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 AMERICANS FOR DEMOCRATIC ACTION; COALITION OF LABOR UNION WOMEN; COMMITTEE OF INTERNS AND RESIDENTS; FEDERALLY EMPLOYED WOMEN; PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO AS AMICI CURIAE

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BRIEF FOR AMERICANS FOR DEMOCRATIC ACTION; COALITION OF LABOR UNION WOMEN; COMMITTEE OF INTERNS AND RESIDENTS; FEDERALLY EMPLOYED WOMEN; PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO AS AMICI CURIAE

INTEREST OF THE AMICI CURIAE

This brief *amici curiae* is filed with the consent of the parties as provided for in the Rules of this Court.

Amicus Americans for Democratic Action (ADA), a progressive, independent political organization, is a national coalition of civil rights leaders, academicians, business people, trade unionists, elected officials, church leaders, professionals, members of Congress, and Americans from many other walks of life. ADA is dedicated to the achievement of freedom, equality of opportunity, economic security and peace for all people through education and political action.

Amicus Coalition of Labor Union Women (CLUW) is a national organization of women and men who are members of more than sixty-five national and international unions. CLUW has 45 active chapters throughout the United States and a National Executive Board composed of the female leadership of national labor organizations. Many members of CLUW are professional public employees who object to governmental interference in the communication between themselves and their clients or patients.

Amicus Committee of Interns and Residents (CIR), founded in 1957, is the oldest and largest union of salaried doctors in the United States. CIR currently has collective bargaining agreements which cover 5,000 salaried doctors in New York, New Jersey, and Washington, D.C. Many members of CIR are employed by public entities and believe that, as publicly-employed physicians, they

have the same obligation to provide their patients with well-considered professional advice and expertise as physicians in the private sector.

Amicus Federally Employed Women (FEW) is a non-profit, membership organization that represents over 800,000 women employed by the federal government. FEW's purpose is to eliminate sex discrimination and promote the advancement of women in the federal workplace.

Amicus Public Employee Department, AFL-CIO, is an organization of thirty-three national and international labor organizations with a total membership of 4,500,000 men and women working, for the most part, in governmental employment. Many of the public employee members of Public Employee Department unions are health care and other professional employees deeply concerned with providing their patients and clients with professional services of the highest quality. Those members are concerned with the First Amendment issues involved in this case because they do not believe that the government should be able to prevent them from fulfilling their professional responsibility to provide their clients and patients with their best professional information and advice regarding matters within their realm of expertise.

SUMMARY OF ARGUMENT

I. Of the questions presented for review in this case, this brief *amici curiae* addresses only the First Amendment issue: May health care professionals who are public employees be required, as a condition of employment, to refrain from providing their patients or clients with truthful information and medically appropriate advice that it is their professional duty to communicate? Before addressing this issue, however, we first consider whether the question is fairly presented by this case in its current posture.

1. Of the three different provisions of the Missouri statute here in question that place limits upon "encourag-

ing or counseling a woman to have an abortion", only one—the proscription on the expenditure of public funds for that purpose (hereafter the "public funds provision") —is now contended by the state to be consistent with the First Amendment. Missouri represents to this Court, albeit less than wholeheartedly, that the public funds provision neither restricts the expenditure of funds for providing information about abortion (as opposed to affirmative advice to procure an abortion), nor prevents public employees from providing information *and* advice to procure an abortion as an incidental part of their broad professional consultation duties.

2. The first limiting construction suggested by Missouri—that the public funds provision reaches advocacy but not nondirective counseling regarding abortions—is one this Court need not address. For, as this Court had reason to explain in *Thomas v. Collins*, 323 U.S. 516 (1945), a statute which purports to permit objective or abstract discussion but not advocacy will necessarily restrain the former as well as the latter, given the inherent difficulties of distinguishing between the two. Consequently, the public funds provision must be considered, for First Amendment purposes, as identical to a statute that in terms restricts nondirective health care counseling.

3. On the other hand, Missouri's second suggestion regarding the limited intent of the public funds provision is one that this Court should in fact entertain. If, as Missouri in its brief at some points (but not others) indicates, the public funds provision will have no adverse effect upon the ability of health care professionals employed by the state to provide abortion counseling as part of their broader professional responsibilities, then there would be no case or controversy in this case concerning any First Amendment issue. And declining to determine the proffered First Amendment issue would be consistent with this Court's general policy of adjudicating constitutional issues, particularly novel and difficult ones, only when strictly necessary.

4. This Court cannot, however, simply accept Missouri's representations as to the limited reach of the public funds provision. For one thing, those representations are so "opaque" that it would be unwise to base a constitutional adjudication on the state's litigating position. Indeed, this Court recognizes that it is unfair to litigants to simply accept the construction of state statutes alleged to chill First Amendment rights proffered by attorneys for the state but not accepted as authoritative by any agency or court, state or federal.

Instead, this Court has developed a variety of mechanisms for determining whether a limiting construction of a state statute under constitutional attack is appropriate. Of those devices, abstention is generally disfavored where First Amendment rights are at issue. Certification to the highest state court, while often proper, is not available here because Missouri law has no provision for certification. The third alternative is for the federal courts to construe the state statute themselves where a limiting construction is reasonably apparent from the statutory scheme.

The importance of the statutory interpretation question here has been altered significantly on appeal to this Court: Because the state now concedes the invalidity of the statutory language that directly limited the counseling activities of professional public employees, a narrowing construction of the public funds provision would avoid the need to decide at all the First Amendment issue the state seeks to adjudicate. For this reason, and because the statutory structure indicates that the public funds provision was not intended to reach abortion counseling provided as part of programs whose larger *purpose* is to provide health care to pregnant women rather than simply to advocate abortions, this Court should itself determine that the public funds provision is so limited. ***Frisby*** *v. Schultz*, —— U.S. ——, 108 S. Ct. 2495, 2501 (1988).

II. The relationship between a health care professional and patient or client is one that, under the common law, is confidential, creates a fiduciary obligation on the part of the doctor, and requires that the doctor communicate to the patient both relevant information regarding the patient's medical options and the professional's best judgment regarding the appropriate course to follow. The professional's obligation to provide patients with appropriate information and advice applies without regard to whether the patient or some third party is paying for the consultation. The question in this case is therefore whether Missouri can consistently with the First Amendment require that health care professionals employed by the state forego making communications to their patients that they have a professional obligation to make.

While the First Amendment gives wide berth to the government in communicating its views to the populace, there are nonetheless significant limitations upon the government's authority to control the use of public resources so as to suppress some ideas and promote others. This Court's nonpublic forum cases so illustrate: even as to government-controlled modes of communication where the government may make identity and content distinctions between users, viewpoint proscriptions are impermissible. Certain public employment relationships, including those of professors in public universities and those in which the government employs individuals to enter into traditional professional relationships with lay clients, closely resemble the nonpublic forum situations. Consequently, the same viewpoint distinction proscription should apply to such employment situations. Since the professed purpose of the public funds provision is to foster an official viewpoint concerning abortion, and since only advice favoring and not advice disfavoring abortion is proscribed, the public funds provision as applied to health care professionals employed by the state is unconstitutional.

ARGUMENT

I

This brief *amici curiae* is concerned with whether a state may, consistently with the First Amendment, preclude health care professionals who are employed by the government from providing their patients and clients with confidential information and advice concerning the availability and advisability of perfectly legal medical procedures that similar professionals not employed by the government would be expected to provide as part of their professional services. Although raised here in the emotional abortion context, the question is a generic one, with implications that stretch beyond the health care situation to include other kinds of professional relationships and contexts. Neither the specific First Amendment question raised in this case nor the broader issue of the protection afforded confidential professional communications of public employees generally by the First Amendment is an issue this Court has had occasion previously to address.

Before proceeding to explore briefly the substantive First Amendment issue, however, we consider whether the issue is actually raised in this case as it now stands. The attorneys for Missouri have in the course of this litigation suggested that the state statute, to the extent that it is now contested, may not in fact preclude professional public employees such as the plaintiffs in this case from offering information and advice to their patients concerning the availability of procuring an abortion not necessary to save the mother's life. Instead, appellants indicate, albeit somewhat ambiguously, that the statute as it now stands would permit such employees, without endangering their jobs, to offer their own best professional judgment as to whether an abortion is the appropriate alternative for the particular patient. Because these representations are neither binding upon the officials en-

trusted with enforcing the Missouri statute here at issue nor sufficiently unambiguous to provide reliable assurance to the affected public employees, however, this Court should directly address, affirm, and clarify the statutory construction suggested by appellant's attorneys, thereby avoiding any need to address the First Amendment issue presented by this case.

1. There are three provisions of the Missouri statutory scheme here at issue that, on their faces, may impact upon the ability of professional public employees to provide their patients with information and advice concerning abortions. The first makes it:

> "unlawful for a doctor, nurse, or other health care professional, a social worker, a counselor, or person of similar occupation who is a public employee within the scope of his public employment to encourage or counsel a woman to have an abortion not necessary to save her life." [RSMo. § 188.210 (1986).]

The second provides that no "public facility" may be used "for the purpose of . . . encouraging or counseling a woman to have an abortion not necessary to save her life." RSMo. § 188.215 (1986). And the third states that it is "unlawful for any public funds to be expended for the purpose . . . of encouraging or counseling a woman to have an abortion not necessary to save her life." RSMo. § 188.205 (1986).

In the district court, the state maintained, first, that none of these provisions "prevent a physician from informing a woman of 'all options' or the 'pros and cons' of an abortion" (J. St. App. A45), and second, that even if the section that directly prohibits public employees from encouraging and counseling abortions is unconstitutional, the "public funds" section, § 188.205, is valid because it is "*not* directed at any plaintiff, either as a physician or other health care provider, but only at 'state and local officials or legislative bodies responsible for expending public funds.' " J. St. App. A45.

In the course of holding the "encouraging or counseling" provisions of the statute as a whole void for vagueness, the district court, without actually rejecting the proffered interpretations on their merits, refused to rely upon them as affecting the constitutional issues before the court: The first suggestion, said the court, was insufficient, even if accepted as within the legislature's intent, to affect the constitutionality of the statute, given the inherent lack of precision in any line drawn between simply providing information and counseling or encouraging a particular course of action. J. St. App. A44-46.[1] As to the "public funds" provision, the district court did not directly endeavor to determine whether the statute could be readily construed so as to avoid the conclusion that it forbids public employees from providing information and advice regarding abortion in the course of carrying out their ordinary medical consultations. Rather, the court simply stated, in the negative, that it was "unpersuaded that § 188.205, which relates to 'public funds,' could *not* apply to inhibit the free speech of any health care provider." J. St. App. A46 (emphasis supplied). And in addressing the merits of the First Amendment issue, as opposed to the vagueness contention, the district court did not separately consider the "public funds" provision at all. Instead, the court considered the three "encouraging and counseling" provisions together, and concluded that they were unconstitutional because they could deny access to medical information affecting a woman's decision whether to continue a pregnancy even where the patient paid the full cost of the counseling. J. St. A49-50.

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[1] In support of this conclusion, the district court cited specific evidence in the record that, to avoid "encouraging or counseling" abortions, health professionals (in at least one instance on the basis of a directive issued by the employing hospital) either were providing no information at all concerning abortions to their patients, or were attempting to "steer their conduct far wider than the lawful zone." J. St. App. 44-45.

On appeal, the court of appeals affirmatively addressed and rejected the state's suggestion that the "encouraging" and "counseling" language as it appeared in the statute should be read as "banning only 'affirmative advocacy.'" J. St. App. A67. The court of appeals believed that such an interpretation would read the term "counseling" as synonomous with "encouraging," thereby violating the "basic principles of statutory construction . . . that a statute should be interpreted so as not to render one part inoperative." J. St. A68. In addition, the court of appeals agreed with the district court that however construed, the term "counseling" "is fraught with ambiguity" and would have the effect of chilling even that objective speech the state contends is outside the intended legislative reach. J. St. App. A68.

Unlike the district court, however, the court of appeals did not mention at all the possibility that the "public funds" provision should be read so as not to overlap with the "public employees" section. Instead, the court of appeals treated the "encouraging or counseling" language of the public employee, public funds, and public facilities sections together, and held all three, without differentiation, both unconstitutionally vague and an "unconstitutional infringement of the right to choose an abortion protected by the fourteenth amendment." J. St. App. 73.[2]

In this Court, Missouri does not seek review of the court of appeals' holding that the public employees and public facilities provisions are unconstitutional insofar as they proscribe "encouraging" or "counseling" women with respect to abortions. *See* J. St. i-ii; *id.*, Question 4 ("Is a state civil statute facially unconstitutional that makes it 'unlawful for any public funds to be expended . . . for the purpose of counseling a woman to have an abortion

[2] Thus, the court of appeals did not address any First Amendment issue, as such, on the merits, although it assumed for purposes of the vagueness analysis that "[t]he prohibition on 'encouraging or counseling' implicates [the] first . . . amendment rights of both physicians and their patients." J. St. App. A67.

not necessary to save her life.'" See RSMo. § 188.205 (1986). And the state maintains, once again, that the "encouraging or counseling" phrase of the statute "does not prohibit the use of public funds to provide information regarding abortions or to inform a woman of the options she may have to cope with an unwanted pregnancy." Brief for Appellants ("App. Br.") at 42.

Moreover, the state now expands upon its contention that the public funds section, taken alone (as it now must be, with the unconstitutionality of the public employees section settled), does not impede the ability of health care providers to communicate with their patients concerning abortions:

> Section 188.205 does not forbid speech; it is only concerned with the spending of public money. . . . The language of § 188.205 directs officials not to expend public funds under their control for the purpose of . . . encouraging or counseling a woman to have an abortion not necessary to save her life. . . . Obviously the language of this statute does not forbid any discussion regarding abortion issues. . . .
>
> Section 188.205 is not directed at the conduct of any physician or health care provider, private or public. Instead, it is directed solely at those persons responsible for expending public funds. . . . The statute does not forbid *incidental* use of funds for counseling, so long as the expenditure has a legitimate *public purpose*. [App. Br. 38, 39, 43.]

This language suggests, but does not clearly state, that a health care provider employed by the state could, without fear of losing his or her job, provide information and advice concerning abortion in the course of a session with an individual patient or client whose *purpose* is to provide an ordinary medical consultation, and not simply to advocate abortion. There is reason to believe, at the same time, that Missouri has carefully chosen the language in its brief to create the *impression* that public employees may provide abortion information and advice

with impunity under the public funds provisions without fully committing the state to that position. Thus, the state's discussion may leave open the possibility that the funding officials could condition the expenditure of funds upon an assurance that employees paid with the funds will not advise a woman to have an abortion; the public hospital or other entity receiving the funds could then make abiding with that funding provision a condition of employment for affected public employees.[3] Under this scenario, the statute itself directly affects only the funding officials, but the consequences for public employees would be that they endanger their jobs if they provide to patients not paying their own fees their best professional judgment on the question of abortion.

2. In our view, the first statutory construction question raised by Missouri's arguments in this Court—whether the "encouraging or counseling" language used in the public funds provision reaches nondirective counseling to woman concerning the abortion option, or only specific advice from a health care professional to a patient that the best medical course for her would be to procure an abortion—is not one pertinent to the resolution of any First Amendment issue before this Court.

[3] For example, the state argues that the state may consistently with the First Amendment, "absolutely restrict[]" public employees from encouraging or counseling a woman to have an abortion where the counseling services are paid for with public funds. App. Br. at 39-40. In the first place, including this argument at all is inconsistent with the suggestion that the public fund provision in fact contains no such restriction. And second, read against this argument, the statements that the statute does not forbid discussion of abortion or control the conduct of public health care professionals may simply mean that the statute controls only the counseling services they provide when paid for with public funds, not the services they provide when the patient pays for the counseling services. *See* J. St. App. A49-50 (district court holding that the public employee and public facility provisions are unconstitutional because they limit the counseling activities of publicly-employed health care professionals even when those activities are fully paid for by the patient).

For the two courts below were surely correct in concluding that any constitutional infirmity in Missouri's regulation of abortion-related speech by professional employees could not be cured by differentiating between providing information about abortions and advocating that a particular patient seek an abortion.

This Court addressed in *Thomas v. Collins*, 323 U.S. 516 (1945), a similar attempt to save a speech-restraining statute [4] by arguing that the statute prohibited only advocacy of a specific, lawful course of action by particular individuals (in *Thomas*, "solicitation" of particular workers to join a union) and not speech generally discussing the merits and demerits of that course of action (in *Thomas*, discussing the availability and advantages of labor organizations as a solution to the problems of workers generally). This Court concluded in *Thomas* that because the distinction between advocacy of a specific course of action and merely discussing unionism was an inherently ephmeral one, the statute in question had to be judged on the assumption that it reached the latter as well as the former. This Court's sensitive discussion of why that was the case in *Thomas* has application by analogy here:

> A speaker . . . could avoid the words "solicit," "invite," "join." It would be impossible to avoid the idea. . . . General words create different and often particular impressions on different minds. No speaker, however careful, can convey exactly his meaning, or the same meaning, to different [individuals]. How one might "laud unionism" . . . yet . . . not imply an invitation, is hard to conceive.

[4] We are not at this juncture prejudging the question whether any restraint worked by RSMo. § 188.205 upon speech by professional public employees is unconstitutional. Rather, the point made in the text is that the narrowing construction suggested by the state concerning the "encouraging or counseling" abortion language would not, if adopted, make the statute any *more* valid than it would be without the limiting construction.

> [W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clearcut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker at the mercy of the varied understanding of his hearers, and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. *It compels the speaker to hedge and trim. . . .* The vice is not merely that invitation, in the circumstances shown here, is speech. *It is also that its prohibition forbids or restrains discussion which is not or may not be invitation.* The sharp line cannot be drawn surely or securely. [323 U.S. at 534-35 (emphasis supplied).]

So here: The relationship between a doctor and a patient, for example, is necessarily one in which the patient is dependent upon the doctor's expertise, and is seeking from the doctor not only information but also specific advice as to the best course to follow.[5] Even if the doctor refuses to provide such advice in explicit terms, it is quite likely that the patient will nonetheless, expecting the doctor to prescribe a specific course of action, perceive advice to be implicit in the information provided. Thus, no health care professional consulted by a pregnant woman "safely could assume that anything he might say upon the general subject [of

[5] For example, a patient consulting a doctor for an upper respiratory infection expects more than a list of the various medications available to treat such infections; he or she expects as well an indication of which one, in the doctor's expert judgment, is best suited for the patient's circumstances.

abortion] would not be understood by some as [affirmatively advocating to a particular woman that she have an abortion]." *Thomas v. Collins*, *supra*, 323 U.S. at 535.

Consequently, the prohibition of affirmative advocacy of abortion *necessarily* "forbids or restrains discussion which is not or may not be [advocacy]," (323 U.S. at 535), and must be considered for purposes of constitutional analysis as identical to a rule that explicitly reaches nondirective counseling concerning the abortion option.[6] For that reason, this Court need not address the precise reach of the "encouraging or counseling" language of the public funds provision of the Missouri statute.

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[6] We note that the analysis in the text differs somewhat from the vagueness analysis upon which the district court and the Court of Appeals relied. Both courts held that the "encouraging or counseling abortion" language in the Missouri statute was subject to heightened scrutiny for unconstitutional vagueness because that language would necessarily discourage speech by public employee professionals to their patients simply providing information on the abortion option. *See* J. St. App. at A45-46, A67. But this vagueness approach, *assumes*, without purporting to decide, that health care professional public employees have a First Amendment right to provide at least nondirective counseling regarding medical procedures to their patients, regardless of any policy pronouncements to the contrary by their public employers. While we believe that that position is ultimately correct (*see* Part II, *infra*), we do not believe that the proposition is so self-evident as to support a ruling that the statute is unconstitutionally vague without considering the merits of the First Amendment issue.

On our analysis, however, the import of the observation that the "encouraging or counseling" abortion language will necessarily discourage both nondirective and advice-oriented consultations by health care professionals paid with public funds is not to hold the statute unconstitutionally vague for that reason. Instead, the ephemeral nature of any distinction between providing abortion-related information and advising a woman to procure an abortion is important because it defines the *merits* of the First Amendment issue as necessarily encompassing *any* kind of abortion-related consultation between health care professionals paid with public funds and their patients.

3. In contrast, the second statutory construction issue raised by Missouri in this Court—whether the public funds provision of the statute has any impact upon the right of health professionals who are public employees to counsel their patients regarding abortions as part of their ordinary medical consultations—could be dispositive of any First Amendment issue raised by the "encouraging or counseling" language of the public funds provision. None of the plaintiffs in this case has any controversy with defendants concerning the expenditure of public funds as such. Rather, the organizational plaintiffs are private non-profit organizations that for purposes of this lawsuit are not seeking to use any public funds to support any abortion counseling they may provide. J. St. App. A10. And the individual plaintiffs are health care professional public employees who, while paid with public funds, have no responsibility for dispersing such funds. Rather, for purposes of the "encouraging or counseling abortion" public funds provision, those individuals are concerned only with assuring that they can continue, in the course of their practices, to provide pregnant women patients who consult them as medical professionals with both information and recommendations concerning the advisability of a legal abortion. J. St. App. A10, 48.

The courts below have held that insofar as the Missouri statutes specifically forbid public employees to engage in this conduct, the statutes are invalid. Thus, unless RSMo. § 188.205, the public funds section, overlaps with the now-inoperative public employee provision, the individual plaintiffs are in no danger that their government jobs will in the future be conditioned upon refraining from providing abortion counseling in the course of their professional consultations, and there is no longer any case or controversy between plaintiffs and defendants concerning the constitutionality of the "encouraging or counseling" prohibitions of the public funds aspect of the statute. If that is the case, the appeal, as to that issue

should not be entertained. *See, e.g., Hall v. Beals*, 396 U.S. 45, 48 (1969); *Powell v. McCormack*, 395 U.S. 486, 496 n.7 (1969); *SEC v. Medical Comm. for Human Rights*, 404 U.S. 403, 407 (1972).

This disposition of the First Amendment issue in this case would have a distinct jurisprudential advantage: As we briefly develop below (*see* Part II, *infra*), the First Amendment issues that would be raised by any governmental interference with the substance of confidential communications within a fiduciary professional-client relationship are substantial and sensitive ones, and remain so whether the professional employee in question is a public employee or not. This Court has long adhered to a "policy of strict necessity in disposing of constitutional issues," (*Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 568 (1947)), and has applied that policy particularly to cases raising novel and important constitutional questions where, for one of various reasons, those questions are not as sharply presented as they might be. *E.g., Rescue Army v. Municipal Court, supra*, 331 U.S. at 565-68 (refusing to exercise appellate jurisdiction where, *inter alia*, the appropriate construction of the statute in question was "ambiguous" and the record presenting the constitutional question in "highly abstract form"); *Minnick v. California Department of Corrections*, 452 U.S. 105, 127 (1981) (refusing to decide the validity of an affirmative action program "because of significant developments in the law—and perhaps in the facts as well—" since the litigation of the case began); *Wainwright v. City of New Orleans*, 392 U.S. 598 (1968) (Harlan, J., concurring) (explaining that the reason for dismissing certiorari was that "this record is too opaque to permit any satisfactory adjudication of [the constitutional] issue proffered"); *Kremens v. Bartley*, 431 U.S. 119, 133-34 (1977). And, in particular, where a constitutional issue can be avoided by interpreting a statute so as to clear up any ambiguities as to the stat-

ute's effect upon constitutional rights and at the same time pretermit any constitutional question, this Court has preferred that course. *E.g., DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const., Trades Council,* —— U.S. ——, 108 S. Ct. 1392, 1397 (1988); *see Erznoznik v. City of Jacksonville,* 422 U.S. 205, 216 (1975); *Broadrick v. Oklahoma,* 413 U.S. 601, 613 (1973).

4. The question then becomes whether the "encouraging or counseling" aspect of the public funds provision in fact reaches, directly or indirectly, the professional consultation function of public employees engaged in medical practice generally, and not in abortion advocacy alone. While Missouri has indicated that RSMo. § 188.205 may not have that reach, the representations of its attorneys concerning the precise reach of that section are, at least, "opaque." *Wainwright v. City of New Orleans,* 392 U.S. 598 (1968) (Harlan, J., concurring). *See* pp. 10-11, *supra.* And, in any event, this Court does not simply accept the representations of a state's attorneys in this Court as to the appropriate construction of a state statute. Since such representations do not bind state courts or state enforcement authorities, blind acceptance of those representations leave the plaintiffs in the position of fearing sanctions should they engage in the conduct they claim to be protected by the First Amendment. *Virginia v. American Booksellers Assoc., Inc.,* —— U.S. ——, 108 S. Ct. 636, 644 (1988); *Frisby v. Schultz,* —— U.S. ——, 108 S. Ct. 2495, 2501 (1988) (first adopting a narrowing construction of the statute in question, and then noting that the interpretation "is *supported* by the representations of counsel for the town at oral argument") (emphasis supplied); *id.* at 2505 (White, J., concurring) (counsel's representations are not "authoritative statements of the law").

Rather, when faced with the need to determine whether a proffered limiting interpretation of a state statute is valid, this Court has chosen from among several options.

One option is to remand to the district court with directions to abstain from deciding the constitutional question while the parties repair to state court to settle the statutory constriction issue. This Court, however, has been "reluctant to abstain in cases involving facial challenges based on the First Amendment." *City of Houston v. Hill*, —— U.S. ——, 107 S. Ct. 2502, 2512 (1987). "In such case[s] to force the plaintiff who has commenced a federal action to suffer the delay of state-court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protest." *Zwickler v. Koota*, 389 U.S. 241, 252 (1987), *quoted in City of Houston v. Hill, supra*, 107 S. Ct. at 2513.

Another alternative available to this Court in securing an adjudication of the meaning of a state statute challenged on First Amendment grounds is to certify the statutory question to a state's highest court, while leaving in effect during the certification process any injunction issued by the lower federal courts preventing application of the statute on constitutional grounds. *Virginia v. American Booksellers Assoc. Inc., supra*, 108 S. Ct. at 644-45. In this instance, however, no certification process is available in the Missouri Supreme Court.

Finally, where "a narrowing construction of state statute is . . . reasonable and readily apparent," the federal courts may themselves construe a state statute so as to avoid constitutional difficulties. *Boos v. Barry*, —— U.S. ——, 108 S. Ct. 1157, 1169 (1988); *see also Frisby v. Schultz, supra*, 108 S. Ct. at 2501. And while this Court ordinarily does not adopt such a limiting construction on its own in the first instance, it may do so where "the lower courts ran afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties." *Frisby v. Schultz, supra*, 108 S. Ct. at 2501.

The latter alternative is appropriate in this case. The court of appeals did not address at all the question whether the RSMo. § 188.205, the public funds provision,

should be construed so as not to preclude public employees from counseling women regarding their abortion options as part of their ordinary professional consultation services. And while the district court did briefly allude to this question of statutory interpretation, that court, quite properly as the case stood at that juncture, took no account of the policy favoring interpretation of statutes to avoid constitutional difficulties, since the separate public employee provision nonetheless required that the basic First Amendment issue raised by the plaintiffs be addressed.

Because the state now accepts the constitutional invalidity of the "encouraging or counseling" aspect of the public employee provision, the current situation is quite different from that faced by the courts below: By a narrowing construction of the public funds provision as it pertains to the First Amendment issue, this Court can entirely avoid the necessity to decide a novel First Amendment issue. And, with the constitutional invalidity of the public employee section conceded, the propriety of such a limiting construction is "readily apparent." *Boos v. Barry*, *supra*, 108 S. Ct. at 1169: It is reasonable to assume that the legislature addressed the scope of "encouraging and counseling" in which public employees could engage in the statutory section that expressly addressed that issue, and intended the "public funds" section to address the separate question whether public officials could spend money for programs dedicated to the express and narrow *purpose* of providing abortion counseling. Under that view of the statute, professional public employees could, in the course of providing general health services to pregnant women, proffer both information regarding the availability of abortions and their own best expert judgment concerning whether an abortion is medically indicated. Since that is all that the public employees who are plaintiffs in this case propose to do (*see* J. St. App. A48), such a construction would pretermit any

case or controversy regarding the constitutional issues raised by the public funds provision.[7]

In sum, because Missouri has chosen to accept the constitutional invalidity of the part of the statute that most directly implicates the First Amendment issue the state seeks to adjudicate, this case presents the unusual situation in which a limiting construction by this Court of a state statute in order to avoid constitutional adjudication is appropriate. Such a construction would provide Missouri's professional public employees with the protection they need to pursue their professional responsibility as they see it, and at the same time would adhere to this Court's "policy of strict necessity in disposing of constitutional issues." *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 568 (1947).

II

Because we regard as compelling the argument that the "public funds" provision should be construed so as to avoid any First Amendment controversy between the parties to this case, we address the First Amendment issue originally raised in this case only briefly.

1. In this case, "[t]here was unchallenged testimony at trial that in such situations [when the mother's *health* may be adversely affected, even if it is not an immediate life-threatening condition] a physician has a professional duty to at least suggest or even to urge the pregnant woman to have an abortion." J. St. App. 48. This finding reflects the basic attributes of the relationship between health care (and other) professionals and their patients or clients that is generally recognized and protected in the common law, and that is at the heart of the First Amendment issue in this case.

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[7] This is not to say, of course, that the public funds provision as thus construed would necessarily be constitutional.

Those basic characteristics are, in essence (1) that the relationship is confidential; (2) that the professional possesses expertise within a certain area of knowledge, and applies that expertise to the particular client's problems within that area; (3) that in applying that expertise, the professional is expected to exercise a special duty of care akin to that of a fiduciary, giving the client his or her best expert judgment without regard to the professional's own self-interest or other external considerations. *See generally* F. Lane, *Medical Litigation Guide* §§ 40.03, 40.06, 40.09, 40.10, 40.17; 61 Am. Jur. 2d ("Physicians, Surgeons, and Other Healers") 290-305, 358-371 (1981).[8] Traditionally, a professional owes that standard of care to any individual whom he or she undertakes to treat or counsel, regardless of whether the fees for the consultation are paid by a third party, or by the government. *National Savings Bank v. Ward*, 100 U.S. 195 (1880); *DuBois v. Decker*, 130 N.Y. 325, 29 N.E. 313 (1891). Thus, professionals paid by the government because their patients cannot themselves afford the usual fees are not exempt from the traditional obligations of their profession when they consult with indigent clients. As a general matter, then,

> [t]he right of the doctor to advise his patients according to his best lights seems so obviously within First Amendment rights as to need no extended discussion. . . . Of course a physician can talk freely and fully with his patient without threat of retalia-

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[8] The professional may decline to provide a particular treatment, or may withdraw altogether from the relationship with the client. In either situation, however, the professional's fiduciary duties persist insofar as he or she has a duty to communicate to the client the need for additional treatment, and to provide necessary medical care until the client secures the services of another professional. *See generally*, 61 Am. Jur.2d at 361-69.

tion by the State. [*Poe v. Ullman*, 367 U.S. 497, 513-14 (1961) (Douglas, J., dissenting).] [9]

The First Amendment question in this case is whether, as Missouri argues, a health care or other professional loses any of the First Amendment's protection for communication that it is his or her professional duty to provide simply because the fees for his or her professional services are paid by the government rather than by the individual to whom the care is provided.

2. Missouri supports the proposition for which it argues by a simple syllogism: Government need not permit public employees, paid with public funds, to participate in performing abortions (or, presumably, any other medical procedure); instead, government may discourage certain activities by refusing to fund those activities. *Maher v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977); *Harris v. McRae*, 448 U.S. 297 (1980). By the same token says the state, government does not have an obligation to "subsidize" or promote speech by private citizens. *Regan v. Taxation with Representation*, 461 U.S. 540 (1983). Ergo, the government is free, without limitation, to limit speech of any kind, and to forbid the expression of some views but not others, as long as the speech could not occur without use of government resources.[10]

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[9] In *Poe*, Justice Douglas filed a dissenting opinion from the court's refusal on prudential grounds to address the constitutional question presented for review and not from an opinion taking an opposite view on the merits. While this Court has not had occasion to revisit the question of the First Amendment protection accorded communication within the professional-patient relationship, Justice Douglas' general proposition that the First Amendment reaches not only public debate and discourse but every manner of communication among citizens has been repeatedly reaffirmed. *E.g.*, *Abood v. Detroit Board of Education*, 431 U.S. 209, 231 (1977).

[10] Missouri puts the argument in terms of the government's right to expend its *funds* in support only of speech that it desires to subsidize, presumably because the statutory provision here at issue relates only to funds. But there is nothing inherent in the use of

But this Court has not sanctioned this glib equation between the government's right to withhold support from disfavored *conduct* and a government right to censor *speech* that is in some measure dependent upon government support for its continuation. Rather, while it is true that the First Amendment has a restricted role to play where the government is seeking to communicate its views to the citizenry,[11] implicit in this Court's First Amendment jurisprudence are several principles that limit the government's ability to foster an official point of view by conditioning the use of government resources for communicative activity upon abiding by government-imposed restrictions.

First, the primacy of the First Amendment necessarily means that there are situations in which the government can bar use of its resources for noncommunicative purposes, but not for speech activity. For example, the public forum cases in one sense concern the question whether and to what degree government can refuse to subsidize speech by providing a suitable location for communication among citizens; absent access to government-owned locations, citizens are not forbidden to speak to each other, but they may find it much more difficult and expensive to do so. *See, e.g., Schneider v. State*, 308 U.S. 147, 161 (1939); *Martin v. City of Struthers*, 319 U.S. 141, 147 (1943). This Court has nonetheless recognized that because of pervasive governmental ownership and control over many of the facilities most appropriate for communication among citizens, the fundamental First Amendment value of promoting the exchange of ideas

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government money, as opposed to the use of other government resources, that should vary the constitutional results. *See*, making the broad argument that the government can withhold *any* form of support from communicative activity that would promote abortion, Hirt, *Why the Government is Not Required to Subsidize Abortion Counseling and Referral*, 101 Harv. L. Rev. 1895 (1988).

[11] *See generally* M. Yudof, *When Government Speaks* (1988); Shiffrin, *Government Speech*, 27 UCLA L. Rev. 565, 568-69 (1980).

among the citizenry would be irretrievably compromised by a rule giving government the same degree of control over communicative activity on public property as over non-communicative activity. *E.g.*, *Hague v. C.I.O.*, 397 U.S. 496 (1939); *Frisby v. Schultz*, *supra*. The result is that a city may ban rollerskating from its parks or skateboarding from its streets because it considers the activities dangerous, but may not forbid supporters of abortion from marching on city streets because it considers their ideas dangerous. *Cf. Frisby v. Schultz*, 108 S. Ct. at 2503.

Secondly, the government's ability to foster a particular point of view by manipulating the distribution and use of government resources is more limited than its authority to dedicate certain resources entirely to non-communicative activity, or to limit the subject matter but not the viewpoint of speech supported with public resources. Again, the cases in which this Court has addressed questions of access to government-controlled property or modes of communication demonstrate that this is the case: While the government may restrict in some instances the use of government owned or controlled systems of communication on the basis of the identity of the speaker or the content of the speech, it may not deny the use of such resources on the basis of the *viewpoint* to be espoused, for the *purpose* of suppressing an idea with which the government disagrees. *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 87, 46 (1980) ("the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable *and not an effort to suppress expression merely because public officials oppose the speakers' view*"); *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 811 (1985) ("[t]he existence of reasonable grounds for limiting access to a nonpublic forum, however, will not save a regulation that is in reality a facade for viewpoint-based discrimination."); *cf. Board of Education v. Pico*, 457 U.S. 853

(1982); *Regan v. Taxation with Representation*, 461 U.S. 540, 548 (the government violates an individual's rights by declining to subsidize their communicative activity if it "discriminate[s] invidiously in such a way as to 'aim at the suppression of dangerous ideas' ").

Finally, there is no unitary rule concerning whether this general principle proscribing viewpoint discrimination by the government in the distribution of subsidies for communicative activity applies to individuals employed by the government for the purpose of carrying out some government policy, as opposed to individuals who, although using government resources, are in no sense agents of the government for any purpose. Rather, whether or not public employees may claim the same measure of protection for their job-related communicative activity as other individuals whose speech is aided by the use of public resources, or whether public employees are instead deemed in effect to have contracted to carry out governmental policy at the expense of First Amendment rights, depends in large part upon the nature of their employment.

The Court has suggested that because the function of elementary and high schools is in large part "inculcating fundamental values necessary to the maintenance of a democratic political system" (*Anspach v. Norwick*, 441 U.S. 68, 76-77 (1979)), the government has relatively broad authority to control the communication that goes on between teacher and student in the public school classroom. *Cf. Board of Education v. Pico, supra*, 457 U.S. at 864 (plurality opinion).[12] At the same time, where

[12] One would expect, however, that there are limits even on the right of a school board to control speech by a teacher in the class room (in addition to the express limitation worked by the Establishment Clause of the First Amendment, *see Epperson v. Arkansas*, 393 U.S. 97 (1968)). For example, if a school board dictated that a teacher support in the classroom election of candi-

the nature of the public employment is such that the government is in effect paying the salaries of certain individuals so that they may freely communicate with others, the nature of employment relationship is quite analogous to the relationships in the nonpublic forum context, and similar rules protecting against government suppression of speech because of its point of view apply.

For example, a government operated university is not a new form of human endeavor but the continuation, in a particular form, of a kind of organization with a noble history in the development of civilization whose mission, it has been long understood, depends upon a basic freedom of communication among scholars and between scholars and their students:

> The essentiality of freedom in the community of American universities is almost self-evident. . . To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and *die.* [*Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).]

See also Keyishian v. Board of Regents, 385 U.S. 589, 601-03 (1967); *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.); *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 292 (1984) (Marshall, J., concurring). Thus, a university administration is in effect

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dates with whom she disagreed, or required that she teach factual information that was indisputably incorrect, the restrictions could not be justified by any legitimate educational purposes of the school board. At that point, we would expect, the basis for concluding that the teacher's free speech rights are subordinate to her obligation to perform the job she had contracted to do would no longer obtain, and the restrictions on speech would be invalid.

conducting a nonpublic forum for the exchange of ideas; while the officials may select the participants in that forum, and prescribe the subject matter to be covered, the nature of the governmental endeavor, as established both by tradition and by the transcendent purpose of the institution, is such that interference with free speech on viewpoint grounds would in the long run undermine the government's reason for subsidizing universities in the first place. For that reason, as the cases just cited show, once the government has made the choice to subsidize a university, it must treat the employees of the university not as instruments for communicating government policy, but as independent professionals whose communicative activity the government has chosen to subsidize.

The same should be true regarding the health care professional-patient relationship involved in this lawsuit. The basic relationship is one that the government did not create; rather, the relationship, as developed in the private sector, depends in large part upon confidence, trust, and upon free communication between the doctor or other professional and the patient or client. *See* p. 21, *supra*. Where such communication is constrained in order to suppress a particular viewpoint,[13] the fundamental nature of the relationship that the government has chosen to subsidize is distorted, and the overall purpose of subsidizing the relationship is undermined. Consequently, government may not choose to subsidize a professional-patient relationship that replicates generally that relationship as it has developed in the society at large and then compromise the communicative freedom that is basic to the success of the relationship.[14] Under that analysis,

[13] That is indubitably the case here. Missouri concedes that the purpose of the statute is to prevent health care professionals from inducing or persuading women to have abortions, because of the government policy that abortions are undesirable.

[14] It is worth noting that at common law, not every professional consultation gives rise to the fiduciary relationship characteristic of such consultations. For example, where an employer, for its own

the public funds provision of the Missouri statute is unconstitutional to the extent, if any, that the provision has the effect of precluding professional employees from fulfilling their professional responsibility to communicate with patients fully concerning available and advisable medical options.

CONCLUSION

For the reasons stated above, the judgment below with respect to the "encouraging" or "counseling" abortion aspects of the public funds provision should be affirmed on the basis that the state statute permits public employees to engage in such "encouraging" or "counseling" as part of a professional consultation with an individual client.

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purposes and not to subsidize treatment of the employee, directs that an employee be examined by a physician, no doctor-patient relationship giving rise to a special duty of care is created. *E.g. Hoover v. Williamson*, 236 Md. 250, 203 A.2d 861 (1964).