No. 88-605

In the Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, et al.,
Appellants,

vs.

REPRODUCTIVE HEALTH SERVICES, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

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I

QUESTIONS PRESENTED

1. Do physicians or other medical personnel have standing to contest the constitutionality of a state legislative preamble in an abortion statute?

2. Are legislative findings in the preamble to a state abortion bill that "the life of each human being begins at conception" and that "unborn children have protectable interests in life, health and well-being" facially unconstitutional? See RSMo 1.205.1(1), 1.205.1(2) (1986).

3. Where a statute requiring a determination of fetal viability when a physician "has reason to believe" that the fetus is "of twenty or more weeks gestational age" (LMP) has been held to be constitutional, is it facially unconstitutional to require that, in making this determination, the physician shall cause to be performed such "medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child . . . ."? See RSMo 188.029 (1986).

4. Is a state civil statute facially unconstitutional that makes it "unlawful for any public funds to be expended . . . for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life." See RSMo 188.205 (1986).

5. Is a state civil statute facially unconstitutional that makes it "unlawful for any public employee within the scope of his employment to perform or assist an abortion, not necessary to save the life of the mother"? See RSMo 188.210 (1986).

6. Is a state civil statute facially unconstitutional that makes it "unlawful for any public facility to be used for the purpose of performing or assisting an abortion not

necessary to save the life of the mother"? See RSMo 188.215 (1986).

7. Whether the *Roe v. Wade*, 410 U.S. 113 (1973), trimester approach for selecting the test by which state regulation of abortion services is reviewed should be reconsidered and discarded in favor of a rational basis test.

III

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the State of Missouri was a defendant in the district court and an appellant in the court of appeals; Planned Parenthood of Greater Kansas City, Howard I. Schwartz, M.D., Robert L. Blake, M.D., Carl C. Pearman, M.D., Carroll Metzger, and Mary L. Pemberton were plaintiffs in the district court and appellees in the court of appeals.

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The June 23, 1987, final judgment of the district court is reported at 662 F. Supp. 407 (W.D. Mo. 1987), *superseding* 655 F. Supp. 1300 (W.D. Mo. 1987), and is reproduced at Appendix A, *infra*. The July 13, 1988, final judgment of the court of appeals is reported at 851 F.2d 1071 (8th Cir. 1988) and is reproduced at Appendix B, *infra*.

JURISDICTION

On July 13, 1988, the United States Court of Appeals for the Eighth Circuit entered a final judgment, holding unconstitutional on their face the Missouri statutes challenged. On September 29, 1988, appellants filed a notice of appeal from the court's final judgment of July 13, 1988 (App. B, *infra*). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Art. III, § 2.
U.S. Const., Amend. I.
U.S. Const., Amend. XIV, § 1.
§ 1.140, RSMo 1986.
§ 1.205, RSMo 1986.
§ 188.010, RSMo 1986.
§ 188.029, RSMo 1986.
§ 188.200, RSMo 1986.
§ 188.205, RSMo 1986.
§ 188.210, RSMo 1986.
§ 188.215, RSMo 1986.
§ 188.220, RSMo 1986.

The pertinent text of each constitutional provision and statute is set forth in Appendix D pursuant to Rule 15(f) of the Supreme Court Rules.

STATEMENT OF THE CASE

On June 26, 1986, the Governor of the State of Missouri signed into law Missouri Senate Committee Substitute for House Bill No. 1596. The effective date was to be August 13, 1986.

Appellees, Reproductive Health Services, et al. (hereinafter "plaintiffs"), filed this facial challenge on July 14, 1986, pursuant to 42 U.S.C. § 1983 (1982) and 42 U.S.C. § 1988 (1982). Jurisdiction was predicated on 28 U.S.C. § 1331 and 28 U.S.C. § 1343. Plaintiffs challenged §§ 1.205.1 (1), 188.025, 188.029, 188.039, 188.205, 188.210, and 188.215, RSMo, as unconstitutional on their face because they allegedly violate the First, Fourth, Fifth, Ninth, and Fourteenth Amendments (Complaint, ¶¶ 2, 19, 30-35).

Plaintiffs alleged that plaintiff Howard Schwartz, M.D., was employed as a "public employee," as the term is defined in § 188.200(1), and was employed at Truman Medical Center, a public facility as that term is defined in § 188.200(2), that he "has occasion to encourage or to counsel said women to terminate pregnancies and on occasion to perform or to assist in the performance of abortions, although the same are not necessary to save the patients' lives on said occasions," and that "[o]n said occasions, Dr. Schwartz is paid for such services by public funds' as that term is defined by § 188.200(3) of the Act." (Complaint, ¶ 7). Virtually identical allegations were made by all individual plaintiffs and incorporated into the district court's opinion (A10).

On October 24, 1986, the plaintiffs requested leave to file a first amended complaint by interlineation in order to challenge the constitutionality of § 1.205.1(2). The Court addressed the constitutionality of this section in its final Order.

The trial was conducted in the District Court on December 15 to December 18, 1986. Just prior to the trial

the District Court granted plaintiffs' motion in limine prohibiting the defendants from presenting any testimony or evidence regarding the constitutionality of §§ 1.205.1(1) or (2).

Medical experts for both plaintiffs and defendants concurred that it is standard medical practice to determine gestational age by ultrasound examination and fetal skull measures whenever it appears that a woman is at least twenty weeks pregnant. Witnesses agreed that no tests other than the ultrasound measurements provide information necessary to determine viability prior to thirty weeks gestational age.

The Missouri Attorney General maintained that the statutory language in §§ 188.205 through 188.215 which forbids public funds, public employees, and public facilities from being used to "encourage or counsel a woman to have an abortion not necessary to save her life" is designed only to forbid the funding and affirmative advocacy of conduct contrary to the State's policy of not promoting abortions not necessary to save the life of the mother. These statutes have no criminal penalties. They can be enforced by an injunctive action. See § 188.220, RSMo.

With regard to §§ 1.205.1(1) and (2), the court cited *Roe v. Wade,* 410 U.S. 113 (1973), and concluded that "a state may not adopt one theory of when life begins to justify abortion regulation" and that it was "inappropriate for this Court to conduct an inquiry into such a difficult and philosophical question." Accordingly, the court held that the legislature's pronouncement conflicts with the essence of *Roe v. Wade,* and that it is "invalid as a matter of law." (A15).

The district court invalidated § 188.025, which required that abortions at and after 16 weeks gestation (LMP) be performed in a hospital. The court concluded that the state did not carry its burden of proving that

the requirement was reasonably related to preserving maternal health (A30-A31).

The district court upheld as constitutional the first sentence of § 188.029 which requires a physician to determine whether a fetus is viable when the physician "has reason to believe" that the woman is twenty or more weeks pregnant (LMP), relying on *Colautti v. Franklin*, 439 U.S. 379 (1979), and *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). However, the court proceeded to invalidate on its face the second sentence of § 188.029. The Court found that "tests to determine fetal weight are not only unreliable and inaccurate, but also add $125.00 to $250.00 to the cost of abortion." (A36). The court also found that "the only method to evaluate lung maturity is by amniocentesis, an expensive procedure which all witnesses agreed would be useless and contrary to accepted medical practice until at least twenty-eight to thirty weeks gestation." (A36). Since the state failed to demonstrate that this provision was "narrowly tailored" to protect the state's interest in fetal life, the court severed the second sentence, and declared it invalid, relying on *Colautti*.

The district court also declared §§ 188.205, 188.210, and 188.215 unconstitutional. The court initially concluded that the "encouraging and counseling" language in each section "abut[s] upon First Amendment freedoms." (A45-A46). Applying the "appropriate rigid standard," the court held that all three sections were "sufficiently vague to render them unconstitutional," reasoning that this court "disapproved of similar terms such as 'counsel,' 'advocate' and 'advise' in the loyalty oath cases of the 1960's because the language was 'not susceptible of objective measurement' and threatened to restrict free speech" (A45-A46).

Besides holding that these three sections were void

for vagueness, the court also held that sections 188.205, 188.210, and 188.215 violated the right of privacy under the Fourteenth Amendment. First, the court held that the "encouraging and counseling" language in sections 188.205, 188.210, and 188.215 "impose[d] a significant barrier to a woman's right to consult with her physician and exercise her freedom of choice." This would result in a situation where "[p]atients who fully pay for their services would be denied access to medical information . . . ." (A49-A50). Second, the court held that the prohibition in § 188.215 on the use of public facilities was unconstitutional under *Nyberg v. City of Virginia*, 667 F.2d 754 (8th Cir. 1982), appeal dismissed for want of jurisdiction, cert. denied, 462 U.S. 1125 (1983), and that *Poelker v. Doe*, 432 U.S. 519 (1977), was not controlling "where there is no indication that 'public funds' would be expended." (A50-A51).

Finally, the court held that the "performing or assisting" language, as applied to public funds or public employees, violated "the Eighth Amendment rights of Missouri inmates to receive medical care," relying on *Monmouth County Correctional Institution Inmates v. Lanzaro*, 643 F. Supp. 1217 (D. N.J. 1986), aff'd in part, modified in part, 843 F.2d 326 (3d Cir. 1987), cert. denied, 108 S.Ct. 1731 (1988). However, the court rejected plaintiffs' claims that these provisions violated "academic freedom" by affecting instruction in abortion procedure at state medical schools.

On March 25, 1987, plaintiffs filed a motion to amend the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. That motion was granted by the court on April 30, 1987. Defendants' notice of appeal was filed May 15, 1987.

Appellants appealed from all aspects of the district

court's decision, except from the injunction against § 188.039, relating to informed consent. No cross appeal was taken to the district court's approval of the first sentence of § 188.029.

The court of appeals affirmed in part and reversed in part. The court of appeals affirmed the invalidation of § 188.025, regarding the performance of abortions in a hospital at sixteen weeks gestation. The court also affirmed the invalidation of the second sentence of § 188.029, regarding tests to determine viability, relying on this Court's statement in *Colautti v. Franklin*, 439 U.S. 379 (1979), that "neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability—be it weeks of gestation or fetal weight or any other single factor." (A59). The court rejected the State's argument that the statute did not require any particular tests but only those "necessary medical examinations so as to determine viability," concluding that the statute "plainly declares that in determining viability, doctors must perform tests to find gestational age, and fetal weight and lung maturity." (A60, n. 5).

The court also affirmed the invalidation of the preamble findings of § 1.205.1. The court held that the plaintiffs had standing because the preamble did "exactly what the Supreme Court has declared it may not do: espouse a theory of when life begins as the foundation of the state's regulation of abortion" and "[n]o persons are better situated to attack the constitutionality of this endeavor than those parties who are directly affected by the state's abortion laws—laws that allegedly are based on and reflective of an impermissible theory of life." (A63). The court invalidated the preamble as "simply an impermissible state adoption of a theory of when life begins to justify its abortion regulations." (A64).

The court also affirmed the invalidation of §§ 188.205 (in part), 188.210, and 188.215 because the "encourage or counsel" language was "void for vagueness and violative of the right to privacy." Even though these provisions carry no criminal penalties, the court held that a "strict scrutiny" standard applied in evaluating the vagueness challenge because the provisions "implicate[d] both first and fourteenth amendment rights of both physicians and their patients: the right to disseminate and receive information about abortion, and the right to knowingly and intelligently choose an abortion after consulting a physician." (A67). Rejecting the State's limiting construction that the "encouraging and counseling" language banned only "affirmative advocacy," the court concluded that the language was "much broader than the interpretation offered by the state" and was "vague because the word 'counsel' is fraught with ambiguity; its range is incapable of objective measurement." *Id.* Finally, the court agreed that the "encouraging and counseling" language of §§ 188.205, 188.210, and 188.215 constituted "an unacceptable infringement of the woman's fourteenth amendment right to choose an abortion after receiving the medical information necessary to exercise the right knowingly and intelligently." (A70).

The appellate court affirmed the district court decision that the "performing or assisting" language of § 188.215 (public facilities) was contrary to *Nyberg v. City of Virginia, supra.* The court also decided that the "performing or assisting" language of § 188.210 (public employees) was equally invalid. However, the court of appeals reversed the lower court's order regarding the "performing or assisting" language of § 188.205 because it was inconsistent with *Poelker v. Doe, supra.* The court of appeals also rejected the district court's construction of the "performing or assisting" language and

stated that the Eighth Amendment was not implicated.

Overall, the court of appeals affirmed the permanent injunction against all provisions appealed, except for the "performing or assisting" language of § 188.205 which was severed and declared facially constitutional.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Beginning with *Roe v. Wade,* 410 U.S. 113 (1973), this Court and the states have been engaged in a very difficult and complex venture in substantive due process. In *Roe,* this Court held that the states have an "important and legitimate interest in protecting the potentiality of human life . . . ." 410 U.S. at 162. Many states have quite legitimately acted upon this explicit constitutional authority, this invitation, to protect the life and health of unborn human life.

In *Roe,* this Court held that restrictive abortion statutes were not justified *merely because* the state "adopt[ed] one theory of life." 410 U.S. at 162. But it never intimated that states may not expound a philosophy about human life in seeking to protect human life. Plainly, all homicide statutes are based on a philosophy about human life. Yet, this court of appeals broadly expanded this dictum in *Roe* in an extreme and unsettling fashion to hold that states may not even make a finding in a legislative preamble that "the life of each human being begins at conception." Under this holding, state legislators are not allowed to even *think* that human life begins at conception. Judge Arnold, concurring in part and dissenting in part, took this error to its logical extreme by suggesting "that while a governmental declaration about when human life begins insofar as it is used to justify abortion is unconstitutional . . . I do not see why [it] should not be upheld insofar as it relates

to subjects other than abortion." (A83). He would have held the preamble "only invalid as applied to the subject of abortion."

Likewise, in *Roe v. Wade,* the Court described the constitutional right to abortion as the right of the woman in concert with her attending physician to decide to have an abortion. In *Maher v. Roe,* the Court characterized the right as "a constitutionally protected interest 'in making certain kinds of important decisions *free of governmental compulsion.*' " *Maher v. Roe,* 432 U.S. 464, 473 (1977) (emphasis added), quoting *Whalen v. Roe,* 429 U.S. 589, 599-600 and nn. 24, 26 (1977). From this premise, this Court held in *Poelker v. Doe,* 432 U.S. 519 (1977), that a municipal government may ban the performance of abortions at *all* public hospitals, whether or not physicians were willing or able to provide abortions and whether or not patients were willing to pay for those services. Subsequently, this Court upheld federal and state restrictions on the use of public funds to pay for abortion services unless the life of the mother was threatened if the pregnancy was carried to term. *Harris v. McRae,* 448 U.S. 297 (1980); *Williams v. Zbaraz,* 448 U.S. 358 (1980).

In reliance upon this Court's decisions in *Poelker, Harris* and *Maher,* other states, like Missouri, have determined to restrict public subsidization for abortion services. See, e.g., N.D. Cen. Code 14-02.3-02 through 14-02.3-04 (1981) ("performs, refers, or encourages abortion"); Pa. Cons. Stat. Ann. tit. 18, sec. 3215 (Purdon's 1983). The federal government has also recently sought to restrict funding for any abortion services, including abortion counseling, while funding childbirth. 53 Fed. Reg. 2922 (Feb. 2, 1988).

Disregarding the facts, language, and principles of *Poelker, Harris,* and *Maher,* the court of appeals relied instead on a 1982 Eighth Circuit decision which held that

a municipality *must* allow the performance of abortions in a public hospital if physicians are willing to perform such abortions and patients are willing to pay for such abortions, to hold unconstitutional on their face three Missouri provisions which prohibited the use of public funds, public facilities, or public employees to "perform or assist" or "encourage or counsel" a woman "to have an abortion not necessary to save her life." *Nyberg v. City of Virginia*, 667 F.2d 754 (8th Cir. 1982), appeal dismissed for want of jurisdiction, cert. denied, *City of Virginia v. Nyberg*, 462 U.S. 1125 (1983).

The *Nyberg* decision has created considerable confusion in the law since 1983. It directly conflicts with the facts and language of *Poelker*. See *Nyberg v. City of Virginia*, 667 F.2d at 759-60 (Heaney, J., dissenting). It contributes to a recent trend by federal courts to ignore the holding of *Poelker* and, to force public hospitals and public programs to support abortion services. See, e.g., *Commonwealth of Massachusetts v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988) (permanently enjoining federal regulations at 53 Fed. Reg. 2922 (Feb. 2, 1988) that preclude federally funded projects from providing abortion counseling or referral); *Planned Parenthood v. Bowen*, 680 F. Supp. 1465 (D. Colo. 1988) (same); *Roe v. City of Owensboro and Daviess County*, No. 88-0097 (W.D. Ky. June 22, 1988) (temporary restraining order entered against enforcement of Ky. Rev. Stat. 311.800(1), prohibiting use of public facilities to perform abortions). See, contra, *New York v. Bowen*, No. 88-0701 (S.D. N.Y. June 30, 1988) (upholding regulations at 53 Fed. Reg. 2922); *County Executive of Prince George County v. Doe*, 300 Md. 445, 479 A.2d 352 (1984) (challenge to order prohibiting abortions in public hospitals did not raise substantial federal claim).

Likewise, this Court has held that the states have a compelling interest in preserving the life of viable unborn

children. *City of Akron v. Akron Center for Reproductive Health,* 462 U.S. 416 (1983). In *Planned Parenthood v. Ashcroft,* 462 U.S. 476 (1983), this Court upheld Missouri's second physician requirement, stating that "the State's compelling interest in protecting a viable fetus justifies the second-physician requirement . . . ." *Id.* at 485, n. 7. The Court explained:

> Preserving the life of a viable fetus that is aborted may not often be possible, but the State legitimately may choose to provide safeguards for the comparatively few instances of live birth that occur.

462 U.S. at 485-86.

Section 188.029 provides a similar "safeguard" in protecting the life of a viable unborn child by ensuring that a physician makes a determination of viability and records his findings.

Other states, like Missouri, have sought to protect the life and health of the viable fetus to the fullest extent possible by requiring the physician to determine, according to his best medical judgment, whether the fetus is viable. See, e.g., Pa. Act No. 1988-31, sec. 3211(a), Pa. Legis. Serv. No. 2 (Purdon's May, 1988) (presumption at 19 weeks).

The decisions of the courts below provide compelling evidence that the lower federal courts do not apply normal principles of constitutional adjudication to abortion cases. The Eighth Circuit's analysis expands this Court's precedents in favor of abortion on demand, further contracts the State's compelling interest in the life of viable unborn children, and disregards this Court's holdings that abortion is a private matter which government need in no way subsidize. Consequently, if Missouri's carefully drafted statutory provisions are unconstitutional under *Roe v. Wade* and its progeny as the Court below maintains, appellants submit that *Roe v. Wade* should itself be reconsidered.

I. The Court of Appeals Erred in Applying an Erroneous Standard of Review in This Facial Challenge to the Constitutionality of Missouri's Abortion Statutes.

Because this is a facial challenge to the constitutionality of a state statute, plaintiffs were required to prove that the challenged provisions were unconstitutional in all of their applications or that the statute could not be constitutionally applied to any set of facts. The facial nature of this challenge was emphasized by the appellants in both the trial court and the court of appeals. Although the court of appeals, and Judge Arnold concurring, recognized the facial nature of the challenge, the court ignored the importance of this and completely failed to apply the proper standard of review.

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the . . . [Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment. (Citations omitted.)

United States v. Salerno, ... U.S. ....., 107 S.Ct. 2095, 2100 (1987). Facial challenges have rarely been upheld outside the context of the First Amendment. This past term, in the context of a facial First Amendment challenge, this Court reiterated this standard:

> Although such facial challenges are sometimes permissible and often have been entertained, especially when speech protected by the First Amendment is at stake, to prevail on a facial attack the plaintiff

> must demonstrate that the challenged law either "could never be applied in a valid manner" or that even though it may be validly applied to the plaintiff and others, it nevertheless is so broad that it "may inhibit the constitutionally protected speech of third parties." (Citations omitted.)

New York State Club Association, Inc. v. City of New York, ... U.S. ....., 108 S.Ct. 2225, 2233 (1988).

In the same manner, this Court rejected a facial First Amendment challenge to a municipal ban on residential picketing. *Frisby v. Schultz*, ... U.S. ....., 108 S.Ct. 2495 (1988). In so doing, the Court rejected contentions that the law was invalid because it did not specify how it would be applied in particular hypothetical circumstances. *Frisby*, 108 S.Ct. at 2504.

This Court rejected such a hypothetical attack in the context of abortion statutes in *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983). In *Ashcroft*, the Court upheld a Missouri statute requiring that a second physician be present during post-viable abortions because it "reasonably further[ed] the State's compelling interest" in preserving life. 462 U.S. at 483. The Court upheld this requirement even for abortions performed by the dilatation and evacuation (D&E) method when there was no possibility of fetal survival and rejected the application of a "narrowly drawn" standard for such legislation. *Id.* at 483, n. 7. Statutes designed to further compelling state interests need not be drafted so as to "accommodate every conceivable contingency." *Id.*

The court of appeals' failure here to apply a proper standard of review to the facial challenge leveled by the plaintiffs is not a discrete instance of error. Rather, it is an example of a pattern that has developed in the

federal courts' approach to abortion statutes.[1] Thus, the court of appeals' standard of review presents a substantial question.

II. The State of Missouri May Make Legislative Findings That "the Life of Each Human Being Begins at Conception" and That "Unborn Children Have Protectable Interests in Life, Health, and Well-Being" Pursuant to a Public Policy of Protecting the Life and Health of Unborn Children to the Fullest Extent Possible in Tort, Criminal, Property, and Abortion Law.

The court below held that subsections 1.205.1(1) and (2), RSMo 1986, were invalid because they conflicted with *Roe v. Wade*, 410 U.S. 113, 162 (1973), wherein the United States Supreme Court declared that a state could not adopt one theory of when life begins to justify abortion regulation.

Initially, one must note that the two subsections declared invalid are preamble statements of fact and principle enacted in order to provide guidance in interpreting the operative language of § 1.205. Neither subsection does anything substantively.

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1. See, e.g., *Akron Center for Reproductive Health v. Rosen*, ... F.2d ..... (6th Cir., No. 86-3664, Aug. 12, 1988) (affirming permanent injunction in facial challenge to parental notice statute); *Planned Parenthood v. Casey*, 686 F. Supp. 1089 (E.D. Pa. 1988) (preliminary injunction entered in facial challenge to amendments to abortion statute passed in response to *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Planned Parenthood v. Harris*, No. 88-1159 (N.D. Ga., July 11, 1988) (*Harris II*) (entering preliminary injunction in facial challenge to amendments to parental notice law passed in response to previous invalidation, *Planned Parenthood v. Harris*, 670 F. Supp. 971 (N.D. Ga. 1987)), appeal docketed, No. ..... (11th Cir. .....); *Planned Parenthood v. Bowen*, 687 F. Supp. 1465 (D. Colo. 1988) (permanent injunction in facial challenge to federal regulations on public funding for abortion counseling, superseding 680 F. Supp. 1465 (D. Colo. 1988)); *Massachusetts v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988) (same).

It is well established in other circuit courts of appeal that "preambles to statutes do not impose substantive rights, duties or obligations." *National Wildlife Federation v. Marsh*, 721 F.2d 767 (11th Cir. 1983). See *Association of American Railroads v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977); *Alexander v. HUD*, 555 F.2d 166, 171 (7th Cir. 1977). By declaring the Missouri General Assembly's findings to be in violation of the plaintiff class's right to privacy, the Court had to decide that the preamble *did something* which is directly contrary to decisions in other circuits that preambles have no operative effect. *Association of American Railroads v. Costle, supra.*

Other states, like Missouri, have sought to persuade citizens, through legislation, "that the unborn child is a human being from the time of conception." Ill. Rev. Stat. ch. 38, ¶ 81.21 (1987). *Cf.* Conn. Gen. Stat. Ann. 53-31a (1985); Neb. Rev. Stat. 28-325 (1985). The court of appeals' holding also conflicts in spirit with decisions of the Seventh Circuit, which has held that such a preamble cannot be the basis for striking provisions of a bill regulating abortion. *Charles v. Carey*, 627 F.2d 772, 778-79 (7th Cir. 1980); *Wynn v. Scott*, 449 F. Supp. 1302, 1314-15 & n. 9 (N.D. Ill. 1978) (3-judge court).

The substantive language of § 1.205, which was unchallenged, expands existing state tort, property, and criminal law protection for unborn children. Prior to the statute, Missouri law provided different degrees of protection for unborn children. This statute updates Missouri law in these areas and provides for consistent treatment of unborn children. However, § 1.205 specifically excludes abortion from its ambit by providing unborn children only those rights, privileges, and immunities permitted by "the Constitution of the United States and decisional interpretations thereof by the United

States Supreme Court." § 1.205.2, RSMo. The statute also specifically provides that it does not create any cause of action against pregnant women with respect to the care of their unborn children. Section 1.205.4, RSMo.

A. Legislative Findings Without Operative Effect Cannot Threaten Injury So As to Create a "Case or Controversy".

The statute was not intended to affect, and does not in any way affect, any woman's constitutional right to choose abortion over childbirth. It simply defines the point at which unborn children are entitled to the protections of Missouri law in circumstances other than those involved in abortion. The court's decision to strike the challenged preamble provisions of the statute does not diminish the statute's impact on state law.

Since § 1.205 cannot infringe upon any judicially established right of any plaintiff class member who desires to obtain an abortion or perform an abortion, the plaintiffs in this action lack standing to challenge any provision of § 1.205, RSMo. The doctrine of standing requires that a plaintiff allege personal injury fairly traceable to a defendant's alleged unlawful conduct. Without standing, a litigant cannot meet the Article III "case and controversy" requirement of federal judicial power. *Allen v. Wright,* 468 U.S. 737, 754-758 (1984). If a person cannot be injured by the operation of a statute, that person cannot allege a case in controversy such that a federal court can exercise its jurisdiction to declare the statute invalid. So long as *Roe v. Wade* and its progeny remain the law, § 1.205 does not affect any right of a woman to have an abortion or the conduct of her physician. Therefore, plaintiffs cannot meet the case and controversy requirements of Article III of the United States Constitution.

B. The Court of Appeals Erred in Invalidating in a Facial Challenge Legislative Findings Which Have No Substantive Effect on Abortion.

The court's decision on the merits was also incorrect both factually and legally, because (1) the Supreme Court has never placed any limitation on state legislative authority to determine when human life begins in a non-abortion context; and (2) since the statute is abortion-neutral, it is in no way inconsistent with *Roe v. Wade.*

State legislatures have always determined the point at which unborn children are entitled to the protections of state law. For example, most states provide children a cause of action in tort for prenatal injuries inflicted by a person other than the child's mother. See W. Prosser, *Handbook on The Law of Torts,* 337 § 55 (4th ed. 1971) ("when actually faced with the issue for decision, almost all of the jurisdictions have allowed recovery even though injury occurred during the early weeks of pregnancy, when the child was neither viable nor quick").

Many states also provide a cause of action to the parents for the wrongful death of their unborn children. For example, the Rhode Island Supreme Court held in *Presley v. Newport Hospital,* 117 R.I. 179, 365 A.2d 748 (1976) that the word "person" as used in the Rhode Island Wrongful Death Act includes unborn children. 117 R.I. at 188, 365 A.2d at 754. As recently as 1983, the Missouri Supreme Court held that the term "person" as used in Missouri's Wrongful Death Statute "includes the human fetus *en ventre sa mere*" stating that its conclusion was "supported by a strong positive trend among other jurisdictions holding that a fetus is a 'person,' 'minor' or 'minor child' within the meaning of their particular wrongful death statutes." *O'Grady v. Brown,* 654 S.W.2d 904, 910 (Mo. banc 1983).

Most states recognize in unborn children certain

rights under property law and many states provide criminal sanctions for the intentional or criminally negligent killing of an unborn child. For example. a number of states impose criminal sanctions in the nature of manslaughter for the killing of a viable fetus or unborn quick child. See, e.g., Cal. Penal Code § 187 (1970); Fla. Stat. Ann. § 782.09 (West Supp. 1983); Mich. Comp. Laws Ann. § 750-322 (West Supp. 1983). In fact, prior to the enactment of § 1.205, Missouri also had such a law. See Section 565.024.1(3), RSMo 1978 (amended by L. 1986, H.B. No. 1596, § A).

The foregoing examples demonstrate that the matters dealt with in Section 1.205 have long been recognized as within the proper purview of state regulation and proper subjects for legislative enactments. Moreover, it is clear that, as stated in § 1.205.1(2), "[u]nborn children have [and always have had] protectable interests in life, health and well being." In this respect, the Statute is merely a proper exercise of legislative authority which recognizes what is now and has long been a fact. Given the states' traditional role in this area, the challenged statutory provisions are entitled to a strong presumption of validity. *Fitz v. Dolyak,* 712 F.2d 330, 333 (8th Cir. 1983).

The General Assembly's findings have been based on what would seem to be indisputable biological and medical understanding that the life of every human being begins at conception. See, e.g., E. Blechschmidt, *The Beginning of Human Life* 16-17 (1977); K. Moore, *The Developing Human: Clinically Oriented Embryology* 1, 13 (3d ed. 1982). The court's holding imposes on states' legislatures a philosophical nihilism that conflicts with modern medical understanding and practice. Even if medical authorities were "sharply divided," the court of appeals should have deferred to the legislature on this point of medical understanding. *Traynor v. Turnage,* 108 S.Ct. 1372, 1383 (1988).

The court below declared invalid provisions of Missouri law with no operative effect intended only to aid in the understanding of substantive provisions which were not challenged. If the substantive provisions of a statute fail to violate anyone's indviidual constitutional rights, the preamble of that statute cannot facially violate such rights.

Finally, if *Roe v. Wade* constitutes authority for the decision of the Eighth Circuit, then appellants submit that *Roe* should be carefully reviewed because its conclusions are inconsistent with the strong factual support for the findings and policy judgments which led to the adoption of the preamble provisions in question.

III. The States May Require a Physician Who Is About to Perform an Abortion to Make a Determination Whether the Unborn Child Is Viable, and in So Doing, to Cause to Be Performed Such Tests As Are Necessary to Make a Finding of the Gestational Age, Weight, and Lung Maturity of the Unborn Child.

The district court and court of appeals were correct in upholding the first sentence of section 188.029, which requires that before performing an abortion on a woman "he has reason to believe is carrying an unborn child of twenty or more weeks gestational age," the physician "shall first determine if the unborn child is viable . . . ." This holding was based on medical evidence by the plaintiffs' own witness, Dr. Maulik, and others, that showed that the twenty-week designation was reasonably related to viability because there may be a four-week or greater error in estimating gestational age.

Despite this conclusion, the court of appeals facially invalidated the second sentence of 188.029. The court below, relying on dictum in *Colautti v. Franklin,* 439 U.S. 379 (1978), that legislatures could not "proclaim one of the elements entering into the ascertainment of viability,"

concluded that "this is precisely what the Missouri legislature has attempted to proclaim." (A59). The court of appeals also adopted the findings of the district court that the lung maturity provision required the use of amniocentesis, which was expensive and not rationally related to the determination of viability at twenty weeks (A60, n. 5).

The court of appeals' reliance on *Colautti* is misplaced. *Colautti* dealt with a state statute which subjected a physician to potential criminal liability if he failed to use a certain procedure "when the fetus 'is viable' or when there is 'sufficient reason to believe that the fetus may be viable.'" 439 U.S. at 381. There the Court stated, "[b]ecause this point may differ with each pregnancy, neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability—be it 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." *Id.* at 389. The court struck down this provision concluding that the term "may be viable" was unconstitutionally vague when stated in conjunction with the phrase "is viable" and because a "scienter requirement with respect to the finding of viability" was absent. *Id.* at 390.

Despite the fact that the court of appeals relied on the *Colautti* dictum that the legislature could not "proclaim one of the elements entering into the ascertainment of viability—be it weeks of gestation or fetal weight or any other single factor—as the determinant," that dictum is plainly not applicable to § 188.029. First, the General Assembly has not emphasized any "single factor," but instead has specified *three* factors—consistent with medical science—for which a finding must be made. Second, the legislature has not prejudged what those findings must be. Finally, the legislature has not made all or any of these factors "determinant" of viability. The

determination of viability is left to the medical judgment of the attending physician. Although three objective factors medically consistent with a determination of viability are identified, none of these factors is made determinant and the physician may consider any other factors. For these reasons, *Colautti* does not apply to strike § 188.029.

The court's invalidation of the second sentence of § 188.029 because of the fetal weight and lung maturity language is indicative of the pattern by federal courts to ignore normal principles of constitutional adjudication in a facial challenge. The court of appeals misread the plain language of 188.029 as a matter of law. The plain language provides that the physician shall cause to be performed such tests "as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child . . . ." The court read this language as saying that "doctors *must* perform tests to find gestational age, and fetal weight and lung maturity." (A60, n. 5). But there is a significant difference between a requirement to perform "tests to find" and one to perform "such . . . tests as are necessary to make a finding."

The court read into the plain language specific tests which are not required by the statute on its face. The statutory language allows for the distinct possibility that no finding can be made, or that a finding can be made by a single test, thereby making *unnecessary* the use of another test, or that a finding can be derived without an intrusive test. The statutory language provides flexibility that the court's jaundiced construction excises.

This allowance for flexibility in obtaining a finding is directly relevant to the "lung maturity" language. The district court and the court of appeals would read the plain language as specifically requiring amniocentesis,

despite the fact that the plain language specifies no tests, but refers more generally to "such . . . tests as are necessary to make a finding." The evidence provided by the medical experts at trial was that amniocentesis could make "no finding" of lung maturity at twenty weeks. Within the plain language of the statute, an amniocentesis test *cannot* be a "necessary" test to "make a finding" if it can provide no information.

The court of appeals' analysis was erroneous as a matter of law. It was based on a misreading of the plain language and it employed an erroneously high standard of review. The court thus erred in facially invalidating the second sentence of 188.029.

Even if the court of appeals was correct in invalidating the "lung maturity" language of 188.029, it erred by failing to sever the "lung maturity" language from 188.029 and upholding the remainder of the section. Such severance of a discrete "finding" would allow the implementation of the provisions for the other required findings. This would further the State's purpose in requiring that necessary findings be made and recorded by a physician determining viability. The court of appeals' decision presents a substantial federal question deserving review. On plenary consideration by this Court, that decision should be reversed.

IV. The State of Missouri May Constitutionally Refuse to Support Abortion Services by Declaring Unlawful the Expenditure of Public Funds for the Purpose of Encouraging or Counseling a Woman to Have an Abortion Not Necessary to Save Her Life.

A. The State Is Not Required to Subsidize With Public Funds the Exercise of a Constitutional Right.

The court below reversed the district court's decision

declaring § 188.205 to be unconstitutional in part on the basis of *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1988), which held that a government may refuse to provide any public assistance for any abortion not necessary to save the life of the mother. Thus, the court felt bound to uphold the provision of § 188.205 which forbids the expenditure of public funds for the purpose of performing or assisting an abortion, not necessary to save the life of the mother. However, the court declared the remainder of § 188.205 to be facially invalid because the phrase "encouraging or counseling a woman to have an abortion not necessary to save her life" was unconstitutionally vague and because the ban constituted an obstacle to a woman's exercise of her right to privacy. Each rationale expressed by the court below should be reviewed because it is inconsistent with decisions rendered by this court regarding the subsidizing of constitutional rights and the standard for reviewing facial challenges to state statutes on the basis of vagueness.

As recently as March, 1988, this Court held that a government is not required to furnish funds in order for a person to maximize the exercise of a constitutional right. The court stated in *Lyng v. International Union, UAW*, ... U.S. ....., 108 S.Ct. 1184, 1190 (1988), that "'we have held in several contexts [including the first amendment] that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.' *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 549 (1983)." Clearly, with regard to § 188.205, the State of Missouri does not violate a woman's right to obtain an abortion by refusing to allow public funds to be used for abortion counseling services. Contrary to the court of appeals' decision, this Court's rulings in *Maher v. Roe, Harris v. McRae,* and

Poelker v. Doe, 432 U.S. 519 (1977), conclusively establish that § 188.205, which is concerned with the expenditure of public funds, does not constitute an obstacle in violation of a woman's right to privacy.

B. The Phrase "Encouraging or Counseling a Woman to Have an Abortion . . ." Is Not Vague.

In its eagerness to declare the encouraging and counseling language used by the General Assembly of the State of Missouri to be vague, the court of appeals ignored not only the appropriate standard for review but also the "well-established principle that statutes will be interpreted to avoid constitutional difficulties" [citations omitted]. *Frisby v. Schultz*, ... U.S. ....., 108 S.Ct. 2495, 2501 (1988). In reaching its decision regarding the second half of § 188.205, the court below decided that the language implicated First Amendment rights, rejected a narrow reading and construction offered by the Missouri Attorney General's Office, and ignored the most accepted definitions of the words it declared vague. Finally, the court disregarded a conflicting decision rendered by the Ninth Circuit Court of Appeals which had concluded that the term "counseling for abortion procedures" was not so vague that a reasonable person would not understand what abortion-related activities the State of Arizona had legislatively decided not to fund. See *Planned Parenthood of Central and Northern Arizona v. State of Arizona*, 718 F.2d 938, 948-949 (9th Cir. 1983), appealed after remand, 789 F.2d 1348 (9th Cir. 1986), aff'd, *Babbitt v. Planned Parenthood*, ... U.S. ....., 107 S.Ct. 391 (1986).

Initially, this Court should note that § 188.205 does not implicate the First Amendment rights of any person. Section 188.205 merely directs officials not to expend pub-

lic funds under their control for the purpose of performing abortion services, including encouraging or counseling a woman to have an abortion not necessary to save her life. The court of appeals clearly erred in reviewing § 188.205 pursuant to a strict scrutiny standard. The statute has no criminal penalties, and does not forbid anyone from discussing the subject of abortion.

When one examines the language declared vague by the district court and the court of appeals in its proper context, it is clear that the restriction is not so vague that a person of common intelligence must guess at its meaning. As the Attorney General of Missouri has stated in both the lower courts, the language in question should be construed as much narrower and specific than suggested by either of the courts' opinions. The restriction in § 188.205 is designed to prohibit the expenditure of public funds for the sole purpose of affirmatively advocating to a particular woman that she undertake an abortion procedure not necessary to save her life. The statute does not prohibit the use of public funds to provide information regarding abortions or to inform a woman of the options she may have to cope with an unwanted pregnancy. Section 188.205 refers to "encouraging" and "counseling" for a particular line of conduct. The purpose of the statute is one which may not be desired by the plaintiffs. There is nothing vague about it, and it provides a reasonable person fair notice of the conduct which will not be subsidized by the state.

In *Grayned v. City of Rockford,* 408 U.S. 104 (1972), despite the fact that First Amendment freedoms were "implicated" in the context of a statute imposing criminal penalties, the court stated:

Condemned to the use of words, we can never expect

> mathematical certainty from our language. The words of the *Rockford* ordinance are marked by "flexibility and reasonable breadth, rather than meticulous specificity" [cit. omit.], but we think it is clear what the ordinance as a whole prohibits.

Id. at 110. Likewise, in *Broderick v. Oklahoma*, 413 U.S. 601 (1973), First Amendment freedoms were "implicated" by an Oklahoma statute which restricted the political activity of public employees. Noting that "there may be disputes over the meaning of such terms in [section] 818 as 'partisan,' or 'take part in,' or 'affairs of' political parties," *id.* at 608, the court rejected the claim that these statutes were constitutionally vague. The court held that the statute was "not so vague that 'men of common intelligence must *necessarily* guess at its meaning.'" *Id.* at 607 (emphasis added). In doing so, it stated:

> There are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice of the public interest.

Id. at 608.

In declaring the latter half of § 188.205 to be unconstitutionally vague, the court below ignored and ridiculed the reasonable construction offered by the Missouri Attorney General as well as every other principle this Court has set forth regarding a facial determination of the constitutionality of a state statute. Thus, the court of appeals' decision presents a substantial federal question which this Court should review.

V. The State of Missouri Can Forbid Public Employees From Performing or Assisting an Abortion Not Necessary to Save the Life of the Mother and Declare It Unlawful for Any Public Facility to Be Used for the Purpose of Performing or Assisting an Abortion Not Necessary to Save the Life of the Mother.

A. The Court of Appeals Erred in Holding That Civil Statutes Forbidding the Performance of Abortion Services by a Public Employee or in a Public Facility Violate a Woman's Right to Privacy Because This Court Has Previously Held in Poelker v. Doe, 432 U.S. 519 (1977) That a Public Hospital Need Not Provide Abortion Services.

In §§ 188.220 and 188.215, the State of Missouri provided in part that it should be unlawful for any public employee within the scope of his employment to perform or assist in abortion not necessary to save the life of the mother or for any public facility to be used for the purpose of performing or assisting in abortion not necessary to save the life of the mother. These provisions were declared to be unconstitutional under *Nyberg v. City of Virginia* (*Nyberg II*), 667 F.2d 754 (8th Cir. 1982), a two-to-one decision of the Eighth Circuit Court of Appeals in which the court refused to remove an injunction previously issued against a municipality entered because of an ordinance prohibiting the performance of abortion in a community hospital. The Eighth Circuit's decision to rely upon *Nyberg* and declare the performing or assisting language in each of these two statutes to be unconstitutional is directly contrary to the superior authority of *Poelker v. Doe*, 432 U.S. 519 (1977), wherein this Court upheld a mayor's "directive," *id.* at 550, applicable to both of the two city-owned hospitals in St. Louis, *id.* at 519, which

totally "prohibited the performance of abortions in the city hospitals except when there was a threat of grave physiological injury or death to the mother." *Id.* at 520. The court also upheld a staffing practice whereby one city hospital used doctors only from "a Jesuit-operated institution opposed to abortion." *Id.*

The court of appeals' decision is also in conflict with several decisions of this Court which have broadly held that government may refuse to provide any public assistance for any abortion not necessary to save the life of the mother. In *Maher v. Roe*, 432 U.S. 464 (1977), this Court upheld a Connecticut administrative regulation which limited benefits for abortions "to those that are medically necessary," *id.* at 466, because it placed "no obstacle—absolute or otherwise—in the pregnant woman's path . . . she continues as before to be dependent on private sources for the service she desires." *Id.* at 474. It "imposed no restriction on access to abortions that was not already there" (i.e., the dependency on private sources). *Id.* The court held that the policy was constitutional, even if it made it "impossible" for a woman to have an abortion that was not "medically necessary." *Id.* at 466, 474.

Most recently, in *Harris v. McRae*, 448 U.S. 297 (1980), this Court upheld "the most restrictive version of the Hyde Amendment," *id.* at 325, n. 27, which withheld funds for abortion "except where the life of the mother would be endangered if the fetus were carried to term." *Id.* at 325, n. 27. The court viewed the Hyde Amendment as representing "a refusal to subsidize abortion." *Id.* at 317. It upheld the Hyde Amendment not on the narrow ground that it restricted "funding," but on the broader principle that it simply created no unconstitutional burden on the right to abortion because a woman who desires an abortion suffers no disadvantage from the amendment—she

continues as before to be dependent on private sources for the services she desires." *Id.* at 314. Citing *Maher*, the Court held that the most restrictive Hyde Amendment was constitutional even if it made it "impossible" for a woman to obtain an abortion in a case where "the life of the mother would [not] be endangered if the fetus were carried to term." *Id.* at 315-316, n. 27.

In applying these controlling precedents, the courts below erroneously limited their broad principle to mean merely that the government is not obligated to *fund* abortions. They found *Poelker* uncontrolling where no public funds would be expended. This is a clear misconstruction. The directive upheld in *Poelker* was not a narrow restriction on "funding" abortions but broadly prohibited "the *performance* of abortions in the city hospitals." 432 U.S. at 520 (emphasis added). As the dissent emphasized, the directive made no exceptions for "paid" abortions, for doctors who "would willingly perform them," or for small communities "where the public hospital is the only health care facility." *Id.* at 523-524 (Brennan, J., dissenting). The court did not require such exceptions, but broadly held that St. Louis could elect "as a policy choice, to provide *publicly financed hospital services* for childbirth without providing corresponding services for nontherapeutic abortions." *Id.* at 521 (emphasis added).

The district court's application of *Poelker* was particularly egregious because *Poelker* was an as-applied challenge, while plaintiffs' is merely a facial challenge. *Poelker*, rather than *Nyberg v. City of Virginia*, 667 F.2d 754 (8th Cir. 1982), cert. denied, 462 U.S. 1125 (1983), should control the result regarding the performing/assisting language in the statutes.

If the "encouraging or counseling" language of §§ 188.210 and 188.215 is unconstitutionally overbroad,

this language should have been severed from the "performing or assisting" language in each statute and the "performing or assisting" language should have been independently upheld. Federal courts are obligated to separate constitutional provisions from unconstitutional provisions in a statute "and to maintain the act in so far as it is valid." *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984). Missouri has a general severability clause in its statutes. § 1.140, RSMo 1986. The district court relied on this severability clause to sever and uphold the first sentence of § 188.029 and the court of appeals severed and upheld the first sentence of § 188.205. The court of appeals should have likewise severed and upheld the "performing or assisting" language of §§ 188.210 and 188.215.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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