No. 88-605

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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

v.

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

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

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## BRIEF FOR THE NATIONAL ORGANIZATION FOR WOMEN AS AMICUS CURIAE SUPPORTING APPELLEES

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### INTEREST OF THE NATIONAL ORGANIZATION FOR WOMEN

The National Organization for Women (NOW) submits this *amicus curiae* brief in support of the appellees in this case.[1] NOW urges the Court to affirm the well-reasoned decision below by the Court of Appeals for the Eighth Circuit, *Reproductive Health Services v. Webster*, 851 F.2d 1071 (1988). NOW further asks this Court to decline to overrule or in any way limit this Court's ruling in *Roe v. Wade*, 410 U.S. 113 (1973), and subsequent cases that the constitutional right to privacy "necessarily includes the right of a woman to decide whether or not to terminate her pregnancy." 410 U.S. at 170 (Stewart, J., concurring).

[1] NOW has the written consent of both parties, filed with the Court, to file this brief.

NOW is the largest feminist organization in the United States. NOW's purpose is to bring full equality to women. Fundamental to NOW's purpose is the right of women to control their own bodies and to determine if and when to bear children. Women's right to reproductive freedom impacts not only their right to privacy, but also their health and safety. NOW has a strong interest in any case, such as this one, that involves women's basic rights and liberties.

As a defender of women's rights, NOW believes that it has an absolute need and right to address what the Solicitor General and the State of Missouri have interjected as the central issue in this case: whether women will continue to make fundamental decisions regarding reproduction or whether that role will be usurped by the state.

## SUMMARY OF ARGUMENT

*Roe v. Wade* was properly decided and should not be reconsidered. The right to choose an abortion is necessarily encompassed by the constitutional right to privacy. Attacks on *Roe v. Wade* stem from an unacceptable narrow view of the right to privacy, a distorted view of history and case law, and a mistaken belief that the scope of individual rights should be determined by state legislatures, rather than protected by the courts. Moreover, these attacks fail to recognize the crucial significance to women of the right to choose between an abortion and childbirth.

A reversal or limiting of *Roe v. Wade* would have far-reaching impacts. Statistics show that women will obtain abortions at the same rate, regardless of whether or not abortion is legal. Thus, the choice is not between abortion and childbirth, but between safe, legal abortions and the dangers of illegal abortions.

Undercutting *Roe v. Wade* would create legal confusion. In addition to the right to abortion, the right to contraception would be open to question. Without the protection

of *Roe v. Wade*, women could be subjected to further encroachment on their privacy rights by states purporting to protect the fetus. Subordinating women's right's to those of the fetus could result in restrictions on individual liberty found nowhere else in our legal system.

The doctrine of *stare decisis* also weighs heavily against reversal of *Roe v. Wade*. *Stare decisis* precludes the arbitrary rejection of settled doctrine, particularly where, as here, the doctrine is consistent with precedent and has been upheld numerous times in the recent past. Even if there were some reason to question the rationale of *Roe v. Wade*, *stare decisis* would prevent the courts from erasing the sixteen years of fundamental societal change that were wrought in that decision.

The Missouri statute at issue here is unconstitutional, imposing severe restrictions on abortions similar to other restrictions struck down by this Court. Even judged under the less strict "undue burden" standard, the statute cannot stand.

## I. *ROE v. WADE* SHOULD BE UPHELD

*Roe v. Wade* was correctly decided and should not be reconsidered by this Court. The attacks upon *Roe v. Wade* by, among others, the Solicitor General, are unconvincing. Moreover, a retreat from *Roe v. Wade* would have disastrous effects on women's health and lead to wide-spread disregard of any subsequently passed abortion restrictions. Finally, reversing or limiting *Roe v. Wade* would be bad law, opening to question the entire right-to-privacy line of cases and setting the dubious precedent that a woman's rights can be subordinated to those of a fetus at the whim of the state.

### A. *Roe v. Wade* Was Correctly Decided

The Court's decision in *Roe v. Wade* was correct and should neither be reconsidered nor reversed. In *Roe v. Wade*, the Court carefully weighed the interests at stake and determined that the constitutional right to privacy

"is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. This conclusion was amply supported by precedent and fully in line with the principle that the Constitution provides "as against the government, the right to be left alone—the most comprehensive of rights and the right most valued by civilized man." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

The Solicitor General attacks *Roe v. Wade* for four reasons. He begins by asserting that the right to abortion is some lesser species of privacy right that has no grounding in American history and is not truly related to earlier right-to-privacy cases.[2] The Solicitor General then claims that if the state has an interest in potential life, that interest is equally compelling at all times during pregnancy.[3] Next, he argues that the *Roe v. Wade* court's division of pregnancy into trimesters and its premise that the state's interest in fetal life becomes compelling only at viability are untenable.[4] Finally, the Solicitor General suggests that the woman's right to abortion can best be governed by state legislatures.[5] The Solicitor General is wrong on all counts.

The Solicitor General argues that the Court should give a crabbed reading to the right to privacy, suggesting that the right is not "comprehensive" at all, and that the right to abortion is not constitutionally mandated. The Solicitor General appears to contend that unless it can be shown that the framers of the Constitution specifically considered and approved the right to abortion, that right is not cognizable. These conclusions are directly at odds with prior decisions by this Court. *See, e.g., Thornburgh*

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[2] Brief of the United States as *Amicus Curiae* ("Solicitor General") at 11-15.

[3] *Id.* at 15-17.

[4] *Id.* at 17-20.

[5] *Id.* at 20-24.

*v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 759 (1986) ("constitutional principles . . . provide the compelling reasons for recognizing the constitutional dimensions of a woman's right to decide whether to end her pregnancy"); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 419 (1983) ("the right of privacy, grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy"); *Carey v. Population Services International*, 431 U.S. 678, 685 (1977) ("The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices"); *see also Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) ("We deal with a right of privacy older than the Bill of Rights, older than our political parties, older than our school system.")[6]

The Solicitor General cites anti-abortion laws enacted from the mid-Nineteenth Century up to the time that *Roe v. Wade* was decided as proof that the right to abortion has not historically been recognized.[7] This simple statement ignores the body of evidence, carefully presented in *Roe v. Wade*, that criminal laws restricting abortion "are of a relatively recent vintage."[8] As the Court noted:

> at the time of the adoption of the Constitution . . . a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States [at the time that *Roe v. Wade* was decided]. At least with respect to that early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century.[9]

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[6] *See generally* Garfield, *Privacy, Abortion, and Judicial Review*, 61 Wash. L. Rev. 293 (1986).

[7] Solicitor General at 16.

[8] 410 U.S. at 129; *see generally id.* at 129-147.

[9] *Id.* at 140-41.

It thus appears that the right to abortion remained unquestioned during most of this nation's first century. It is laws restraining the exercise of that right that are new and require justification.[10]

Even if the specific right to abortion were not envisioned by the framers, this Court has previously rejected claims that the Constitution protects only those rights specifically spelled out therein. In *United States v. Classic*, 313 U.S. 299, 316 (1941), Justice Stone explained that:

> in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government.

*See Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) ("the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution").

As detailed below, *Roe v. Wade* was solidly grounded in a series of cases, stretching back to the early part of this century, recognizing that individuals have a right to protection from government interference in decisions regarding their private lives. *Roe v. Wade* is clearly in line with the "great purposes" of the Constitution.

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[10] For a similar view, *see generally* Luker, *Abortion and the Politics of Motherhood* 11-39 (1984) and authorities cited therein.

The Solicitor General's claim that the state has an equal interest in life at all stages of pregnancy is also incorrect. The Court has repeatedly rejected attempts by states to assert their interests throughout pregnancy. *See Roe v. Wade*, 410 U.S. at 163; *Akron*, 462 U.S. at 428. While a "powerful theological argument can be made for that position . . . [the Court's] jurisdiction is limited to the evaluation of secular state interests . . . the development of a fetus—and pregnancy itself—are not static conditions, and the assertion that the government's interest is static simply ignores this reality." *Thornburgh*, 476 U.S. at 778 (Stevens, J., concurring).[11] *See Colautti v. Franklin*, 439 U.S. 379, 386-89 (1979) (reviewing and affirming earlier holdings that state interest becomes compelling only at viability, and that viability must be determined in each case by the physician).[12] If the Solicitor General were correct, the state could impose detailed and burdensome restrictions upon women from the moment they became pregnant.[13] The Solicitor General proposes no standard under which state regulation could be limited were his argument accepted. His theory could result in overbroad, conflicting state regulation.

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[11] *See also* Leff, *The Leff Dictionary of Law: A Fragment*, 94 Yale L.J. 1855, 1997 (1985) ("the relevant legal question ought not to be whether a fetus is "alive" or a "person" from the moment of conception, or the moment of viability, etc., as if the question were one of natural rather than social decision. A *legal* decision will still have to be made to whom the law ought to give protection and at what cost, paid by who[m]. . . .").

[12] The viability standard itself can be overly restrictive. For example, it is difficult to justify state control over late-term abortions in cases where the fetus is diagnosed as having an incurable defect that would condemn it to a short, pain-filled life. *See* Rhoden, *Trimesters and Technology: Revamping Roe v. Wade*, 95 Yale L.J. 639, 684-691 (1986). The decision whether to have an abortion in such a case is best left to the woman, who will in any event bear the consequences.

[13] *See* note 44, *infra*.

The assertion that *Roe v. Wade*'s division of pregnancy into trimesters is untenable must similarly fall. In *Akron*, 462 U.S. at 429 note 11, this Court reaffirmed that the *Roe v. Wade* trimester system "continues to provide a reasonable legal framework for limiting a state's authority to regulate abortions." As the Court recognized in *Roe v. Wade*, an early abortion is safer than a later one; indeed, it is considerably safer for the woman than childbirth. *See* 410 U.S. at 163. The Solicitor General offers no reasonable alternative standard and no justification whatsoever for allowing the states to force unwilling women to carry early pregnancies to term.

Finally, the Solicitor General would turn over control of the reproductive aspect of women's lives to the various state legislatures, which he apparently considers appropriate arbiters of such purely personal choices, and would deny any role to the judiciary. The Solicitor General ignores the fact that important constitutional rights are at issue here. It is a fundamental tenet of constitutional jurisprudence that the judiciary is empowered to protect against "the occasional tyrannies of governing majorities," *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis and Holmes, J.J., concurring), and that "liberty regulated by law cannot be permanently secured against the assaults of power or the tyranny of a majority, if the judiciary must be silent when rights existing independently of human sanction . . . are at the mercy of legislative action . . . ." *Taylor and Marshall v. Beckham*, 178 U.S. 548, 609 (1900) (Harlan, J., dissenting); *see McCleskey v. Kemp*, 481 U.S. 279, 343 (1987) (Brennan, J., dissenting) ("The Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life").[14]

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[14] *See also Hurtado v. California*, 110 U.S. 516, 536 (1884) ("The limitations imposed by our constitutional law upon the action of

There is no guarantee that state legislatures, however well-intentioned, will adequately protect individual rights. Indeed, "[e]xperience teaches us to be most on our guard to protect liberty when Government's purposes are beneficient. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead*, 277 U.S. at 479 (Brandeis, J., dissenting). *See* Garfield, *supra* note 6, at 359:

> Abortion laws attempt to solve, not so much a social problem, as an individual problem of great complexity and great import to the individual involved. In this context, the intractable nature of the problem leads to the conclusion, not that it should be left to the legislatures, but that it should be left to the individual. Whatever the decision may be, it is the individual who is going to have to deal with its consequences, not the state. When the consequences are so grave and far reaching, only the person who must bear them should be entitled to make the choice.

The Solicitor General suggests that the majority, in the person of State legislatures, should decide what for all women is a deeply personal, ethical and spiritual question and that the will of the majority should be absolute. Yet no decision can be more personal, more private, or more important to a woman than her choice whether or not to accept the risks and obligations of bearing a child. This decision is one which individual women are uniquely

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the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well as against the power of numbers. . . ."); *Feldman v. United States*, 322 U.S. 487, 501 (1944) (Black, J., dissenting).

qualified to make. No legislature can possibly weigh the considerations that face individual women and craft regulations that adequately cover all cases. The choice whether to obtain an abortion can only be meaningfully exercised by individual women.

Throughout his argument, the Solicitor General ignores the impact of forced pregnancy on women, apparently not realizing the consequences of a reconsideration of *Roe v. Wade*. This Court, however, has recognized that the denial of the right to abortion would have a wide range of negative effects upon women forced to bear unwanted children. In *Roe v. Wade*, the Court explained:

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.

410 U.S. at 153. These impacts can be even harsher on disadvantaged women, such as those who are poor, young or disabled, who are least able to cope with the burdens of compulsory pregnancy or unwanted motherhood.[15]

There is no authority for the proposition that the state can compel an individual to give up the right to control

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[15] *See Beal v. Doe*, 432 U.S. 438, 458-59 (1977) (Marshall, J., dissenting):

his or her body to benefit another.[16] The idea, for example, that the state could determine that a supposedly less worthy member of society must donate an organ to save the life of a pillar of the community is unthinkable.

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> An unwanted child may be disruptive and destructive of the life of any woman, but the impact is felt most by those too poor to ameliorate those effects. If funds for an abortion are unavailable, a poor woman may feel that she is forced to obtain an illegal abortion that poses a serious threat to her health and even her life. . . . If she refuses to take this risk, and undergoes the pain and danger of state-financed pregnancy and childbirth, she may well give up all chance of escaping the cycle of poverty. Absent day-care facilities, she will be forced into full-time child care for years to come; she will be unable to work so that her family can break out of the welfare system or the lowest income brackets. If she already has children, another infant to feed and clothe may well stretch the budget past the breaking point. All chance to control the direction of her own life will have been lost.

*See also Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 473 (1981), where then-Justice Rehnquist concluded for the Court that "virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female."

[16] *See, e.g., Union Pacific Rwy. v. Botsford*, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or influence of others, unless by clear and unquestionable authority of law."); *see also McFall v. Shrimp*, 10 Pa. D. & C.3d 90, 91 (C.P. Ct. 1978), where the court refused a request from a man suffering anemia to force his cousin to donate bone marrow to him, stating:

> For a society, which respects the right of *one* individual, to sink its teeth into the jugular vein or the neck of one of its members and suck from it sustenance for *another* member, is revolting to our hard-wrought concepts of jurisprudence. Forceable extraction of living body tissue causes revulsion to the judicial mind. Such would raise the spectre of the swastika and the Inquisition, reminiscent of the horror this portends.

So too, is it far beyond the pale to suggest that a parent be ordered to undergo surgery and months of life-threatening activity in order to benefit a child. Yet that is precisely what women may be forced to do if *Roe v. Wade* is reconsidered. And the sacrifice would be required, not for a living human being, but for a fetus, which has never been accorded personhood in our jurisprudence.[17] Forcing a woman to undergo an unwanted pregnancy and delivery clearly is not risk-free. In no other case does society dictate to a patient acceptance of a procedure that is considerably more dangerous, lengthy, and expensive than the procedure of the patient's choice.

Indeed, forcing a woman to sacrifice her body and put her life at risk by carrying an unwanted pregnancy to term is akin to the involuntary servitude that is barred by the Thirteenth Amendment. This Court has held that the Thirteenth Amendment was enacted:

> to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free by prohibiting that control by which the personal service of one . . . is disposed or coerced for other's benefit which is the essence of involuntary servitude.

*Bailey v. Alabama*, 219 U.S. 219 (1911).[18] The Thirteenth Amendment "is not confined to African slavery alone. It is general and universal in its application. Slavery of white men as well as of black men is prohibited, and not merely slavery in the strict sense of the

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[17] *See Thornburgh*, 476 U.S. at 779 (Stevens, J., concurring); *Roe v. Wade*, 410 U.S. at 156-59.

[18] *See also Plessy v. Ferguson*, 163 U.S. 538, 555 (1896) ("The Thirteenth Amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude.") (Harlan, J., dissenting); *see Slaughter-House Cases*, 83 U.S. 36, 72 (1873).

term, but involuntary servitude in every form." *Slaughter-House Cases*, 83 U.S. at 90 (Field, J., dissenting). Requiring women to surrender control of their bodies to the state during pregnancy is in a very real sense a form of involuntary servitude and thus is inconsistent with the letter and spirit of the Thirteenth Amendment.[19]

### B. Reversing or Limiting *Roe v. Wade* Would Have Negative Results

Reversing or limiting *Roe v. Wade* would create a fundamental upheaval in American society. Women accustomed to the free exercise of their constitutional rights would be faced with a bewildering, inconsistent patchwork of state regulation. The consequences on women's health, society's respect for the law, and on the law itself would be devastating.

#### 1. *Anti-Abortion Laws Do Not Prevent Abortions.*

Before *Roe v. Wade*, as many as 1.2 million American women obtained illegal abortions every year.[20] There is no reason to believe that the situation would be different if *Roe v. Wade* were overturned. Reversing or limiting *Roe v. Wade*, then, would restore massive disrespect for and disobedience of laws that cannot be enforced.

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[19] *See* Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv L. Rev. 1, 40 (1973):

> A woman in contemporary America who is coerced into submitting herself, at the insistence of a man empowered by law to control her choice, to the pains and anxieties of carrying, delivering, and nurturing a child she did not wish to conceive or does not want to bear and raise, is entitled to believe that more than a play on words has come to link her forced labor with the concept of involuntary servitude.

[20] *Hearing on the Medical and Psychological Impact of Abortion Before the Human Resources and Intergovernmental Relations Subcomm. of the House Comm. on Governmental Operations*, 101st

Global abortion statistics show that making abortion illegal does not reduce the abortion rate. The abortion rate in the United States now is little different from what it was when abortion was generally unlawful.[21] Abortion rates in countries where abortion is severely restricted, including Brazil, Argentina, and Mexico, are equal to the rate in the United States.[22] In Latin America, where abortions generally are illegal, some 10 to 12 million women nonetheless procure abortions each year.[23] In Ireland, where abortion is illegal, the overall abortion rate (including abortions obtained in foreign countries) is the same as in the Netherlands, where abortions are freely available.[24]

It thus appears clear that the legal status of abortion does not serve as a deterrent. Women will seek and obtain abortions whether or not they are legal. To reconsider *Roe v. Wade* would be to ignore this reality and condemn women to the danger of illegal and often unsafe abortions.

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Cong., 1st Sess. 26 (1989) (Final Draft Report of the Honorable C. Everett Koop, M.D., Surgeon General of the United States, at 12) [hereinafter *Surgeon General's Report*]; *see* Fox, *Abortion Deaths in California*, 98 Am. J. of Obst. and Gynec. 645 (1967).

[21] *Hearing on the Medical and Psychological Impact of Abortion Before the Human Resources and Intergovernmental Relations Subcomm. of the House Comm. on Governmental Operations*, 101st Cong., 1st Sess. 26 (1989) (Statement of Dr. Jaroslav Fabian Hulka, Professor of Obst. and Gynec., School of Medicine, University of North Carolina) [hereinafter *Hulka Testimony*] at 3 ("One out of four pregnancies ended in induced abortion before legalization, the same rate as now. Regardless of what Congress or the Supreme Court decide this year, it will be true next year").

[22] *World Abortion Trends*, 9 Population 1 (Sept. 1982) (Population Crisis Comm.).

[23] N.Y. Times, November 26, 1988, at 1, col. 4.

[24] Tietze, *Induced Abortion, A World Review 1986* (Guttmacher Institute 1986) at 3.

### 2. *Banning Abortion Threatens Women's Lives.*

As noted, before *Roe v. Wade*, some 1.2 million illegal abortions were performed each year. And women were dying from illegal abortions. Between 1958 and 1972, an annual average of over 260 women died as a result of abortions, a rate of approximately one in every 4,600 abortions.[25] In addition, thousands of women were severly injured as a result of botched, illegal abortions.[26] Often, death resulted when women attempted their own abortions, utilizing such crude techniques as inserting foreign objects into their vaginas and uteruses, including metal rods, curtain rods, copper wire, telephone wire, chopsticks, coat hangers and knitting needles; drinking caustic solutions such as pine oil, Lysol, soap, alcohol, and hydrogen peroxide; and inserting air by syringe, football pump, and bicycle pump.[27]

The World Health Organization has established that as many as 200,000 women die every year in developing countries as a result of unsafe abortions.[28] Illegal abortion now is Latin America's leading cause of pregnancy-related mortality.[29] Romania has twice imposed restrictions on abortion in the last three decades. Despite these

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[25] Derived from Tietze, *supra* note 24 at 131 (Table 22). If the number of abortions was less than 1.2 million, the mortality rate becomes even greater.

[26] Treatment of women suffering from the complications of illegal abortions was a common subject of discussion in medical literature during the 1960s. *See e.g.*, Reid, *Assessment and Management of the Seriously Ill Patient Following Abortion*, 199 J. of Am. Med. Ass'n 141 (1967); Fox, *supra* note 20; Stevenson and Yang, *Septic Abortion with Shock*, 83 Am. J. of Obst. and Gynec. 1229 (1962); Levin, Rizzi, and Veprovsky, *Management of Incomplete Abortion*, 83 Am. J. Obst. and Gynec. 9 (1962).

[27] Fox, *supra* note 20, at 648-49.

[28] N.Y. Times, November 26, 1988, at 1, col. 4.

[29] *Id.*

barriers, the abortion rate has risen constantly, while abortion-related deaths have increased by 500 percent.[30]

After abortion was legalized in the United States as a result of *Roe v. Wade*, illegal abortions and resultant deaths dropped dramatically. Abortion is now considered an extremely safe procedure, since it is now performed under sanitary conditions by trained medical personnel.[31] The United States Center for Disease Control reported that in 1985 there were only six deaths from legal abortion in the United States, or one for every 200,000 abortions.[32] For abortions performed during the first trimester of pregnancy the rate is even lower, one in 400,000.[33] Full-term pregnancy and childbirth pose a seven to ten times greater risk of death to a woman than an early abortion.[34] Moreover, medical studies have shown that legal abortion does not lead to any difficulty in subsequent conception or pregnancy.[35]

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[30] *See* Huber, *Restricting or Prohibiting Abortion by Constitutional Amendment: Some Health Implications*, 27 J. of Repro. Med. 729 (1982).

[31] *Surgeon General's Report, supra* note 20, at 12-13. ("Major medical and public health associations thus consider abortion a safe surgical procedure when performed by a licensed physician in a good clinical setting").

[32] *Hearing on the Medical and Psychological Impact of Abortion Before the Human Resources and Intergovernmental Relations Subcomm. of the House Comm. on Governmental Operations*, 101st Cong., 1st Sess. 26 (1989) (Statement of Ralph R. Reed, M.D., Acting Assistant Secretary for Health, United States Public Health Service, Department of Health and Human Services, at 4).

[33] Cates, *Putting the Risk in Perspective*, Contraceptive Technology Update (November, 1980). Ninety percent of all abortions are performed in the first trimester, forty-seven percent in the first eight weeks. *Surgeon General's Report* at 11.

[34] *Hulka Testimony, supra* note 21, at 2.

[35] *Surgeon General's Report, supra* note 20, at 12-13; *Hulka Testimony, supra* note 21, at 2; Frejka, *Induced Abortion and*

The choice presented here is stark. Legal abortions are safe and simple; illegal abortions are life-threatening. Yet, if this Court were to reverse or limit *Roe v. Wade*, state bans on abortion and contraception could resurrect the health care crisis posed by illegal abortions.

### 3. *Allowing the States to Regulate Abortions Will Reduce the Availability of Abortions in All States.*

An indirect impact of a decision to permit the states to ban abortion will be increased difficulty in obtaining abortion even in those states that continue to permit them. Even now, abortion is not readily available to all women. Ninety-one percent of all counties in the United States have no abortion providers at all.[36] If abortion can be made illegal on a state-by-state basis, this situation will be exacerbated. Many states and regions will have no abortion providers. This will result in women having to travel, perhaps long distances, to find an abortion provider.[37] Those who cannot afford to do so will be forced to turn to illegal abortion.

In addition, a signal from this Court that the right to abortion is not subject to judicial protection will give increased impetus to those seeking to chill the exercise of that right where it remains legal. In 1985, almost half of all abortion providers experienced at least one form of harassment by anti-abortion activists.[38] Eighty-

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*Fertility* in *Abortion Services In The United States, Each State & Metropolitan Area, 1984-1985* at 63-67 (Guttmacher Institute 1988).

[36] *Id.*

[37] *See* Tietze, *supra* note 24, at 131 ("restrictions appear to have little effect on the abortion rate, although they may result in delay, inconvenience, increased travel distance, increased cost and international migration of women seeking abortions") (citation omitted); *see also Akron*, 462 U.S. at 434-35.

[38] Forrest and Henshaw, *The Harassment of U.S. Abortion Providers* in *Abortion Services in the United States, Each State & Metropolitan Area, 1984-1985* at 32 (Guttmacher Institute 1988).

three percent of large, non-hospital abortion facilities were subjected to harassment, including picketing, bomb threats, physical contact with patients, invasion of the facility, vandalism, death threats and tracing of patient's license plate numbers.[39] If the number of states permitting abortion shrinks, the pressure on remaining abortion providers will grow, making it even harder for women to obtain abortions.

#### 4. *Reconsidering* Roe v. Wade *Would Create Legal* Confusion.

If the Court were to reverse or limit *Roe v. Wade*, the states might conclude that the entire right-to-privacy line of cases is open to question. For example, some widely used contraceptives, including certain oral contraceptives and the intrauterine device, are abortifacients that do not prevent ovulation or fertilization, but rather interfere with the implantation of the ferilized egg in the uterine wall.[40] This Court has held repeatedly that the Constitution protects the right to obtain contraceptives. *Carey*, 431 U.S. 678; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold*, 381 U.S. 479. Yet, if the states are allowed to restrict access to abortion, they may well assert the right to ban all contraceptives that operate as abortifacients. Ironically, such actions could well result in an increased abortion rate. Since abortifacients are the most effective contraceptives, a ban on their use would lead directly to a radically increased number of unwanted pregnancies and a correspondingly higher abortion rate, whether legal or illegal.[41] In addition, a ban on abortion could deprive women of access to the

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[39] *Id.*

[40] *See* Huber, *supra* note 30, at 730-732.

[41] *See* Tietze, *supra* note 24, at 132 ("Part of the decline in the number of illegal abortions in the United States was undoubtedly due to more widespread use of more effective contraceptives, notably the Pill and the IUD. . . .").

most modern, safe technology, such as the new abortion-inducing drug RU 486.[42] Women will be precluded from safe alternatives and forced to take unnecessary risks to obtain what should be safe, simple medical care.

Reversing or limiting *Roe v. Wade* also would encourage rulings restricting or punishing pregnant women on the basis of conduct allegedly harmful to the fetus. Cases already before the courts include: a doctor seeking a court order requiring a woman to abstain from non-prescription drugs; a father suing a mother on behalf of a child because a drug the woman took during pregnancy allegedly discolored the child's teeth; criminal charges being brought against a woman who allegedly failed to follow her doctor's advice to avoid sexual intercourse and drugs; and a pregnant women charged with forging $700 worth of checks being jailed to protect her fetus from her alleged cocaine use.[43] This assault on women's civil liberties must not be encouraged.[44]

Reversing or limiting *Roe v. Wade* would pose far more questions than it would answer. There is no reason

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[42] *See* N.Y. Times, October 30, 1988, at 1, col. 1.

[43] Sherman, *Fetal Rights*, 11 Nat'l L.J. 25, at col. 1 (1988).

[44] *See* Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights*, 10 Harv. Women L.J. 9 (1987); *see also* Westfall, *Beyond Abortion: the Potential Reach of a Human Life Amendment*, 8 Am. J. of L. & Med. 97, 111 (1982) ("[Women] might be required to lead less active life-styles in order to preserve the life of a conceptus (or possible conceptus). The interests of the conceptus will often diverge from those of the woman in such matters. From the standpoint of the conceptus, a passive carrier who exposes it to the minimum risk of miscarriage or prenatal injury is preferred. She should not smoke, drink, or use any drugs with possible adverse effects on the conceptus. Skiing, working in hazardous environments, flying, and riding in automobiles might be prohibited for such women in order to minimize possible adverse effects on the conceptus. Indeed, the Victorian regime for upper-class pregnant women that minimizes activities either inside or outside the home might be ideal").

for this Court to plunge the country into the fear, confusion and uncertainty that would follow such an action. Accordingly, *Roe v. Wade* should be reaffirmed.

## II. *STARE DECISIS* PRECLUDES OVERRULING *ROE v. WADE*

### A. *Stare Decisis* Should Be Given Strict Adherence Where Individual Rights Are at Stake

*Stare decisis*, the rule of following existing precedent, is a crucial underpinning of our legal system because it "promotes the even-handed, predictable, and consistent development of legal principles; it fosters reliance on judicial rules; and it contributes to the fact and appearance of integrity in our judicial system." [45] The principle of *stare decisis* requires "that every successful proponent of overruling precedent has borne the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective." *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986). Former Justice Goldberg has articulated a sensible formulation for the application of the rule, explaining that:

> stare decisis applies with an uneven force—that when the Supreme Court seeks to overrule in order to cut back the individual's fundamental, constitutional protections against governmental interference, the commands of stare decisis are all but absolute; yet when a court overrules to extend personal liberties, the doctrine imposes a markedly less restrictive caution.[46]

There have been no changes in society or in the law that justify reconsidering *Roe v. Wade*. Indeed, the Court

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[45] Solicitor General at 9.

[46] Goldberg, *Equal Justice: The Warren Era and the Supreme Court* at 74 (1972).

should be exceptionally wary of overturning precedent where, as here, it is being asked to restrict a hitherto accepted right, in this case, that of a woman to determine whether to continue a pregnancy. In addition, where, as here, the matters in question are the subject of public debate, adherence to precedent can reassure society that constitutional questions are answered with reference to settled principles, rather than in response to political considerations.[47]

The Solicitor General cites several cases for the proposition that *stare decisis* has less force in constitutional litigation and that the Court should reexamine precedent where its reasoning is called into question.[48] None of these cases is on point here. In most of the cases cited, the Court found the overruled decision to have been inconsistent with earlier precedents.[49] No party has shown that *Roe v. Wade* is in any way inconsistent with this Court's prior rulings. In fact, as will be discussed below, *Roe v. Wade* rests securely on a long line of cases recognizing the right of the individual to privacy and to be protected from undue interference by the state. Also,

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[47] *See* Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Columbia L. Rev. 723, 751 (1988) ("even when expectations or practices are not deeply entrenched, if serious public debate still surrounds an issue, departure from precedent may sometimes threaten the stability and continuity of the political order and should therefore be avoided: *Roe* provides a ready example") (footnote omitted).

[48] Solicitor General at 9.

[49] *E.g.*, *Solorio v. United States*, 55 U.S.L.W. 5038, 5039-42 (1987); *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 273-75 (1980); *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658, 695-96 (1978); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 47 (1977); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 628 (1974) (Powell, J., concurring); *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).

many of the cited cases represent expansions of individual rights;[50] none involves a dilution of these rights.[51]

Were the Court to reverse or limit *Roe v. Wade*, it would undermine the very purpose of *stare decisis*, "the public belief that . . . rights labelled fundamental in the past still retain their status."[52] As explained by Justice Edward White:

> The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity, and let it be felt that on great constitutional questions this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of the people.

*Pollock v. Farmer's Loan & Trust Co.*, 157 U.S. 429, 652 (1895) (White, J., dissenting), *vacated on rehearing*, 158 U.S. 601 (1895). A retreat from *Roe v. Wade* would lead the public to believe that political considerations, rather than adherence to constitutional principles, moti-

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[50] *E.g.*, *Vasquez*, 474 U.S. 254 (vindicating protection against discrimination in jury selection); *Thomas*, 448 U.S. 261 (expanding the ability to receive worker's compensation); *Monell*, 436 U.S. 658 (expanding right of individual to sue municipalities); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (expanding protection of foreign individuals against discrimination in state courts).

[51] A number of the cited cases do not directly implicate individual rights. *E.g.*, *Continental T.V.*, 433 U.S. 36 (whether per se rule or rule of reason applied in antitrust action); *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962) (question involved whether certain courts were Article III courts); *Helvering*, 309 U.S. 106 (question regarding tax treatment of an estate).

[52] Goldberg, *supra* note 46, at 94.

vated the Court's rulings. Such an unfortunate perception must be avoided.

### B. *Roe v. Wade* Is Consistent with Prior Precedent

It is impossible to look at *Roe v. Wade* in isolation. *Roe v. Wade* is part of an unbroken chain of cases in which this Court "has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Roe v. Wade*, 410 U.S. at 152. The diversity of these decisions demonstrates that the right to privacy is not to be construed narrowly.[53] This Court has recognized "the right to be free, except in very limited circumstances, from unwarranted governmental intrusion into one's privacy." *Stanley v. Georgia*, 394 U.S. 557 (1969). Thus, those who seek to undermine *Roe v. Wade* attack not only the holding of that case, but also the basic principle that "the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." *Thornburgh*, 476 U.S. at 772.

Moreover, *Roe v. Wade* hardly stands alone. Since 1973, the Court has had repeated occasion to revisit the issue of the right to abortion and consistently has confirmed that right.[54] Even when upholding laws that argu-

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[53] *See, e.g., Eisenstadt*, 405 U.S. 438 (right of both married and unmarried couples to have access to contraception); *Loving v. Virginia*, 388 U.S. 1 (1967) (right to marriage); *Griswold*, 381 U.S. 479 (right of married couples to obtain contraceptives); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (right to ability to procreate); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (right to attend private school); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right to learn a foreign language).

[54] *See Thornburgh*, 476 U.S. 747; *Akron*, 462 U.S. 416; *Planned Parenthood Ass'n of Kansas City, Missouri v. Ashcroft*, 462 U.S. 476 (1983); *Simopoulous v. Virginia*, 462 U.S. 506 (1983); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Harris v. McCrae*, 448 U.S. 297 (1980); *Williams v. Zbarez*, 448 U.S. 358 (1980); *Colautti*, 439 U.S. 379; *Poelker v. Doe*, 432 U.S. 519 (1977); *Carey*, 431 U.S. 678 (1977); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Planned Parent-*

ably restrict women's access to abortion—such as statutes barring the provision of state funds for poor women seeking abortions—the Court has emphasized that its holding "signals no retreat from *Roe* or the cases applying it." *Maher v. Roe*, 432 U.S. 464 (1977).[55] Indeed, in one of the most recent abortion cases, this Court explained in detail why *stare decisis*, as well as reasoned decision-making, bound the Court to uphold *Roe v. Wade*. *See Akron*, 462 U.S. at 420-21 and n.1.[56]

This review of case law demonstrates not only that is *Roe v. Wade* in accord with prior precedent, but also that its holding has been affirmed by this Court more than a dozen times over the last sixteen years. As a result, overturning or limiting *Roe v. Wade* would be a revolutionary act. Unlike other cases cited to this Court as examples of cases that have been reversed, *Roe v. Wade* is not inconsistent with earlier cases, is not stale, and has not been overtaken by subsequent developments. There is nothing in the record to demonstrate that either society or law has changed in such a way as to require reversal.[57]

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*hood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Sendak v. Arnold*, 429 U.S. 968 (1976); *Singleton v. Wulff*, 428 U.S. 106 (1976); *Connecticut v. Menillo*, 423 U.S. 9 (1975); *Doe v. Bolton*, 410 U.S. 179 (1973).

[55] *See also Harris*, 448 U.S. at 312 ("The constitutional underpinning of *Roe v. Wade* was a recognition that the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment includes not only the freedoms explicitly mentioned in the Bill of Rights, but also a freedom of personal choice in certain matters of marriage and family life") (footnote omitted).

[56] Those asking this Court to reverse *Roe v. Wade*, then, are asking the Court not only to reverse that case, but also to reverse its own holding that *stare decisis* precludes such a reversal.

[57] As demonstrated above, the abortion rate remains essentially unchanged, showing that women have a consistent need to exercise their right to abortion. The fact that anti-abortion forces have increased their attempts to chill the exercise of this right hardly constitutes a change cognizable by this Court as a basis for reversal.

In fact, as demonstrated above, the impact of *Roe v. Wade* has been entirely positive, essentially eliminating illegal abortion and its devastating impact upon women. *Stare decisis*, then, counsels strongly against reversing or limiting *Roe v. Wade*.

## III. THE MISSOURI STATUTE AT ISSUE HERE IS UNCONSTITUTIONAL

The Missouri statute at issue here represents the state's third attempt to pass a law "designed to prevent a woman, with the advice of her physician, from exercising her freedom of choice." *Thornburgh*, 476 U.S. at 759; *Planned Parenthood v. Ashcroft*, 462 U.S. at 476, *see Planned Parenthood v. Danforth*, 428 U.S. 52. Like the earlier attempts, the current statute is unconstitutional.[58]

The statute begins with a preamble that asserts, *inter alia*, that life begins at conception. *See* Mo. Rev. Stat. § 1.205.1(1) (1986). This legislative finding is barred by the Court's rejection of a similar statute, based upon its holding in *Roe v. Wade* that "a State may not adopt one theory of when life begins to justify its regulation of abortions." *Akron*, 462 U.S. at 444 (citing *Roe v. Wade*, 410 U.S. at 159-162).

The statute goes on to require a psysician, before performing an abortion, to perform various tests apparently designed to determine the viability of the fetus. *See* Mo. Rev. Stat. § 188.029 (1986). In *Colautti*, the Court affirmed its prior holdings that viability may vary from case-to-case and can be determined only in the judgment of the attending physician, stating that "neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability—be it

[58] *Amici* believe that the opinion below, *Reproductive Health Services*, 851 F.2d 1071, convincingly demonstrates the manifest infirmities of the Missouri law, and therefore will only briefly discuss this issue.

weeks of gestation or fetal weight or any other single factor—as the determinant of when the State has a compelling interest in the life or health of the fetus." 439 U.S. at 388-89. Here, Missouri is attempting to set twenty weeks as the beginning of viability and to force the physician to satisfy the state by conducting a battery of tests on a possibly unwilling woman, regardless of the physician's judgment as to whether those procedures are necessary or advisable. These requirements clearly invade the woman's fundamental right to have her physician be given "the room he needs to make his best medical judgment." *Doe*, 410 U.S. at 192; *see Akron*, 462 U.S. at 427, 429-30. Consequently, the statute impermissibly invades the woman's right to privacy.

Finally, the Missouri statute contains a number of provisions designed to prevent public employees from in any way counseling, encouraging, assisting in, or performing abortions not necessary to save the life of the mother. *See* Mo. Rev. Stat. §§ 188.205, 188.210, 188.215 (1986). These restrictions also are unconstitutional.

The Missouri statute "places the State between physicians and their patients by forbidding the physicians from relaying certain information, opinions, and advice." *Reproductive Health Services*, 851 F.2d at 1079.[59] As the Court of Appeals noted, this prohibition could forbid a doctor from advising a patient to have an abortion that the doctor believed was medically advisable although not necessary to save the patient's life. *Id.*

There is little doubt that both the intent and the effect of the statute is to "place obstacles in the path of a woman's exercise of her freedom of choice." *Harris*, 448 U.S. at 316. The statute raises the possibility of a woman being unable to obtain advice from the same doctor who helped her obtain contraception and conducted her preg-

[59] The prohibitions also would apply to nurses, counselors, and others upon whom many women rely.

nancy test. To then require the woman to seek an entirely new physician to advise her about abortion is a complete breach of the doctor-patient relationship and would subject women to great hardship in obtaining basic medical care.

The ban on state employees assisting or performing abortions and on the use of state facilities also represents an improper obstacle to abortion. As the lower court explained, the cost of the facilities and the employee's services used during an abortion are recouped when the patient pays. Thus, the state is blocking the use of public facilities not to save money, but only to discourage abortions. *See Reproductive Health Services*, 851 F.2d at 1083. These restrictions are not justified by any compelling state interest, but instead are unconstitutional regulations "designed to influence the woman's informed choice between abortion or child birth." *Akron*, 462 U.S. at 444 (footnote omitted). The Missouri statute would place significant new barriers in the path of a woman seeking abortion counseling and serivces, contrary to the Court's holding that state abortion statutes are proper only if they do not add any "restriction on access to abortions that was not already there." *Maher*, 432 U.S. at 474; *see Whalen v. Roe*, 429 U.S. 589, 605, n.33 (1977).

The statute's sweeping prohibition on the use of state facilities even for the *discussion* of abortion is so broad as to make it almost impossible for many women to determine freely whether to have an abortion. Even if judged under the less restrictive standard advocated by some members of this Court for review of abortion regulations, the statute is unconstitutional. *See Akron*, 462 U.S. at 453 (O'Connor, J., dissenting).

## CONCLUSION

Women's lives and fundamental rights are at stake in this case. Were this Court to retreat from *Roe v. Wade*, women would face a return to the days of back-

alley abortions, as well as a threat to their freedom from control by the state. This Court over the past sixteen years has consistently affirmed *Roe v. Wade*'s holding that the right to privacy grants to women the right to decide whether or not to continue a pregnancy. The weight of precedent, social policy, and medical science is on the side of freedom of choice. This Court should once again protect that freedom.

Respectfully submitted,

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