No. 88-605

In the

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, et al.,

Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, et al.,

Appellees.

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

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

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STATEMENT OF INTEREST

Americans United for Separation of Church and State is a nonprofit corporation formed to maintain and advance civil and religious liberties through enforcement of the rights and privileges granted by the First and Fourteenth Amendments to the United States Constitution.

Americans United has some 50,000 individual members of various religious beliefs and some of no religious belief, plus 4,000 cooperating religious organizations, in all states of the

United States, including the State of Missouri. Both the governing board of Americans United and its National Advisory Council (which elects the organization's Board of Trustees) include clergy and laypersons who have varying views on the question of abortion with many of them personally opposed to abortion on philosophical, moral, or religious grounds.

In this brief, Americans United takes no position on the questions of whether public funds or facilities should be utilized to provide abortions or the regulation of abortions. Our concern, rather, is directed to what we believe to be theologically-derived legislative findings by the Missouri legislature that personhood begins at the moment of conception. Such an inherently theological, but controversial, determination violates a core purpose of the Establishment Clause of the First Amendment—that is, the absolute prohibition against government preference of one religious sect or denomination over another and the placing of the state's imprimatur on a particular religious dogma.

The membership and governing board of Americans United believe that this specific legislation does not present the appropriate vehicle to resolve the other non-Establishment Clause concerns which this Court will at some later date address. Americans United further believes that any judicial determination ignoring the Establishment Clause question which is unique to this legislation will only generate additional political divisiveness along religious lines.

This *amicus* brief will only address the specific question of whether the Missouri statute here in question violates the Establishment Clause of the First Amendment to the United States Constitution. Americans United understands that no other *amicus* brief will specifically address Establishment Clause concerns of the law's stated legislative findings and its impact.

SUMMARY OF ARGUMENTS

This brief narrowly focuses on the question of whether the Missouri anti-abortion statute violates the Establishment

Clause of the First Amendment. The statute, co-authored by the Missouri Catholic Conference, is based upon inherently theologically-derived legislative findings over which there has been a long and continuing history of deep division within the Judeo-Christian community.

Although civil government is not a competent arbiter of Scripture, the Missouri legislature, in the written text of the statute, determined that human life or personhood is conferred at the time of conception. Such an idea is not subject to scientific or medical confirmation and always has been viewed as theological in character.

Although Americans United readily acknowledges that religious organizations have the constitutional right to speak to moral and ethical issues and to influence public policy, that does not exempt legislation from the proscriptions of the Establishment Clause. It has also become a part of our Establishment Clause jurisprudence that legislation may parallel sectarian teachings and belief without resulting in a violation of the Establishment Clause. Americans United, however, contends that the text of the Missouri statute reveals a legislative purpose of endorsing a sectarian belief. The program has a perceived and actual effect of advancing the religious aims of certain religions. The message conveyed, therefore, is one of endorsement of a particular religious belief to the detriment of those who do not share it. As such, the statute cannot withstand the Establishment Clause. Appellants contend that the legislative finding that personhood is conferred at the moment of conception is neither a necessary nor operative provision. If appellants are correct, there can be no valid claim that the legislative declaration merely parallels a religious belief. Rather, it must be concluded that the legislature has adopted, endorsed, and encouraged a specific and divisive sectarian belief as the stated purpose for the remainder of the statute.

In fact, the theologically-derived finding as to personhood is operative since the statute itself requires all laws in Missouri, presumably both existing and future, to be interpreted and

construed so as to acknowledge on behalf of the unborn fetus at every stage of development all the rights, privileges, and immunities available to all other persons. The endorsement of a sectarian belief with the requirement that the theological view embraced by the legislation will be used to interpret all other related laws in the state clearly creates the potential for political divisiveness. As such, it provides a warning signal suggesting that the legislative act is perceived as an endorsement of religion. Legislation enacted under the guise of securing secular values cannot be promoted in theological terms by religious figures without those values taking on an inherently sectarian character.

This Court has recognized that the common law and, until the mid-nineteenth century, a large majority of jurisdictions in this nation recognized that an abortion performed before quickening was not an indictable offense. Arguments have been raised suggesting that somehow the theological concept that personhood is conferred at the time of conception has been engrafted as part of the Fourteenth Amendment's reference to persons. Those arguments focus on what is perceived to have been the prevailing mood of the nation and the existing laws relative to abortion at the time of its adoption. This contention, however, ignores the fact that the language of the Fourteenth Amendment tracks with the language of the Fifth Amendment. It is only logical that the authors of the Fourteenth Amendment, in using the word "persons," had in mind the same definition of persons as used by the drafters of the Bill of Rights.

This legislation, suffused with the use of theological terms and concepts, should be disposed of on Establishment Clause grounds for the same reasons considered by this Court in reviewing the Alabama moment of silence legislation in *Wallace* v. *Jaffree*, 472 U.S. 38 (1985), and the Louisiana creation-science legislation reviewed by this Court in *Edwards* v. *Aguillard*, 107 S.Ct. 2573 (1987). The motivating and perceived legislative purpose for the enactment of this statute was

sectarian in nature and thus unlike *Harris* v. *McRae*, 448 U.S. 297 (1980), it does not set forth a legislative will that merely corresponds with certain sectarian beliefs. Here, the imprimatur of the State of Missouri has been placed on sectarian views that have historically generated, and are currently the subject of, divisive theological debate which by its very nature can never be resolved by legislative findings derived from a consensus of the scientific and medical communities.

ARGUMENTS

I. THE LEGISLATIVE FINDINGS AND THE STATED PURPOSE OF THIS STATUTE TAKEN TOGETHER WITH ITS AUTHORSHIP CLEARLY DEMONSTRATE THE INHERENTLY RELIGIOUS BASIS OF THE STATUTE IN QUESTION.

The specific language of the Missouri statute here under review, which we believe raises serious Establishment Clause problems and demonstrates that the statute is predicated upon theologically-derived legislative findings, includes the statement that "[t]he life of each human being begins at conception" (Mo. Rev. Stat. § 1.205.1(1) (1986)) and a requirement that "laws of . . . [the State of Missouri] shall be interpreted and construed to acknowledge on behalf of the unborn child at *every stage of development*, all the rights, privileges, and immunities available to all other persns . . ." (Mo. Rev. Stat. § 1.205.1(2) (1986)) (emphasis supplied).

In enacting the statute, the legislature stated its purpose as follows: "It is the intention of the General Assembly of the State of Missouri to grant the right of life to *all humans, born and unborn* . . ." (Mo. Rev. Stat. § 188.010 (1986)) (emphasis supplied).

Thus the Missouri statute is based upon what Americans United believes to be theologically-derived legislative findings and purpose which, read collectively, have the effect of declaring that personhood is conferred at the moment of conception

and that all existing and future legislation of the state must be interpreted from that sectarian viewpoint.

Such an interpretation of the legislative findings does not appear to be the product of a crabbed interpretation of the statutory language. In fact, key parts of the statute are quoted by major organizations in their *amicus* briefs to this Court demonstrating that those organizations had the same understanding from the reading of the text as did Americans United. The "Brief for 127 Members of the Missouri General Assembly as *Amicus Curiae* Supporting Appellants," at 10, states: "In the 1986 Act, the Missouri General Assembly expressed its continuing concern with the protection of human life by finding that '[t]he life of each human being begins at conception' and that '[u]nborn children have protectable interests in life, health, and well-being.'"

That same brief, *id.* at 12, later states: "The Missouri legislature has defined personhood to include all human beings—and not to exclude any."

The "Brief of *Amicus Curiae* Missouri Catholic Conference in Support of Appellants," at 1-2, explains in its Statement of Interest:

> The interest of the Missouri Catholic Conference in this case arises from the position of the Catholic Church as expressed by the National Council of Catholic Bishops, which includes all of the Catholic Bishops of Missouri, that "human life is a precious gift from God; that each person who receives this gift has responsibilities toward God, toward self, and toward others and that society through its laws and social institutions, must protect and sustain human life at every stage of existence. These convictions grow out of [the] Church's constant witness that life must be protected with the utmost care from the moment of conception." *Pastoral Plan for Pro-Life Activities: A Reaffirmation*, Nov. 14, 1985. Based on these principles, the Missouri Catholic Conference supported, through testimony before committees of the Missouri General Assembly, the legislation which is the subject of this lawsuit.

> *The Missouri Catholic Conference believes that the Missouri legislature should be permitted to express the wishes of the majority of the residents of the State, including the Catholics of Missouri, regarding when an unborn child is deemed to be a human being*, and regarding the use of public facilities or public employees to perform or assist in an abortion as provided in the challenged statute. [Emphasis supplied.]

The Missouri Catholic Conference was one of two organizations that *prepared* the language of the statute in question, according to its publication, the MCC Messenger, May 30, 1986, at 1, under the headline "State Paid Abortions—Not Here" (a copy of which appears as Appendix B to this brief at 42a):

> The most significant package of pro-life legislation since 1979 was enacted into law by the General Assembly this year. H. B. 1596 was approved by a vote of 119-36 in the House of Representatives and 23-5 in the Senate.
>
> The final bill is a combination of a bill *prepared* by the Missouri Catholic Conference, prohibiting the use of public funds, facilities and employees for the performance or promotion of abortions, in an omnibus pro-life bill *prepared* by Missouri Citizens for Life. [Emphasis supplied.]

The "Brief of the Lutheran Church-Missouri Synod, the Christian Life Commission of the Southern Baptist Convention, and the National Association of Evangelicals as Amici Curiae in Support of Appellants," at 4, states:

> This case squarely presents this Court with the question of whether, under the United States Constitution, a state legislatively may determine when its protectable interest in human life begins, and, predicated upon that interest in human life, thereafter regulate abortion. *Missouri, in prefacing its abortion law with a statement of the will of its people that human life begins at conception*, reveals its intent to enact a statute . . . to protect the interest of the state in human life before birth, as distinguished from a statute predicated principally upon protection of the health and welfare of the mother. [Emphasis supplied.]

The Lutheran Church-Missouri Synod, Christian Life Commission of the Southern Baptist Convention, and National Association of Evangelicals apparently recognized that the legislative finding was not, and could not, be based upon scientific evidence because their brief, *id.* at 6-7, further states:

> The Missouri legislature acted within the scope of its police power in enacting a statute stating that life begins at conception. Nothing in the Constitution prohibits the state from reaching the factual conclusion that life begins at conception and codifying it. The Supreme Court generally does not require legislatures to prove *their assumptions* or that the means which the legislature chooses will achieve only the ends which the legislature hopes to obtain. Reviewing courts "do not demand of legislatures 'scientifically certain criteria of legislation.'" *Ginsberg* v. *New York*, 390 U.S. 629, 642-43 (1968) (*citing Noble State Bank v. Haskel*, 219 U.S. 104, 110 (1911)). *Legislatures properly may rely on scientifically unprovable assumptions when protecting the broad social interest in order and morality. Paris Adult Theater I v. Slaton*, 413 U.S. at 60. [Emphasis supplied.]

In the same *amicus* brief, *id.* at 20, arguing that state laws prohibiting abortions are not unconstitutional establishments of religion, the organizations commented:

> The sanctity of human life from conception and opposition to abortion are, in fact, sincere and deeply held religious beliefs of The Lutheran Church-Missouri Synod, The Southern Baptist Convention, and of the other forty-seven church denominations represented in this brief. The Lutheran Church-Missouri Synod has, throughout its history, opposed abortion and has adopted official positions in its convention since 1971 condemning willful abortion as contrary to the will of God. Its convention resolution "To State Position on Abortion" adopted in 1979, states that based upon Scripture, "the living but unborn are persons in the sight of God from the time of conception;" that "as persons, the unborn stand under the full protection of God's own prohibition against murder;" and that abortion is not a moral option, except as tragically necessitated by medical procedures applied to prevent the death of the mother.

Likewise, the brief's Statement of Interest, *id.* at 2, states the beliefs of the National Association of Evangelicals: "The National Association of Evangelicals' profound interest in this case stems from its position that, based upon Scripture, human life begins at conception and deserves protection against destruction from its earliest stage."

Although the Roman Catholics, Missouri Synod Lutherans, Southern Baptists, and Evangelicals in Missouri may have a uniform theological view about when human life or personhood commences, other denominations and religious traditions reject the theological concept that human life or personhood begins at the time of conception.

For example, Rabbis Raymond Zwerin and Richard I. Shapiro write that "according to Jewish law, a fetus is not considered a full human being and has no juridical personality of its own . . . . The Talmud contains the expression *Ubar yereah imo*—the fetus is as the thigh of its mother, i.e., the fetus is deemed to be part and parcel of the pregnant's woman's body." Zwerin and Shapiro, *Judaism & Abortion* 1-2 (1987). Another prominent Jewish leader, Rabbi Henry Siegman, Executive Director of the American Jewish Congress, testified before Congress that "the fetus is not a person, in Jewish tradition, until the moment of birth. . . ." *Human Life Bill: Hearing Before the Subcommittee on Separation of Powers of the Committee on the Judiciary*, 97th Cong., 1st Session 48-49 (1981).

Professor Paul D. Simmons, Professor of Christian Ethics at the Southern Baptist Theological Seminary, notes:

> Perhaps the major issue in the abortion debate centers on the question of the personhood of the fetus. Those who are working for a constitutional "human life" amendment to ban abortion in America argue that the Bible teaches (1) that the fetus is a human being and (2) that abortion is murder and thus should be legally prohibited.

Simmons, *Birth and Death: Bioethical Decision Making* 78 (1985). Adding that some traditional religious communities do

not agree with the proposition that human life or personhood begins at the moment of conception. Professor Simmons explains:

> Not all scholars are convinced the Bible teaches that abortion is murder or that the fetus is a person. John Stott, for instance, rejects the notion that a fetus is a human being; he believes that, at best, it may be regarded as potentially a person.
>
> Several things might be noted about these statements. First, many writers use the terms "human," "human life," "life," "person," and "human being" as if they were synonymous and thus interchangeable. Second, each statement reveals certain assumptions about what it means to be a human being or person. Third, each writer brings the teaching of the Bible as that writer understands it to buttress the argument. Finally, there is apparently no single teaching or definition in the Bible regarding personhood, or there would presumably be universal agreement among biblical scholars on this question. To understand the question of the personhood of the fetus and relate the teaching of the Bible more clearly to the question, it may prove helpful to deal with some of the assumptions involved.

Id. at 79. After reviewing the Biblical view of personhood, id. at 87-88, Simmons concludes:

> The biblical portrait of person, therefore, is that of a complex, many-sided creature with the godlike ability and responsibility of making choices. The fetus—certainly in the early stages of gestation—hardly meets those characteristics. At best, it begins to attain those biological basics which are necessary to show such capacities no earlier than the latter part of gestation. The "burden of proof" argument used by those who would equate fetus with person needs to be turned around. Brown argued, for instance, that the burden of proof is on those who say that the fetus is not a human person. "We must be able to say we are sure it is *not* human . . . . How can we be sure it is not a human being?" No one can disagree with him that the fetus is human. That is a simple statement that acknowledges the species to which the fetus belongs. Human is an adjective. The fetus is not bovine (cow), or feline (cat), but

> a *human* conceptus. The problem is asserting that the fetus is a person or human being. The terms are not synonymous. "Human being" is a noun and designates or names a living entity with the qualities of personality and life that distinguish *Homo sapiens* from all other creatures. Plainly the presence of life or animation is not a sufficient distinction, since all animals have life in that sense. The uniqueness of being person is reflecting the qualities of the image of God.

Annexed as Appendix A at 1a to 39a to this brief is a research paper of the Congressional Research Service of the Library of Congress entitled "Catholic Teaching on Abortion: Its Origin and Later Development," which traces the teaching of the Roman Catholic Church on the question of abortion including the theological question of personhood. This research shows that until relatively recent times there were conflicting but acceptable theological views within the Roman Catholic Church as to the beginning of human life or personhood.

Reviewing historic Roman Catholic writings on the subject, the research paper states (Appendix at 17a):

> For St. Thomas, "seed and what is not seed is determined by sensation of movement." What is destroyed in abortion of the unformed fetus is seed, not man. This distinction received its most careful analysis in St. Thomas. It was the general belief of Christendom, reflected, for example, in the Council of Trent (1545-1563), which restricted penalties for homicide to abortion of animated fetus only.

C. Whittier, *Catholic Teaching on Abortion: Its Origin and Later Development* 18 (1981).

The research paper, *id.* at 20 (Appendix at 18a-19a), further notes:

> In 1869 in his Apostolic Constitution *Apostolicae Sedis*, Pope Pius IX broke with the older tradition by omitting all distinctions in canonical penalties between the unformed and the formed fetus. The effect was implicitly to accept the theory of immediate ensoulment or, at least, to provide for it as a likely possibility. In 1917, with the promulgation

of the new Code of Canon Law by Benedict XV (1854-1922), the 40 to 80 day animation determination, still in effect for dealing with irregularities, was completely eliminated. The definition of abortion as the ejection of an immature or non-viable fetus by deliberate intent and efficacious means derives from Sixtus V. By fetus is meant the human organization in the womb after conception and before birth. In effect, the teaching of *Effraenatam* and the Council of Elvira has become the officially sanctioned position of the Church.

The research paper, *id.* at 34-35 (Appendix at 29a-30a), concluded:

> The official teaching of the Catholic Church at present was stated in 1970 by the United States Catholic Bishops: "from the moment of conception the child is a complex and rapidly-growing being endowed with the characteristics of human life"; in brief, "the child in the womb is human." This simply reasserts the judgment of Vatican Council II: "From the moment of its conception, life must be guarded with the greatest of care." Thus, in 1964, Pope Paul VI cited the words of Pius XII thirteen years before: "Innocent human life, in whatever condition it is found, is to be secure from the very first moment of its existence from any direct deliberate attacks . . . . Whatever foundation there may be for the distinction between these various phases of the development of life that is born or still unborn, in profane or ecclesiastical law, and as regards certain civil and penal consequences, all these cases involve a grave and unlawful attack upon the inviolability of human life."
>
> In conclusion, the pastoral and penitential practice of the Catholic Church regarding abortion today is to act as if the soul were present from conception, assuming the possibility, if not the probability, of fully human life or at least its unique potentiality in the *conceptus*. This represents a significant change from the dominant tradition in the past, which distinguished the unformed from the formed fetus in terms of canonical definition of abortion and of appropriate penalties.

In a similar vein, ecumenical dialogue sponsored by the Catholic Bishops' Committee for Ecumenical and Inter-

religious Affairs of the National Conference of Catholic Bishops and the Caribbean and North American Area Council of the World Alliance of Reformed Churches (Presbyterian and Congregational) issued a statement on Ethics and Christian Unity, A Statement on Abortion that noted substantial agreement on certain basic principles concerning abortion but indicated substantial differences on "the moment and meaning of personhood," "the rights of the unborn in situations where rights are in conflict," "the role of civil law in matters pertaining to abortion," and "the interrelation of individual versus communal factors in decision making." C. Whittier, Catholic Teaching on Abortion, *id.* at 39 (Appendix at 34a-35a).

II. RELIGIOUS ORGANIZATIONS HAVE THE RIGHT TO SPEAK OUT ON MATTERS OF MORAL AND ETHICAL CONCERN.

Nothing stated in this *amicus* brief should be construed as criticizing the right of religious organizations to speak out on important issues of moral and ethical concern. As Justice Brennan wrote in *McDaniel* v. *Paty*:

> That public debate of religious ideas, like any other, may arouse emotion, may incite, may foment religious divisiveness and strife does not rob it of constitutional protection. . . . The mere fact that a purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife, does not place religious discussion, association, or political participation in a status less preferred than rights of discussion, association and political participation generally. "Adherents of particular faiths and individual churches frequently take strong positions on public issues including . . . vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right." *Walz* v. *Tax Comm'n,* 397 U.S. 664, 670 (1970).

435 U.S. 618, 640-41 (1978) (Brennan, J., concurring).

Justice Brennan in his same concurrence added that "[t]he Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion . . . . It may not

be used as a sword to justify repression of religion or its adherents from any aspect of public life." *Id.* at 641. However, the fact that religious organizations and their clergy have First Amendment rights to speak out on public issues and to seek to influence the political process in no way detracts from the Establishment Clause proscription against government adopting a sectarian belief on issues that are essentially religious. As Justice Brennan concluded in *McDaniel* v. *Paty*:

> Our decisions under the Establishment Clause *prevent government* from supporting or involving itself in religion or *from becoming drawn into ecclesiastical disputes*. These prohibitions naturally tend, as they were designed to, to avoid channeling political activity along religious lines and to reduce any tendency toward religious divisiveness in society. *Beyond enforcing these prohibitions, however, government may not go*. The antidote which the Constitution provides against zealots who would inject sectarianism into the political process is to subject their ideas to refutation in the marketplace of ideas and their platforms to rejection at the polls. With these safeguards, it is unlikely that they will succeed in inducing government to act along religiously divisive lines, *and, with judicial enforcement of the Establishment Clause*, any measure of success they achieve must be short-lived, at best. (Emphasis supplied)

Id. at 642.

In fact, Americans United firmly believes that religious organizations, like secular bodies and private citizens, have a constitutional right to speak to public questions. Members of the clergy and their religious organizations certainly have the right to speak out on matters of moral and ethical concern and have done so throughout this nation's history. This is why Americans United committed its resources to assisting the church plaintiffs in *Bemis Pentecostal Church* v. *State of Tennessee*, 731 S.W.2d 897 (Tenn. 1987), *appeal denied*, 108 S.Ct. 1102 (1988), in which thirteen churches in Jackson, Tennessee, publicly opposed a liquor-by-the-drink referendum, and challenged the constitutionality of Tennessee's Campaign Disclosure Act.

Thus, although religious organizations have the constitutional right to speak out on public questions, the ultimate protection remains within the political process *and with the courts* to enforce the guarantee against establishment of religion.

III. GOVERNMENT MAY PROPERLY TAKE ACTION AGAINST CONDUCT OR ACTIVITIES EVEN WHEN IT MAY PARALLEL SECTARIAN TEACHINGS AND BELIEFS WITHOUT VIOLATING THE PROSCRIPTION OF THE ESTABLISHMENT CLAUSE.

The developing Establishment Clause jurisprudence clearly accepts the proposition that mere parallelism between religious dogma and legislative action does not in and of itself result in an Establishment Clause violation. In fact, Judeo-Christian religious teachings may properly be the fountainhead from which community morals may spring. Americans United, however, believes that disputed sectarian dogma may not receive the imprimatur of the state as the stated purpose or predicate for governmental legislative action.

In *Harris* v. *McRae*, 448 U.S. 297, 319-320 (1980), this Court stated:

> It is well settled that "a legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive governmental entanglement with religion." *Committee for Public Education* v. *Regan*, 444 U.S. 646, 653. Applying this standard, the District Court properly concluded that the Hyde Amendment does not run afoul of the Establishment Clause. Although neither a State nor the Federal Government can constitutionally "pass laws which aid one religion, aid all religions, or prefer one religion over another," *Everson* v. *Board of Education*, 330 U.S. 1, 15, it does not follow that a statute violates the Establishment Clause because it "happens to coincide or harmonize with the tenets of some or all religions." *McGowan* v. *Maryland*, 366 U.S. 420, 442. . . . The Hyde Amendment, as the District Court noted, is as much a

> reflection of "traditionalist" values towards abortion, as it is an embodiment of the views of any particular religion. . . . In sum, we are convinced that the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, *without more*, contravene the Establishment Clause. [Emphasis supplied.]

Justice Stewart based part of his *Harris* v. *McRae* analysis on this Court's decision in *McGowan* v. *Maryland*. In that case, this Court specifically stated that a law may violate the Establishment Clause "if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion." *McGowan* v. *Maryland*, 366 U.S. 420, 453 (1961).

IV. THE MISSOURI LEGISLATURE, IN ADOPTING ITS ANTI-ABORTION STATUTE, DEMONSTRATED A RELIGIOUS PURPOSE AND ENTERED THE THEOLOGICAL THICKET FROM WHICH IT IS BARRED BY THE ESTABLISHMENT CLAUSE.

In *Harris* v. *McRae*, 448 U.S. at 319-20, this Court, although finding that a secular legislative purpose may properly parallel a sectarian interest, implied that a legislative body may nevertheless transgress the Establishment Clause when enacting anti-abortion legislation. In *Harris* the Court merely acknowledged that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church and would not, "without more," violate the Establishment Clause.

Americans United, however, believes that in the Missouri case the legislation does not merely coincide with a sectarian teaching. Rather, the text of the statute itself results in a breach of the wall between church and state erected by the Establishment Clause of the First Amendment because the statute is predicated upon a theologically-derived legislative finding that "[t]he life of each human being begins at conception" (Mo. Rev. Stat. § 1.205.1(1) (1986)) and a requirement

that "laws of . . . [the State of Missouri] shall be interpreted and construed to acknowledge on behalf of the unborn child *at every stage of development*, all the rights, privileges, and immunities available to *all other persons* . . . ." (Mo. Rev. Stat. § 1.205.1(2) (1986)) (emphasis supplied).

The legislature, in enacting the statute, said its legislative purpose was "to grant the right of life *to all humans, born and unborn* . . . ." (Mo. Rev. Stat. § 188.010 (1986)) (emphasis supplied).

This legislative findings and statement of purpose go beyond a statement of "traditionalist values" represented by the Hyde Amendment and embrace theological dogma and are an attempt to place the imprimatur of the state on one side of the theological argument as to the "personhood" of a fetus.

In *McRae* the district court carefully observed that the consensus of the legislative opinion that gave rise to the passage of the Hyde Amendment prohibiting the use of federal funds for abortion "did not in truth turn on whether an embryo or fetus or, indeed, a zygote or blastocyst is a 'human being.'" *McRae* v. *Califano*, 491 F.Supp. 630, 715 (E.D. N.Y. 1980). The Missouri legislature, however, clearly predicated its legislation on a purely theological finding—a finding which has not been validated by a consensus within the medical or scientific communities.

Appellants and their supporting *amici* argue that the legislative finding is not an operative portion of the statute but merely contributes to a general understanding of the statute. We do not agree, but, whatever merit that argument may have, the legislative declaration nevertheless does clearly demonstrate that the legislative purpose was religiously based. Even though the purpose prong of the *Lemon* test usually looks to the subjective intent of the legislature, intent may be deduced from the face of the statute. *Edwards* v. *Aguillard*, 107 S.Ct. 2573, 2585 (1987). Therefore, if the legislative finding concerning when life begins is unnecessary to further the state's legitimate interests, as claimed by appellants, *amicus* believes

an improper intent may be inferred. It may be concluded that if the legislative declaration is unnecessary for the regulation of abortion, then Missouri is not "paralleling" a religious belief, but adopting and encouraging one.

Appellants argue that the state has a legitimate secular interest in regulating all trimesters of a pregnancy. If this is so, there is no reason for a legislative body to take the extra step and declare that life has in fact begun at the moment of conception, particularly when this issue has not been decided by the medical or scientific communities and is the subject of continuing theological debate. Such a legislative finding, therefore, serves no secular purpose but does demonstrate that the legislative purpose is religiously based.

This Court, over the years, has used a three-part test to analyze Establishment Clause challenges: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster an excessive entanglement with religion.'" *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13 (1971).

More recently Justice O'Connor has suggested additional refinements to the traditional *Lemon* test which we believe are helpful in the analysis of the Establishment Clause issue present in this case. In *Lynch* v. *Donnelly*, 465 U.S. 668, 690 (1984), Justice O'Connor, concurring, suggested that the purpose prong goes to the issue of what government intended to communicate by its action (the "objective" meaning of the statement in the community), while the effects prong relates to what message governmental action actually conveyed whether intended or not (the "subjective" meaning of the statement). Justice O'Connor analyzed the issue as follows:

> The meaning of a statement to its audience depends both on the intention of the speaker and on the "objective" meaning of the statement in the community. Some listeners need not rely solely on the words themselves in discerning the speaker's intent: they can judge the intent

> by, for example, examining the context of the statement or asking questions of the speaker. Other listeners do not have or will not seek access to such evidence of intent. They will rely instead on the words themselves; for them the message actually conveyed may be something not actually intended. If the audience is large, as it always is when government "speaks" by word or deed, some portion of the audience will inevitably receive a message determined by the "objective" content of the statement, and some portion will inevitably receive the intended message. Examination of both the subjective and the objective components of the message communicated by a government action is thereby necessary to determine whether the action carries a forbidden meaning.
>
> The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

Id. *See also* *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 711 (1985) (O'Connor, J., concurring).

Justice O'Connor further suggested in *Lynch* v. *Donnelly* that in reviewing the question of whether the action of government "was understood to place its imprimatur on the religious content" and thereby "communicates endorsement of religion is not a question of simple historical fact." Rather, the question, "like the question whether racial or sex-based classifications communicate an invidious message," is "in large part a legal question to be answered on the basis of judicial interpretation of social facts." *Id.* at 693-94. Further, Justice O'Connor suggested that, in making such an analysis, "[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion. In making that determination, courts must keep in mind both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded.

Government practices that purport to celebrate or acknowledge events with religious significance must be subjected to careful judicial scrutiny." *Id.* at 694.

In *Wallace* v. *Jaffree*, 472 U.S. 38, 73-74 (1985), Justice O'Connor. in applying her modified *Lemon* test analysis to an issue substantially the same as the question addressed here—that is, whether the purpose of the so-called moment of silence legislation enacted by the Alabama legislature had the purpose of advancing religion—stated:

> The crucial question is whether the State has conveyed or attempted to convey the message that children should use the moment of silence for prayer. This question cannot be answered in the abstract, but instead requires courts to examine the history, language, and administration of a particular statute to determine whether it operates as an endorsement of religion.

In *Wallace* Justice O'Connor also suggested that any inquiry into the legislative purpose to determine Establishment Clause violations "should be deferential and limited" without attempting "to psychoanalyze the legislators." *Id.* at 74. In this case, however, Americans United believes that that portion of the text of the statute setting forth the aforementioned legislative findings and purpose of the legislation is inherently religious in character. This, coupled with the acknowledgement that the legislation actually was co-drafted by the Missouri Catholic Conference, should relieve this Court of any need for an intensive investigation of legislative motive.

The Establishment Clause is violated by the advancement of a particular religious belief. *Stone* v. *Graham*, 449 U.S. 39, 41 (1980); *Edwards* v. *Aguillard*, 107 S.Ct. at 2578. Also. this Court in *Epperson* v. *Arkansas*, 393 U.S. 97, 106 (1968), stated that a law should not "be tailored to the principles or prohibitions of any religious sect or dogma." Nevertheless, this is exactly what the Missouri legislature has done.

In *Wallace* v. *Jaffree*, 472 U.S. 38, 75 (1985), Justice O'Connor in her concurrence stated:

> It is not a trivial matter, however, to require that the legislature manifest a secular purpose and omit all sectarian endorsements from its laws. That requirement is precisely tailored to the Establishment Clause's purpose of assuring that government not intentionally endorse religion or religious practice.

It seems clear, as demonstrated earlier in this brief, that a historic and contemporaneous link exists between the teachings of certain religious groups and the human "life begins at the time of conception" finding of the Missouri legislature. In *Edwards* v. *Aguillard*, 107 S.Ct. at 2582, this Court stated: "Because the primary purpose of the Creationism Act is to advance a particular religious belief, the Act endorses religion in violation of the First Amendment."

This Court also stated in *Edwards* v. *Aguillard*, 107 S.Ct. at 2583, that "[t]he plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history, can control the determination of legislative purpose." *See also Wallace* v. *Jaffree*, 472 U.S. at 74 (O'Connor, J., concurring); *Richards* v. *United States*, 369 U.S. 1, 9 (1962); *Jay* v. *Boyd*, 351 U.S. 345, 357 (1956).

Justice Blackmun concluded in his dissent in *Bowen* v. *Kendrick*, 108 S.Ct. 2562, 2590 (1988), that secular values may be properly promoted by legislation: "Whereas there may be secular values promoted by the AFLA, including the encouragement of adoption and premarital chastity and the discouragement of abortion, it can hardly be doubted that *when promoted in theological terms by religious figures, those values take on a religious nature.*" (Emphasis supplied.)

V. THE MISSOURI STATUTE HAS THE PERCEIVED EFFECT OF ENDORSING A CONTESTED THEOLOGICAL POSITION CONTRARY TO THE PROHIBITION OF THE ESTABLISHMENT CLAUSE.

In *Larson* v. *Valente*, 456 U.S. 228, 244 (1982), this Court stated that "[t]he clearest command of the Establishment

Clause is that one religious denomination cannot be officially preferred over another."

In *Wallace* v. *Jaffree*, 472 U.S. 38, 69-70, Justice O'Connor reviewed her suggested modifications of the *Lemon* test and stated:

> Direct government action endorsing religion or a particular religious practice is invalid under this approach because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." . . . Under this view, *Lemon's* inquiry as to the purpose and effect of a statute requires courts to examine whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement.

Justice O'Connor continued:

> A statute that ostensibly promotes a secular interest often has an incidental or even a primary effect of helping or hindering a sectarian belief. Chaos would ensue if every such statute were invalid under the Establishment Clause. For example, the state could not criminalize murder for fear that it would thereby promote the Biblical command against killing. The task for the Court is to sort out those statutes and government practices whose purpose and effect go against the grain of religious liberty protected by the First Amendment.

Id. at 69-70. Justice O'Connor further stated:

> The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred. Such an endorsement infringes religious liberty of the non-adherents for "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."

Id. at 70. Here the power and direct coercive pressure of the state are exercised on behalf of a sectarian teaching about "personhood."

Under Justice O'Connor's endorsement test, courts must examine whether a statute under review "in fact conveys a message of endorsement," irrespective of the state's actual intent. *Lynch* v. *Donnelly*, 465 U.S. 668, 690 (1984). As Justice O'Connor added in her concurrence in *Presiding Bishop* v. *Amos*, 107 S.Ct. 2862, 2874 (1987), "To ascertain whether the statute conveys a message of endorsement, the relevant issue is how it would be perceived by an objective observer acquainted with the text, legislative history, and implementation of the statute."

Not only were Missouri Catholics informed through their own church newspaper, the MCC Messenger (Appendix B herein at 40a), that the Missouri Catholic Conference had co-authored, not merely promoted, the anti-abortion bill enacted into law, but also the general public was informed by the secular press that the executive director of the Missouri Catholic Conference and the state legislative chairman of Missouri Citizens for Life had "ghost written" the legislation. The Kansas City Times noted that the role played by the Missouri Catholic Conference was no secret and quoted the executive director to the effect that "some critics of the proposal at the time noted his involvement and charged that religious beliefs were being advanced in the form of state legislation." Sentell, *Abortion Law was Work of Ghostwriters*, The Kansas City Times, Jan. 23, 1989. A copy of this article is annexed hereto as Appendix C at 43 a.

Also, if an objective observer reading the text of the Missouri statute considers the declaration of personhood contained in the legislative findings as being unnecessary to achieve a valid state interest, then the effect of the statement would be to convey a message that the particular theological theory of life is "favored or preferred." *Wallace* v. *Jaffree*, 472 U.S. at 70. In essence, if the legislative finding does not further the state's

interest, and is in fact an encroachment into a religious area, then both the actual purpose and effect must be to endorse a particular religious viewpoint.

At the very least, the legislative finding made by the Missouri legislature sets forth a legislative preference for a specific theological idea. As Justice Blackmun stated recently, "A statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable. *Texas Monthly, Inc.* v. *Bullock*, 57 U.S.L.W. 4168, 4175 (U.S. Feb. 21, 1989) (Blackmun, J., concurring).

In *Thomas* v. *Review Board*, 450 U.S. 707, 716 (1981), this Court reasserted the principle that "[c]ourts are not arbiters of scriptural interpretation." If this is beyond the competence of the Judicial Branch, it is equally outside the domain of the Legislative Branch.

Although noting in *Wallace* v. *Jaffree* that it is possible that a legislature will enunciate a sham secular purpose for a statute, nevertheless Justice O'Connor had "little doubt that our courts are capable of distinguishing a sham secular purpose from a sincere one, or that the *Lemon* inquiry into the effect of an enactment would help decide those close cases where the validity of an express secular purpose is in doubt." 105 S.Ct. at 75. Arguments that the legislative purpose was based upon secular concerns are belied by the sectarian foundation of the legislative action. According to Justice O'Connor, "While the secular purpose requirement alone may rarely be determinative in striking down a statute, it nevertheless serves an important function. It reminds government that when it acts it should do so without endorsing a particular religious belief or practice that all citizens do not share." *Id.* at 75-76.

VI. IF THIS COURT SHOULD VALIDATE A LEGISLATIVE ACT PREDICATED ON A THEOLOGICALLY-DERIVED LEGISLATIVE FINDING INTENDED TO BE USED IN THE INTERPRETATION OF ALL EXISTING AND PROSPECTIVE LEGISLATION TOUCHING ON THE STATUS OF "THE UNBORN CHILD AT EVERY STAGE OF DEVELOPMENT," SUCH LEGISLATION CREATES THE POTENTIAL FOR EXCESSIVE ENTANGLEMENT BETWEEN CHURCH AND STATE.

The Missouri legislature specifically stated that its findings that "the life of each human being begins at conception" are to be utilized in interpreting and construing the laws of the state. Thus, the suggestion that the findings and purpose portion of the statute is not operative is pure fiction. Apparently such a mandated interpretation would apply to both existing and prospective legislation. The legislature specifically stated that "the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and construction of this state." (Mo. Rev. Stat. § 1.205.1(2) (1986)).

It is clear that the legislature in this case went beyond restricting the use of public funds or facilities in abortions. It attempted to place a theological interpretation on all existing and future legislation touching on "the unborn child at every stage of development." Such a statutory requirement portends a myriad of unpredictable ways for wreaking havoc in the future.

In *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973), this Court indicated that the "potential for political divisiveness" was relevant in determining whether legislation created excessive entanglement

between church and state. In *Nyquist* this Court noted that "while the prospects for such divisiveness may not alone warrant the invalidation of state laws . . ., it is certainly a 'warning signal' not to be ignored." 413 U.S. at 797-98.

In *Lynch* v. *Donnelly*, Justice O'Connor in her concurring opinion stated that "[p]olitical divisiveness is admittedly an evil addressed by the Establishment Clause. Its existence may be evidence that institutional entanglement is excessive or that a government practice is perceived as an endorsement of religion." 465 U.S. at 689.

VII. THERE IS NO LOGICAL BASIS FOR IMPLANTING ONE THEOLOGICAL VIEW OF PERSONHOOD INTO THE FOURTEENTH AMENDMENT.

In *Roe* v. *Wade*, 410 U.S. 113, 132-133 (1973), this Court recognized that "abortion performed *before* quickening' was not an indictable offense at common law and that "[t]he absence of a common-law crime for pre-quickening abortion appears to have developed from a confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins."

This Court in *Roe* v. *Wade* also acknowledged that "the law in effect until mid-nineteenth century was the pre-existing English common law" and that by the end of the 1950's a large majority of jurisdictions banned abortion "unless done to save or preserve the life of the mother." *Id.* at 138, 139. This Court also noted that "at the time of the adoption of our Constitution, and throughout the major portion of the nineteenth century, abortion was viewed with less disfavor than under most American statutes" in effect at the time of the *Roe* v. *Wade* decision. *Id.* at 140.

A number of *amicus* briefs filed in this case in support of appellants have argued that the Fourteenth Amendment to the United States Constitution somehow changed the common law and somehow included a fetus as a "person" who could neither be deprived of "life, liberty, or property without due process of law" nor be denied the "equal protection of the law." For

instance, the brief of a number of religious pro-life groups addresses "the personhood, under the Fourteenth Amendment, of human beings conceived but not yet born." *Amicus* Brief of Catholics United for Life at 4. That brief argues that the "absence or dearth of case support for unborn personhood is irrelevant" and takes a gigantic leap in logic by citing Cong. Globe, 37th Cong., 2d Sess. 1449 (1862) (Sen. Sumner) tying such a concept to the proposition that the framers of the Fourteenth Amendment intended that "in the eyes of the Constitution, every *human being* within its sphere . . . from the President to the slave, is a person." *Id.* at 7, 14.

Similarly, the *amicus* brief of the Knights of Columbus argues that "viability is an invalid benchmark for construing the meaning of 'person' in the Fourteenth Amendment because it has nothing to do with attributes of personhood, or a particularized state of being, but only the state of medical technology." Brief of the Knights of Columbus at 2. In effect, the Knights of Columbus would have this Court substitute Roman Catholic theology for "medical technology," the sectarian for the secular.

Even the Knights of Columbus brief admits, however, that "the legislative history of the [Fourteenth] Amendment makes no explicit reference to the unborn or to abortion." *Id.* at 18. Whether the term "human being" includes all unborn children to the time of their conception also is not demonstrated in any Fourteenth Amendment generated case law, and, therefore, would rest solely on church dogma or teaching.

The *amicus* briefs of Catholics United for Life and Knights of Columbus focus on what they perceive to have been the prevailing mood of the nation and the existing abortion laws at the time the Fourteenth Amendment was adopted. Then, *ipse dixit*, they engraft on the Fourteenth Amendment the concept that its protection of "persons" includes a fetus. This argument ignores the fact that the common law and the prevailing view at the time of the adoption of our Constitution and the Bill of Rights fails to support any such notion.

The Fifth Amendment contains the same type of language and restraint as does the Fourteenth Amendment. Both provide that a "person" shall not be deprived of "life, liberty, or property, without the due process of law." The only difference is that the Fifth Amendment proscribes actions by the federal government, and the Fourteenth prevents similar action by state governments. How ironic it would be if the same language within the Constitution could produce distinctly different results according to whether the action is federal or state. It is more logical to believe that the authors of the Fourteenth Amendment, in using the word "persons," had in mind the same definition of persons as used by the drafters of the Bill of Rights.

CONCLUSION

The legislative findings and stated legislative purpose establishing the Missouri statute in question on a theological teaching about which there are deep divisions within the religious community require a constitutional determination by this Court that both the purpose and effect of the statute violate the Establishment Clause of the First Amendment because they place the imprimatur of the state upon a particular sectarian belief. For this reason, this Court should affirm the decision of the Court of Appeals.

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Respectfully submitted,

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