 million unlawful abortions per year); see also H. Rodman, B. Sarvis, & J. Bonar, The Abortion Question (1987); Fox, *Abortion Related Deaths*, in American Journal of Obstetrics and Gynecology 652 (1967) (approximately 100,000 women annually had unlawful abortions in California alone during this period). Police reports reveal that in 1960, illegal abortion was the third largest illegal enterprise in the United States, after gambling and narcotics. See E. Schur, Crimes Without Victims, Deviant Behavior and Public Policy 25 (1965); see also N. Lee, The Search for An Abortionist (1969).

Currently, between 27% and 30% of all pregnancies in the United States end in abortion, producing a total of between 1.5 and 1.6 million. This rate has remained about the same since the late 1970s. See H. Rodman, B. Sarvis, & J. Bonar, The Abortion Question 1 (1987) ("[m]ore than one pregnancy out of four is being terminated by induced abortion"); S. Henshaw, J. Forrest, & J. VanVort, *Abortion Services in the United States, 1984 and 1985*, 19 Family Planning Perspectives 63 (1987); Torres & Forrest, *Why Do Women Have Abortions?*, 20 Family Planning Perspectives 169, 169 (1988). See also Center for Disease Control, Abortion Surveillance: Preliminary Analysis—United States, 1982-1983, 35 Morbidity & Mortality Weekly Report (1986).

This difference—before *Roe*, the abortion rate was at least 20% and perhaps as high as 30%; since *Roe*, it is 27-30%—is strikingly small. The Court has said that even "a disparity [that] is not trivial in a statistical sense . . . hardly can form the basis for the employment of a gender line" (*Craig v. Boren*, 429 U.S. at 201). Cf. *Carey v. Population Services Int'l*, 431 U.S. 678, 702 (1977) (White, J.) ("the State has not demonstrated that the prohibition . . . measurably contributes to the deterrent purposes which the State advances as justifications for the restriction"). In view of the various factors that complicate the comparison between the pre- and post-Roe statistics—changing demographics; new medical technology making it easier to perform an abortion; altered social mores;[4] and the ease of underestimating the frequency of illegal conduct—the difference between the abortion rates in the two periods may approach insignificance.[5]

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[4] See Kaplan, *Abortion as a Vice Crime*, 51 Law & Contemp. Probs. 151 (1988).

[5] "The reality is that overruling *Roe* would have only a marginal effect on the number of abortions." Farber, *The Facts on Abortion*, 5 Constitutional Commentary 285, 286 (1988).

For this reason, the claim that restricting abortion promotes the asserted state interest in protecting fetal life has not been made out. "At most the broad ban is of marginal utility to the declared objective." *Griswold*, 381 U.S. at 507 (White, J., concurring).

3. *Restrictions on Abortion Increase the Mortality and Morbidity Rates of Pregnant Women.*

There is evidence suggesting that before 1973, as many as 5,000 to 10,000 women per year died as a result of unlawful abortions. See L. Lader, Abortion 3 (1967); R. Schwarz, Septic Abortion 7 (1968); see also H. Morgentaler, Abortion and Contraception 110 (1982).[6]

The available evidence indicates that morbidity (disease) rates from illegal abortions were also very high. For example, in 1960 about 33% of illegal abortions required women to stay in a hospital; according to one study, no fewer than 42% of all emergency admissions into hospitals during that year consisted of women attempting to recover from illegal abortions. See H. Morgentaler, Abortion and Contraception 111 (1982). Among the conditions caused by illegal abortions were permanent infertility, severe bleeding, gangrene, infection, and cervical wounds. See generally E. Messer & K. May, Back Rooms: Voices from the Illegal Abortion Era (1988).

Since *Roe*, abortion-related deaths have dropped by no less 90%; in the year after *Roe* alone, abortion-related deaths dropped by over 40%. See 7 Family Planning Perspectives 54 (1975). See also Cates, *Legalized Abortion: Effect on National Trends of Maternal and Abortion-*

[6] Almost 80% of the deceased were women from minority groups. See L. Lader at 66. See also C. Tietze, Abortion as Cause of Death, in Fertility Regulation and the Public Health 274 (S. Tietze ed. 1987).

Related Mortality, American Journal of Obstetrics and Gynecology 213 (1976) (describing the "increasing availability of legal abortion" as one of the "most likely explanations for th[e] decline in abortion mortality ratio."); C. Tietze & S. Lewit, *Epidemiology of Induced Abortion*, in Abortion and Sterilization 56 (J. Hodgson ed. 1981) (principally because of the "replacement of illegal by legal abortions," abortion "is no longer an important cause of death" in the United States); Cates & Rochat, *Illegal Abortions in the United States: 1972-1974*, 8 Family Planning Perspectives 2 (1976) (illegal abortion death-to-case rate "is approximately eight times greater than the death-to-case rate for legal abortion").

In sum, available evidence indicates that prohibiting abortion is likely not to have a substantial effect on the number of abortions but may well endanger the lives and health of pregnant women. The probable effect of overruling *Roe* would be not to protect fetal life but to bring about a dramatic increase in illegal and dangerous abortions.[7] The contention that a prohibition against abortion protects fetal life or represents a reasonable accommodation of the interests of fetal life and the pregnant woman rests not on an evaluation of the facts but on simplistic and uninformed assumptions.

4. *A prohibition against abortion would create intolerable difficulties in the case of pregnancies resulting from coercion and abuse.*

As we have shown, a prohibition against abortion is a gender-based measure. When a state enacts such a measure, it must do so on the basis of a careful assessment of the relevant facts and considerations, not on the basis of "simplistic" and "inaccurate[] assumptions." *Missis-*

[7] Indeed, in view of technological changes since the 1960s, making abortions easier to perform, modern legislation might well be even less effective than legislation in the days preceding *Roe*. See Kaplan, *Abortion as a Vice Crime*, 51 Law & Contemp. Probs. 151, 168-170 (1988).

sippi University for Women, 458 U.S. at 726. The reason for this requirement is the concern that a gender-based measure will not reflect a sufficiently well-informed and reflective assessment of the interests of the disfavored group.

Prohibitions against abortion not only fail to come to grips with the available data on the rate of pre-*Roe* abortions and the effects of illegal abortions on women. They also do not recognize the frequency with which abortions are sought to terminate pregnancies that resulted from coercion or abuse, and the difficulty of administering a system of restrictions on abortion that would take account of this problem.

Existing data suggest that at least 15,000 women per year have abortions after a pregnancy resulting from rape or incest. See Torres & Forrest, *Why Do Women Have Abortions?*, 20 Family Planning Perspectives 169 (1988). There is no doubt that this figure substantially understates the problem. Disclosure of victimization produces social stigma; various forms of "non-stranger" rape are often considered, by prosecutors and victims alike, not to be rape at all; rape and incest are notoriously underreported crimes. See S. Estrich, Real Rape 8-26 (1987). Before *Roe*, the use of illegal abortion after pregnancies produced by acts of violence has been well-documented. See L. Lader, Abortion (1966); E. Messer & K. May, Back Rooms (1988).

If *Roe* were overruled, women who became pregnant as a result of rape or incest would frequently be required to bring the child to term, even in states that provided exceptions to a prohibition on abortion in such circumstances. For victims, rape and incest are difficult enough to allege and prove in a criminal prosecution. A requirement of particularized proof, by pregnant women, of rape or incest in abortion proceedings would lead to enormous difficulties—often, as a practical matter, making

abortion impossible to obtain. The legal determination whether pregnancy is a result of rape or incest is an extraordinarily intrusive procedure.

Moreover, provable rape or incest is not the heart of the problem. Even an exemption for rape or incest does not recognize the coercive nature of the environment in which, for example, battered women live. A woman may submit to sexual intercourse because of fear of violence and then be threatened with further violence if she alleges that the resulting pregnancy is the result of coercion. A battered woman who becomes pregnant is less able, economically and otherwise, to leave the batterer, and her economic dependence on the batterer will only increase if she is forced to bear the child. The incidence of battery increases during and as a result of pregnancy. See R. Gelles, *Violence and Pregnancy*, The Family Coordinator 81 (January, 1975). The incidence of sexual assault and rape by formerly intimate partners also increases as women leave those partners. Violence of this sort serves as a means of continuing the power and control inherent in battering situations, and it often leads to pregnancy. Prohibitions on abortion simply do not recognize the extraordinary difficulty of these situations; instead, in this area as well, they rest on simplistic and ill-informed assumptions.

In many cases, the Court has invalidated gender-based laws because they reflected factual assumptions about men and women that were inaccurate and overly broad in light of the actual differences between the sexes. In this case, by contrast, the factual assumptions are inaccurate not because men and women are in fact substantially the same—with respect to the capacity to become pregnant, they are not—but instead because laws prohibiting abortion are largely ineffective and will produce serious adverse effects on the lives and health of many women. But this distinction does not warrant a different

outcome here. The reason for heightened scrutiny of gender-based measures is not the concern that governments will act maliciously toward women but rather that the interests of women will be overridden too cavalierly, without adequate reflection or investigation, on the basis of "simplistic" and "inaccurate[] assumptions." *Mississippi University for Women*, 458 U.S. at 726. That danger arises whenever a legislature acts against one sex alone and on the basis of superficial investigation rather than careful consideration of the relevant concerns.

5. *Restrictions on abortion often rest on stereotyped and outmoded notions of women's proper role.*

There is considerable reason to believe that prohibitions against abortion have reflected, and continue to reflect, " 'the role-typing society has long imposed' on women." *Califano v. Webster*, 430 U.S. 313, 317 (1977), quoting *Stanton v. Stanton*, 421 U.S. 7, 15 (1975). As the government acknowledges (U.S. Am. Br. 13 n.10), legislation prohibiting abortion is for the most part a product of the period from 1860 to 1880. This was precisely the period when gender stereotyping was at its height. To cite only the most notorious example, in *Bradwell v. Illinois*, 16 Wall. 130, 142 (1873), Justice Bradley, joined by Justices Swayne and Field, concurring in a decision upholding a law that prohibited women from practicing law, reasoned as follows:

> [T]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.

Historical work has revealed that the abortion restrictions of this period grew in large part out of precisely these ideas. See, *e.g.*, J. Mohr, Abortion in America:

The Origins and Evolution of National Policy, 1800-1900 at 168-172 (1978).[8]

Modern studies also suggest that support for laws banning abortion is often an outgrowth of stereotypical notions about women's proper role, and indeed a reaction to the increasing number of women who have assumed responsibility for work outside of the home. See generally K. Luker, Abortion and the Politics of Motherhood 192-215 (1984); Luker, *Abortion and the Meaning of Life*, in Abortion: Understanding Differences 25 (S. Callahan & D. Callahan eds. 1984).[9]

Thus the impetus for prohibiting abortion does not only rest on inaccurate and simplistic assumptions about

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[8] This study explains that the physicians largely responsible for bringing about abortion restrictions "were among the most defensive groups in the country on the subject of changing traditional sex roles. . . . To many doctors the chief purpose of women was to produce children; anything that interfered with that purpose, or allowed women to 'indulge' themselves in less important activities, threatened . . . the future of society itself. Abortion was a supreme example of such an interference for these physicians." Mohr at 168-69. See also *id.* at 105 (quoting a nineteenth century doctor complaining that "the tendency to force women into men's places" was creating insidious "new ideas of women's duties" and including among such ideas the notion "that her ministrations . . . as a mother should be abandoned for the sterner rights of voting and law making"); see also L. Gordon, Women's Body, Women's Right: A Social History of Birth Control in America (1976); K. Luker, *supra*, at 11-39.

[9] See, *e.g.*, Luker, Abortion and the Meaning of Life at 31: Those involved in anti-abortion activities "concur that men and women, as a result of . . . intrinsic differences, have different roles to play: Men are best suited to the public world of work, whereas women are best suited to rearing children, managing homes, and loving and caring for husbands. . . . Mothering, in their view, is itself a full-time job, and any woman who cannot commit herself fully to mothering should eschew it entirely. In short, working and mothering are either-or choices; one can do one or the other, but not both." These sentiments closely resemble the now-unacceptable views expressed by Justice Bradley in *Bradwell.*

the connection between statutory means and ends; it may reflect outmoded and archaic role-typing of women. Indeed, the casual acceptance of inaccurate and simplistic assumptions about the real-world effects of restricting abortion—which is in itself sufficient ground for invalidating a prohibition against abortion—may be a " 'by-product of a traditional way of thinking about females' " (*Califano v. Webster*, 430 U.S. at 320 (citation omitted)). The Court has time and again invoked the Equal Protection Clause in order to disapprove such an approach.

CONCLUSION

Insofar as reversal of the judgment of the court of appeals would require reconsideration of *Roe v. Wade*, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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