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 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

LEONARD J. PRANSCHKE
ANN T. STILLMAN
SIBYL C. BOGARDUS
PHILIP E. DRAHEIM *
DRAHEIM & PRANSCHKE
1633 Des Peres Road
Suite 302
St. Louis, Missouri 63131
(314) 965-6455

Attorneys for Amici Curiae

* Counsel of Record

QUESTION PRESENTED

Whether, under the United States Constitution, the Missouri State Legislature may determine the point at which human life begins and enact legislation protecting human life from that point.

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INTEREST OF AMICI CURIAE

The Lutheran Church-Missouri Synod is the second largest Lutheran denomination in North America and the eighth largest Protestant body in the United States. It is composed of approximately 6,200 member congregations which, in turn, have approximately 2,600,000 individual members. The Lutheran Church-Missouri Synod

holds as a profound belief that human life begins at conception and opposes willful abortion, except as tragically necessitated to prevent the death of the mother. The Lutheran Church-Missouri Synod believes that compassionate alternatives to abortion should be offered to all persons confronted with unwanted pregnancies.

The Lutheran Church-Missouri Synod initiated this brief and is its principal proponent. It is joined by The Christian Life Commission of The Southern Baptist Convention and The National Association of Evangelicals.

The Christian Life Commission of The Southern Baptist Convention is the agency of the Convention charged by the Convention with assisting Southern Baptists in understanding the moral demands of the Christian faith and helping Southern Baptists apply Christian principles to moral and social problems. The Southern Baptist Convention, the nation's largest Protestant denomination, with 37,000 member churches and 14.8 million church members, has assigned the Christian Life Commission of The Southern Baptist Convention the specific task of addressing issues such as abortion.

The National Association of Evangelicals, located in Wheaton, Illinois, is a non-profit association of evangelical Christian organizations, including 50,000 churches and forty-seven member denominations. It serves a constituency of 10 to 15 million people. 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.

The letters from the parties consenting to the filing of this brief are submitted herewith to the Clerk pursuant to Rule 36.2.

STATEMENT OF THE CASE

Amici adopt the statement of the case in the Brief for the Appellants.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case presents to the Court a state statute regulating abortion, expressly predicated upon a legislative intent of protecting the state's interest in life from the moment of conception. The statute includes a provision stating when life begins. Accordingly, it is a significant opportunity for the Court to review *Roe v. Wade*, 410 U.S. 113 (1973), as it affects a state legislature's right to determine when life begins and to enact statutes prohibiting or limiting abortions. In this manner it distinguishes itself from state statutes motivated principally by the protection of maternal health.

This case, by focusing on a state statute that is predicated upon the state's interest in protecting unborn life, should allow reconsideration of the holding in *Roe v. Wade* that a state does not have a compelling interest in protecting prenatal life until the fetus attains the point of viability. The approximately 30 million Americans represented by the *amici* believe it is time for that holding to be reconsidered.

Section A. of this brief discusses the past decisions of this Court establishing principles that certain matters of law involving deeply divided views of the people, and matters of fact that are not easily proven, should be deferred to the legislatures. The critical question of when life begins, such that it should be protected by state law, should be decided by the legislatures.

Section B. argues that *Roe v. Wade*, in holding that the state's interest in protecting unborn life does not become compelling until the fetus attains viability, should be reexamined. Pregnancies that reach viability show only a slightly greater likelihood of reaching full term and live childbirth than pregnancies at any other stage. The state's compelling interest in protecting prenatal human life arises if it is reasonably likely that the prenatal life will come to full term and reach childbirth.

Section C. discusses the various alternatives to abortion available to women with unwanted pregnancies. Weighed against the reasonableness and availability of such alternatives, the termination of human life, even at its earliest stages, is unjustified.

Section D. of the brief states that deeply held religious beliefs in the sanctity of human life from the moment of conception may coincide with state laws prohibiting abortion. Such laws do not violate the First Amendment prohibition upon the establishment of religion.

ARGUMENT

THE STATE LEGISLATIVELY MAY DETERMINE THAT ITS PROTECTABLE INTEREST IN HUMAN LIFE BEGINS AT CONCEPTION AND FROM THAT POINT MAY PROHIBIT ABORTION.

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, Mo. Rev. Stat. §§ 1.205; 188.010-.220 (1986), 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.

The U.S. District Court decision in this case, *Reproductive Health Services v. Webster*, 662 F. Supp. 407 (W.D. Mo. 1987), and Court of Appeals decision, *Reproductive Health Service v. Webster*, 851 F.2d 1071 (8th Cir. 1988), have held that the expressions of legislative intent in the Missouri statute that "the life of each human being begins at conception" and that "unborn children have a protectable interest in life, health and

well-being" are unconstitutional. These holdings should be reversed. The holdings of the U.S. District Court and Court of Appeals are, of course, ultimately based upon *Roe v. Wade*, 410 U.S. 113 (1973). Much of this brief, therefore, addresses that case and the need for this Court to re-address certain of its holdings.

A. A State Legislature, and Not This Court, Is the Proper Body to Determine Whether the State Has a Protectable Interest in the Life of an Unborn Human Being and to Create Legislation Protecting That Interest.

The legislature of each state, rather than the United States Supreme Court, is the proper body to determine whether each state has a protectable interest in the life of an unborn human being and to weigh that interest against the rights of the mother. The police power is broad enough to encompass the abortion issue and is reserved to the states and vested in the state legislatures. The state legislature is a superior body to weigh the competing interests of the mother and unborn child, find facts relative to when life begins, and promulgate legislation that protects the rights of all persons. While the acts of the legislature are subject to judicial review, this Court should recognize the ultimate constitutional authority of the legislature in factually determining when life begins and when it should be protected against abortion. If a legislature reasonably determines that human life exists, no judicial or constitutional prohibition of that determination is appropriate, unless the lives of other persons are placed in jeopardy.

The police power gives the states broad powers to regulate the relative rights and duties of their citizens, to protect the public health, morals, and safety of their citizens, and to promote the common good. *Barsky v. Board of Regents*, 347 U.S. 442, 449 (1954); *House v. Mayes*, 219 U.S. 270, 282 (1911); *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1904). The scope of police powers

is broad, allowing state legislatures to do everything essential for the public safety, health, and morals. *Lawton v. Steele*, 152 U.S. 133, 136 (1894). The legislature may exercise its police power whenever the public interests demand it. *Id.*

The state legislature is vested with the discretion to determine what the interests of the public require and what measures are necessary for the protection of those interests. *Id.* (*citing Barbier v. Connolly*, 113 U.S. 27 (1884)). Therefore, not only does the Constitution reserve the police power to the states, but the Supreme Court concedes that only the state legislatures are vested with the authority to regulate in the police power area.

Supreme Court precedent establishes that permissible state interests include public morals, health, and life. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973) (Upholding a Georgia statute that enjoined the showing of two obscene films, based on the state's right to maintain a decent society); *Barsky v. Board of Regents*, 347 U.S. 442, 449 (1954) (Upholding a New York statute that denied licenses to doctors convicted of a crime, based on the plenary power of states to establish standards for the practice of health); *Maher v. Roe*, 432 U.S. 464, 478 (1977) (Upholding a Connecticut statute that denied abortion funding to indigent women based on the state's unquestionably "strong and legitimate interest in encouraging normal child birth," which exists throughout the pregnancy). Any one of these three permissible state interests may be the basis for an anti-abortion statute, so the state has the *power* to legislate in this area.

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 Treatre I v. Slaton*, 413 U.S. at 60.

The difficult determination of when human life begins depends upon the adequate collection and analysis of facts. Legislatures are better suited than courts to investigate factual matters because they "ha[ve] superior fact-finding capabilit[ies]." Brief for the United States as Amicus Curiae in Support of Petitioners at 12, *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983). A legislator "is not limited either by the case or controversy requirement or by the decision of legal counsel in a particular case to construct the record in a particular way. The legislator is not only free to inquire into any relevant facts, but can carry that inquiry wherever the general public interest, rather than the interest of private litigants, might indicate." *Id.* Overall, "legislatures are better suited to make the necessary factual judgments in this area." *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. at 458 (O'Connor, J., dissenting).

When the Supreme Court declared the Texas statute unconstitutional in *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court violated its own precedent defining its role relative to the sovereignty of the state legislature when reviewing an exercise of police power. The cardinal rule of the Supreme Court when reviewing state statutes is that the judges on the Court "do not sit as a super-legislature to determine the wisdom, need, and pro-

priety of laws that touch economic problems, business affairs, or social conditions." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). The Supreme Court failed to observe this standard in *Roe v. Wade*, and, in essence, violated the federal separation of powers, when the Court created a federal abortion "statute" after, in effect, declaring all state anti-abortion statutes unconstitutional.

The regulation of abortion demands the resolution of conflicts of value, and assessments of the competing worth of the lives of the unborn human being and of the mother, all very sensitive issues that involve differences of feeling. As Mr. Justice Frankfurter wrote, "Obviously the proper forum for mediating a clash of feelings and rendering a prophetic judgment is the body chosen for these persons by the people," the legislature. *American Federation of Labor v. American Sash and Door Co.*, 335 U.S. 538, 557 (1949). In further support of this principle, Justice White has stated: "Abortion is a hotly contested moral and political issue. Such issues, in our society, are to be resolved by the will of the people, either as expressed through legislation or through the general principles they have already incorporated into the Constitution they have adopted." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 796 (1986) (White, J., dissenting).

The majority in *Roe v. Wade* ignored other precedent that guides the Court in its limited review of the police power. In *Dandridge v. Williams*, 397 U.S. 471 (1970), the Court held that Maryland's method of administering a public welfare program was a valid exercise of the police power. Rather than intrude on the province of the legislature, the Court stated that it is not the Court's role to determine whether a state statute is wise, whether it best fulfills the relevant social and economic objectives that a state might ideally espouse, or whether a more

just and humane system could be devised. *Id.* at 487. The Supreme Court acted impermissibly under its own guidelines when, in *Roe v. Wade*, it determined that the Texas abortion statute was unwise, that states must permit abortions, and that the Court could devise a better system.

When the Supreme Court concluded that the state abortion statute in *Roe v. Wade* was unconstitutional, it intruded not only on the sovereignty of the state legislature to determine state interests, but also upon the power and right of citizens to voice their opinions by electing state officials who respond to their needs. We should not forget that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, K. & T. R. Co. v. May*, 194 U.S. 267, 270 (1904) (Holmes, J.). "We should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch" *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring).

Chief Justice Waite said, in *Munn v. Illinois*, 94 U.S. 113, 134 (1877), "For protection against abuses by legislatures the people must resort to the polls, not to the courts." If a state legislature passes an abortion statute that is based on state interests not held by a majority of the people, it is the province of the citizens to elect new representatives. The Supreme Court is to permit the regulation to stand until legislatively repealed, rather than to determine that the state interest is not proper. As Mr. Justice Stewart said in his dissent in *Griswold*, "That is the constitutional way to take this law off the books." *Griswold v. Connecticut*, 381 U.S. 479, 531 (1965) (Stewart, J., dissenting).

The Supreme Court should not second-guess state officials charged with the responsibility of exercising the police power. *Dandridge v. Williams*, 397 U.S. 471, 487 (1970). As the Court has said: "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986). The Court also stated that it should resist the temptation "to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority." *Id.* at 195.

The Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), justified its ruling on the Texas statute by stating that the statute implicated a fundamental right. However, contrary to the conclusions on which the Court relied in *Roe v. Wade*, no fundamental right to an abortion or to choose an abortion exists in the Constitution, expressly or in the due process clause of the Fourteenth Amendment. The *Roe* court based the right to an abortion on the right of privacy established in its prior opinions. While we acknowledge the right of privacy, we submit that no "privacy" right supports the abortion of an unborn human being, unless the lives of other persons are endangered.

The Supreme Court's analysis in *Roe* of the right to an abortion is inconsistent with the Court's most recent opinion dealing with a fundamental right of privacy. The Supreme Court, in *Bowers v. Hardwick*, 478 U.S. 186 (1986), upheld a Georgia statute prohibiting sodomy, based on the Court's test that any fundamental right, including the right of privacy, must be a right "deeply rooted in this nation's history and tradition" or "implicit in the concept of ordered liberty." *Id.* at 194. Apply-

ing this test, the Court held that the right of privacy does not protect homosexual sodomy. It is doubtful that the *Bowers* definition would extend the right of privacy to include abortion for the same reason this Court held that it did not extend to sodomy: because aborting an unborn human being at *any* stage in a pregnancy is not "deeply rooted in this nation's history and tradition" or "implicit in the concept of ordered liberty." For the Court to hold otherwise creates an incongruity unsupported by this most recent Supreme Court precedent regarding the right of privacy.

Based on the foregoing discussion, we believe that under correct constitutional standards the state legislature is the body constitutionally empowered to decide when life begins and thereafter to act to protect that life.

B. *Roe v. Wade* Is in Error in Holding That a State's Interest in Protecting Human Life Does Not Become Compelling Until a Fetus Attains Viability.

This section of the brief focuses on that portion of the *Roe* opinion that addresses the issue of whether the state has a compelling interest in regulating abortion from conception as a result of its interest in protecting prenatal human life. It does not address those portions of the *Roe* opinion that deal with whether a fetus has a right to life under the Fourteenth Amendment, or whether the interest of the state in protecting the health and well-being of the mother is sufficiently compelling to permit it to prohibit abortion. Instead we address, in the setting of the Missouri statute at issue in this case, the issue of whether the state's interest in preserving prenatal human life permits it to prohibit abortion from the earliest stages of life.

The majority opinion in *Roe*, without analytic support and reason, concludes that a compelling state interest in prenatal human life does not arise until the fetus attains

viability. 410 U.S. at 163. The opinion, as it applies to the question of the interest of the state in protecting human life prior to birth, proceeds along the following line of thought:

1. Every woman has a right of privacy derived from the Fourteenth Amendment concept of personal liberty and restrictions upon state action. *Id.* at 153.

2. The right of privacy of the pregnant mother is a "fundamental" right that includes the abortion decision. *Id.*

3. State regulation limiting the pregnant mother's decision to abort the fetus is a limitation on a "fundamental" constitutional right and, therefore, is justified only by a "compelling interest" of the state. *Id.* at 155.

4. The state has an interest in protecting the "potential" of human life during pregnancy. That interest grows in "substantiality" during the term of the pregnancy and, "at a point during pregnancy, . . . becomes 'compelling.' " *Id.* at 162-163.

5. The compelling point of interest of the state is at viability of the fetus, because, "the fetus then presumably has the capacity of meaningful life outside the mother's womb." *Id.* at 163.

The point must be made, when discussing the portion of the *Roe* opinion that deals with the state's interest in the "potential" for human life, that the Court could not reach an opinion based upon precedent, or analogy to precedent, from other areas of the law. *Roe* was a case that could not be decided by such traditional methods and necessarily depended upon an analysis of the issue by reasoning through the difficult facts surrounding the question of state protection of human life prior to birth. This difficulty is acknowledged in the opinion itself. *Id.* at 159-161.

The *Roe* opinion states at several points that the state has an interest not only in protecting human life after

birth but in protecting prenatal human life, referred to by the Court as "potential" human life. *Id.* at 150, 154, 159, 162. The Court then concludes that the state's interest does not rise to the constitutionally "compelling" point until the prenatal life it seeks to protect has attained viability. *Id.* at 162-163.

The conclusion reached by the opinion unfortunately is reached without logical analysis and support other than to state that at viability "the fetus then presumably has the capability of meaningful life outside the mother's womb." *Id.* at 163. The conclusion is not tied to any logical premise that capability for meaningful life outside the womb is the point during the pregnancy at which the state's interest becomes "compelling." The lack of reasoning on the critical point of when the state's interest becomes compelling means that the conclusion is arbitrary, without reasonable support and, therefore, in error.

Why the point of viability is determined in *Roe* as the point of compelling interest of the state may only be inferred from one other statement rendered in the opinion: that the state's interest in protecting the "potentiality" of human life "grows" to a point at which it becomes "compelling" during the pregnancy. *Id.* at 162-163.

Thus, it appears that viability of the fetus was held to be the point at which the state's interest in protecting human life becomes compelling, because the opinion assumes without question that the state's interest "grows" to a point of compelling interest during the pregnancy. No answer is related in the opinion to the question of why it is assumed that the state's interest in protecting human life could not be "compelling" at the very earliest point of pregnancy, i.e. fertilization of the human egg.

No reasonable foundation exists for the *Roe* majority's sole stated reason—capability of life outside the womb—for choosing viability of a fetus as the earliest point of compelling state interest. By using viability as the ear-

liest point of compelling state interest, the Court implies that the state's interest in prenatal life first must have attained a certain degree of probability of actually reaching live birth. Such an inference must be drawn, because the only measurement of the degree of "potentiality" of human life must be the likelihood of prenatal life attaining childbirth. Accordingly, the difference in degree between the "potential" for human life represented by the fetus at viability and the "potential" for human life represented by the fertilized human egg may be expressed only in terms of the likelihood that either will result in a childbirth.

If we are to assume, as the majority in *Roe* apparently did, that the interest of the state becomes compelling as a certain degree of likelihood of live birth is reached, a well-reasoned approach, not taken by the majority in *Roe*, cannot avoid the following statistical data: out of every 1000 pregnancies verified following the first missed menses, 885, or 88.5%, normally (if not terminated by abortion) will come to full term and reach childbirth.[1] Out of every 1000 pregnancies that reach the point of fetal viability, 985, or 98.5% will come to full term and result in actual childbirth.[2] From these

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[1] Total "pregnancy wastage" per 1,000 known conceptions in the United States is derived from data reported in D. Danforth & J. Scott, *Obstetrics & Gynecology* 291-292 (5th ed. 1986), which reported a known spontaneous abortion rate of 10 percent of all pregnancies, a neonatal death ratio of 6.9 per 1000 live births, a stillbirth ratio of 8.9 per 1000 live births, and a ratio of 358 legal abortions per 1000 live births.

[2] This statistic was based on a stillbirth ratio of 8.9 per 1000 live births and a neonatal mortality ratio of 6.9 per 1000 live births, the source and support for which are described in footnote 1, above. We have used the beginning of the 21st week as the point of viability in deriving these rates. Support for this point in the pregnancy as the point of viability may be found in Brief of The American Association of Pro-Life Obstetricians and Gynecologists in Support of Appellants, *passim*, *Webster v. Reproductive Health Services*, No. 88-605.

statistics one concludes that the Court's judgment in *Roe* is that the state does not have a compelling interest in protecting the lives of 885 out of every 1,000 "potential" individuals, but does have a compelling interest in protecting the lives of 985 out of every 1000 "potential" individuals. Stated another way, a state may not constitutionally pass a law prohibiting the abortion of a prenatal human life that has an 88.5% chance of realizing childbirth, but may constitutionally prohibit the abortion of prenatal life that has a 98.5% chance of reaching childbirth. Such a holding, based upon a difference of a 10% likelihood of childbirth, is without basis in reason or common sense.

The probability, or likelihood of a human birth, based upon known medical or scientific data, resulting from a typical pregnancy or human egg fertilization should form the basis for a state determining that it has a protectable interest in that pregnancy or fertilization and for it to be able to act constitutionally to prohibit the termination of the pregnancy or fertilization. That is, state protection, or preservation, of a single human life from its earliest stages is justified if it can be shown it is likely that a human being will develop from that stage and be born in the normal course of events. The test should be whether a postnatal human life reasonably may be expected to be preserved by a state enactment of a law preventing termination of prenatal human life at *any* given stage of development.

The basic logic of showing the state's interest in protecting human life to be compelling at the earliest stages of human life is as follows:

> 1. The state has a compelling interest in protecting human life at its earliest stage if it can be shown that such protection is reasonably likely to result in the birth of a human being.

2. Pregnancies, including those at the earliest stages, are reasonably likely to result in human birth.

3. Therefore, the state has a compelling interest in protecting and preserving human life from its earliest stages.

We believe this logic should be considered by the Court as the basis for reconsidering the holding in *Roe v. Wade* that the state does not have a compelling interest in protecting prenatal human life until the point in time that a fetus attains viability. This Court should reverse the Eighth Circuit Court of Appeals holding that the Missouri legislature may not legislate when human life begins.

C. The State's Interest in Protecting Human Life from Its Earliest Stages Does Not Unconstitutionally Infringe Upon the Mother's Right of Privacy.

The state's interest in protecting human life from its earliest stages is not absolute and must be balanced against the rights of the pregnant woman. However, because the state's interest is in the preservation or protection of a human life, only the protection of another human life, i.e. the mother's, may outbalance the interest of the state in prohibiting abortion. The right of privacy of the mother should not be considered sufficient, absent the need to save the life of the mother, to outweigh the state's interest in protecting life from its early stages through laws prohibiting abortion.

The termination of human life, even in its earliest stages, is unnecessary and unfair when balanced against reasonable alternatives available to the mother who chooses abortion for reasons other than the preservation of her own life. Such reasons under the present status of the law can, for example, include the inconvenience of pregnancy, financial incapability of supporting a child, or lack of financial means to provide for the prenatal care

or safe delivery of the baby. Reasonable alternatives presently existing for meeting those needs, on balance, render such reasons for abortion insufficient to outweigh the interest of the state in protecting human life.

The interest of the state is emphasized further as outweighing the mother's right of privacy when the defenseless nature of the fetus and the complete lack of choice available to it are considered. The fetus has no choice: it either reaches birth as a human being or does not, depending upon the decision of the mother. The mother, on the other hand, has alternatives to abortion which, if utilized, can eliminate all negative consequences of her unwanted pregnancy except the inconvenience and discomfort of carrying a baby to term and delivering that baby.

No level of inconvenience or discomfort of a human being should be a justification for terminating human life, even at its earliest stages, as is now permitted in the first and second trimesters of pregnancy. However, as church organizations, we are fully aware, through our own agencies established to counsel and assist pregnant women currently facing the abortion decision, of the burden it places upon them and society in general to decide not to abort their pregnancies. Many women cannot afford to support themselves during their pregnancies. Some may be unable, because of age or emotional maturity, to be adequate mothers. Many are without financial support and are too poor to pay for proper prenatal and postnatal care and to support a family. It has been asserted that some women, out of a sense of resentment for the child following birth, may even engage in physical abuse of the child.

Reasonable alternatives are presently available to deal with the severe societal problems that might be expected to increase if a state is constitutionally permitted to prohibit abortion in the first and second trimesters of preg-

nancy. It is our position that through private and public funding such alternatives can be expanded to alleviate the burdens placed upon all of society as a result of prohibiting abortions.

A multitude of organizations, agencies, and facilities are presently available, and could be expanded, to meet the need for services and facilities for women facing unwanted pregnancies. These services and facilities generally fall into the categories of counseling, housing, financial support during pregnancy, financial support for prenatal care, and for hospital delivery and recovery, providing maternity clothing, baby furnishings, child care, temporary foster care, adoption, legal services, programs for the completion of high school, vocational training, and job placement for those in need of employment either during or after pregnancy. While the exact number of such agencies and facilities is not known, one association of such organizations presently lists over two thousand agencies providing such services and facilities nationwide. ALTERNATIVES TO ABORTION INTERNATIONAL, 1988/89 WORLD-WIDE DIRECTORY OF PRO-LIFE EMERGENCY PREGNANCY SERVICES (1988). Some of the more common types of such organizations are as follows:

> 1. *Counseling Services.* These services range from telephone hotlines (usually the first link a woman has to advice on her pregnancy) that are immediate sources of information for alternatives to abortion, to agencies providing financial and other assistance to pregnant women who need help. Counseling services provide assistance to single pregnant women who do not have the support of the fathers of their children and who feel they cannot go through their pregnancies alone. Such programs provide female volunteers who serve as partners to single pregnant women in need of assistance and guide them through their pregnancies. They assist them in arranging for doctors' visits, for childbirth classes, delivery room assistance and assistance in the weeks immediately following delivery.

2. *Housing Services.* Organizations, including church organizations throughout the country, provide housing for pregnant women, particularly single pregnant women who need a safe and clean environment in which to live during and immediately following their pregnancies. Often these services are tied to organizations that arrange for the foster care or adoption of the infant following delivery.

3. *Foster Care and Adoption Services.* Many public and private organizations presently arrange for foster care and adoption of babies whose mothers, for any reason, cannot, or do not want to, keep their children.

4. *Financial Assistance.* Organizations are available to meet the costs and burdens of prenatal care, hospital deliveries and hospitalization before delivery and during recovery following delivery. Many agencies provide free or low-cost maternity clothes, infant clothing and baby furnishings.

The state's interest in prohibiting abortion may be outweighed when confronted with an actual threat to the life of the mother. The state's interest must be balanced, on a case by case basis, against the need to save the mother's life. The mother's medical condition and risk to her life without an abortion must be considered and balanced against the likelihood of survival of the fetus without the abortion. Under most such situations an abortion becomes necessary, on balance, and must be regarded as a tragically unavoidable consequence, if medical procedures necessary to prevent the death of the mother include or result in an abortion.

D. State Laws Prohibiting Abortions Are Not Unconstitutional Establishments of Religion Under the First Amendment to the Constitution.

It has been argued that state laws prohibiting abortion unconstitutionally impose the religious beliefs and views of one religion upon persons not adhering to those views,

thereby constituting an "establishment" of religion prohibited by the First Amendment.

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 conventions 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. *See* 1979 Lutheran Church-Missouri Synod Resolution 3-02A "To State Position on Abortion," Appendix 1a.

The Southern Baptist Convention has passed numerous resolutions opposing abortion in its annual meetings in the last two decades. Such resolutions are the principal means of expressing collectively the Convention's convictions about moral issues. Both the 1982 and 1984 annual meetings of The Southern Baptist Convention adopted resolutions specifically opposing abortion except as necessary to save the physical life of the mother. *See* 1984 Southern Baptist Convention Resolution No. 8, "On Abortion," and 1982 Southern Baptist Convention, Resolution No. 11, "On Abortion and Infanticide," Appendix 3a.

The foregoing statements opposing abortion except as necessary to save the life of the mother indicate that the positions of the Synod and other churches represented in this brief and the aforementioned resolutions of The

Southern Baptist Convention express profoundly held religious beliefs. However, we do not advocate the imposition of our religious views by law in order to impose upon others our religious beliefs. Rather, those religious beliefs are also deeply seated in the moral and ethical system that forms the basis of much of the civil and criminal law of this nation and, therefore, if the state legislatures so decide, may coincidentally be expressed in legislation.

The fact that a state's law coincides with a deeply held religious belief does not render that law unconstitutional under the First Amendment. The Judeo-Christian ethic continues to be the foundation for many criminal statutes in every state in the United States. Criminal statutes against homidice and larceny coincide with the Fifth and Seventh Commandments, and probably are, in fact, based upon them as a result of the ethical heritage of this nation. It is not reasonable to suggest that such laws violate the establishment clause. Equally unfounded is the suggestion that the coincidence of the religious beliefs of The Lutheran Church-Missouri Synod and the other church organizations who have joined in this brief are imposed upon the general public of a state by its passage of a law prohibiting abortion.

The principle that abortion legislation does not violate the First Amendment establishment clause was squarely addressed in the case of *Harris v. McRae*, 448 U.S. 297 (1980). In that case this Court held that a statute that coincides with the tenets of some or all religions does not violate the establishment clause. *Id.* at 319-320. It held that legislative funding restrictions upon abortions did not contravene the establishment clause of the First Amendment simply because the legislation coincided with the religious tenets of the Roman Catholic Church. *Id.* at 320. Based upon the holding in *Harris* and for the reasons above set forth, it is submitted that while the views stated herein relative to the right and interest of

the state in prohibiting abortion are motivated by deeply-held religious beliefs, such laws do not violate the First Amendment prohibitions on the establishment of religion.

CONCLUSION

The Eighth Circuit Court of Appeals should be reversed in its holding that a state legislatively may not determine when its interest in prenatal human life begins. This Court should defer to the legislatures that question and, to the extent necessary to permit the states legislatively to determine when their protectable interests in human life begin and to protect that life accordingly, overturn the decision of *Roe v. Wade*.

Respectfully submitted,

LEONARD J. PRANSCHKE
ANN T. STILLMAN
SIBYL C. BOGARDUS
PHILIP E. DRAHEIM *
DRAHEIM & PRANSCHKE
1633 Des Peres Road
Suite 302
St. Louis, Missouri 63131
(314) 965-6455
Attorneys for Amici Curiae

* Counsel of Record