No. 88-605

In the

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, et al.,

Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, et al.,

Appellees.

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

MOTION TO AFFIRM

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STATEMENT

Appellees ("plaintiffs") move to affirm the judgment of the Court of Appeals for the Eighth Circuit on the basis that it is clearly correct and that the issues raised by appellants ("the State") are "so unsubstantial as not to need further argument." Sup. Ct. R. 16.1(c). Moreover, plaintiffs believe that a case or controversy no longer exists as to one of the issues the State raises in this appeal. Accordingly, that issue should be remanded for further proceedings. *See* Section V, *infra* p. 12.[1]

A review of the issues presented on this appeal will show that none of them requires reconsideration of *Roe v. Wade*, 410 U.S. 113 (1973). Moreover, for the reasons set forth in Section VI, *infra* p. 16, *Roe v. Wade* should not be reconsidered.

This case involves a challenge to 1986 amendments to Missouri's abortion law ("the Act"). Four provisions of the Act have been brought to this Court for review of the holdings, first of the District Court and then of the Court of Appeals, that the provisions are unconstitutional. One provision bans the performance of abortions in public facilities, thereby eliminating what is effectively the only source of late in-hospital abortions in the state,[2] a crucial medical service for high risk patients. Mo. Rev. Stat. § 188.215 (1986); Jurisdictional Statement ("J.S.") at A 91. A second provision imposes "straitjacket" restrictions[3] on the ability of some doctors to communicate with their patients about abortion, and these restrictions are written in classically vague and viewpoint discriminatory language. Mo. Rev. Stat. § 188.205[4]; J.S. at A90-91. A third provision dictates

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1 Plaintiffs also suggest that this Court remand one of the Court of Appeals holdings for consideration of alternative state law grounds to support the judgment. *See* Section II, *infra* p. 6.

2 Jurisdictional Statement ("J.S.") at A51 n.57; *Reproductive Health Services v. Webster*, 662 F. Supp. 407, 428 n.57 (W.D. Mo. 1987).

3 *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 67 n.8 (1976).

4 The State appeals only the restriction on use of public funds for this purpose, not the restriction on the use of public facilities or employees. *See* Section V, *infra* p. 12.

to physicians that certain costly, medically dangerous tests be performed on women seeking abortions past the nineteenth week of pregnancy, even though the State does not dispute that these tests, in most instances, would be contrary to standard medical procedure. Mo. Rev. Stat. § 188.029; J.S. at A89-90. All of these restrictions are preceded by a fourth provision that declares that "[t]he life of each human being begins at conception" and that "[u]nborn children have protectable interests in life, health, and well-being." Mo. Rev. Stat. §§ 1.205.1 (1) and (2); J.S. at A88.

The State makes some rather remarkable and inflammatory assertions about the opinion of the Court of Appeals and the issues presented to this Court for review. The State claims the Court of Appeals departed from "normal principles of constitutional adjudication . . . expand[ed] this Court's precedents in favor of abortion on demand . . . contract[ed] the State's compelling interest in the life of viable unborn children, and disregard[ed] this Court's holdings that abortion is a private matter which government need in no way subsidize." J.S. at 11.

However, a more objective review of the holdings below reveals that the State's assertions are unfounded rhetoric. The Court of Appeals and the District Court strictly applied this Court's precedents to sustain some provisions of the challenged statute[5] and to declare others unconstitutional. Further, the State has appealed to this Court only some of the Court of

5 The District Court sustained the requirement that physicians make a determination of viability at 20 weeks of gestation. Mo. Rev. Stat. § 188.029. J.S. at A36; 662 F. Supp. at 422. The Court of Appeals upheld the provision of the Act making unlawful the expenditure of public funds for the purpose of performing or assisting an abortion not necessary to save the life of the mother. Mo. Rev. Stat. § 188.205. J.S. at A79-82; *Reproductive Health Services v. Webster*, 851 F.2d 1071, 1084-85 (8th Cir. 1988). Plaintiffs did not appeal either of these holdings.

Appeals' rulings of unconstitutionality.[6] This confirms that, contrary to the image the State seeks to portray in its Jurisdictional Statement, the court below hardly ran amok over the State's "legitimate interest in protecting . . . . the life and health of unborn human life." J.S. at 8.

As to those holdings appealed, a fair review reveals not only that the Court of Appeals was entirely correct, but that the issues raised by the State are without legal foundation or are minor contentions not rising to the level of substantial federal questions. With regard to the speech restrictions of the Act, the State has structured its appeal and framed this issue in a way that eliminates any case or controversy between it and the plaintiffs.

ARGUMENT

I. THE COURT OF APPEALS EMPLOYED THE CORRECT STANDARD OF REVIEW

The State's argument that the Court of Appeals applied an incorrect standard of review is frivolous. The standard of review for state regulations that impinge upon fundamental rights is long settled: the regulation "may be justified only by a 'compelling state interest,' " and "must be narrowly drawn to express only the legitimate state interests at stake." *Roe v. Wade*, 410 U.S. at 155. It is not only the appropriate standard for state regulations impinging upon the exercise of the right to elect abortion, *id.*; *City of Akron v. Akron Center for Repro-*

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6 The State has not appealed the Court of Appeals' invalidation of § 188.025, which would have required all post-15 week abortions to be performed in hospitals. J.S. at A57-58; 851 F.2d at 1073-74. Nor has the State appealed the Court of Appeals' holding of unconstitutionality as to those portions of §§ 188.210 and 215 which ban speech by public employees or in public facilities which encourages or counsels women to have abortions. J.S. at A65-73; 851 F.2d at 1077-81. Additionally, the State did not appeal the District Court's invalidation of the Act's requirement that a physician personally provide certain information to a pregnant woman considering an abortion. J.S. at A17-22; 662 F. Supp. at 413-16.

ductive Health, 462 U.S. 416, 420, 426-31 (1983);[7] *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 759 (1986), it is the standard applied to any regulation that impinges upon "fundamental rights." *Roe v. Wade*, 410 U.S. at 155.

The Court of Appeals faithfully applied the correct standard. It determined whether each provision of the Missouri Act directly interfered with access to abortion and, if so, whether the restriction was narrowly tailored to express the relevant state interests at stake. *See, e.g.*, J.S. at A59-60 and n.5; 851 F.2d at 1075 and n.5 (affirming the District Court's holding that Mo. Rev. Stat. § 188.029 was not narrowly tailored to further the State's interest in fetal life or maternal health).

Neither *United States v. Salerno*, 107 S. Ct. 2095 (1987); *Frisby v. Schultz*, 108 S. Ct. 2495 (1988); nor *Planned Parenthood Association of Kansas City, Missouri v. Ashcroft*, 462 U.S. 476 (1983) requires, as the State claims, a different standard. J.S. at 12-13.

In *Salerno*, 107 S. Ct. 2095, this Court inquired into whether the Bail Reform Act's pre-trial detention provisions were narrowly tailored to advance compelling state interests. *Id.* at 2103. Although this Court said that a facial challenge requires the plaintiff to establish that "no set of circumstances exists under which the Act would be valid," *id.* at 2100, that statement must

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7 In *City of Akron*, this Court answered the same argument made by the State here:

> It is true that a state abortion regulation is not unconstitutional simply because it does not correspond perfectly in all cases to the asserted state interest. But the lines drawn in a state regulation must be reasonable, and this cannot be said of § 1870.03. By preventing the performance of D&E abortions in an appropriate nonhospital setting, Akron has imposed a heavy, and unnecessary, burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure. Section 1870.03 has 'the effect of inhibiting . . . the vast majority of abortions after the first 12 weeks,' *Danforth*, 428 U.S. at 79, and therefore unreasonably infringes upon a woman's constitutional right to obtain an abortion (citations omitted).

462 U.S. at 438-39.

be understood in the context of that case: the plaintiff in *Salerno* made no allegations that the challenged law was unconstitutional as applied to him. *Id.* at 2100 n.3. In such abstract circumstances, a law which appears on its face to be narrowly tailored to meet compelling state interests will not be held facially invalid because it "might operate unconstitutionally under some conceivable set of circumstances." *Id.* at 2100.

In *Frisby*, 108 S. Ct. 2495, this Court upheld a ban on residential picketing because it was "narrowly tailored" to meet the state's significant interest in protecting unwilling listeners. *Id.* at 2501-502. The standard of review expressed was exactly that relied upon by the Court of Appeals here: "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Id.* at 2502.

In *Ashcroft*, 462 U.S. 476, which was decided the same day as *City of Akron*, 462 U.S. 416, this Court upheld Missouri's "second doctor" requirement for post-viability abortions on the ground that it furthered the state's compelling interest in viable fetal life. In a lengthy footnote, this Court dealt with the *Ashcroft* plaintiffs' contention that in some cases the method of abortion precluded fetal survival and therefore rendered the second doctor useless. *Ashcroft*, 462 U.S. at 483 n.7. This Court concluded, after a careful review of the evidence on the record, that such circumstances were "rare" and held the statute valid, concluding that "[l]egislation need not accommodate every conceivable contingency." *Id.*

Ashcroft did not, as the State contends, reject "the application of a 'narrowly drawn' standard" for abortion legislation. J.S. at 13. This Court did not uphold the Missouri law because it searched and found some valid application for it. Rather, it upheld the law because, in all but rare circumstances, it was justified by a compelling state interest: protection of viable fetal life.

The State implies that there was something "hypothetical" about the claims made by plaintiffs. J.S. at 13. Yet, it never identifies the basis for that contention. A review of the Court of Appeals' decision negates any such suggestion, and reveals that

it stringently followed the consistent mode of analysis dictated by this Court and applied uniformly by it and lower courts since 1973.

II. THE JUDGMENT OF THE COURT OF APPEALS STRIKING DOWN MO. REV. STAT. §§ 1.205.1 (1) AND (2) SHOULD BE AFFIRMED OR REMANDED FOR CONSIDERATION OF ALTERNATIVE STATE LAW GROUNDS TO SUPPORT THE JUDGMENT

The State's objection to the Court of Appeals' invalidation of Mo. Rev. Stat. §§ 1.205.1 (1) and (2) amounts to no more than a quibble. The State does not dispute the Court of Appeals' holding that these provisions are unconstitutional in so far as they adopt a theory of when life begins as a basis for regulating abortion. The State's sole contention is that it should be able to assert its theory of when life begins as a basis for legislating in certain other areas, such as inheritance rights. J.S. at 17-18. There is nothing in the Court of Appeals' opinion which forecloses the State from doing so, however, in a separate statute.[8] The State's argument with the Court of Appeals, therefore, boils down to one of statutory location, hardly an issue meriting plenary review.

Additionally, separate and independent state grounds exist which may render these sections invalid. Plaintiffs advanced the argument in the Court of Appeals that if, as the State maintains, §§ 1.205.1 (1) and (2) pertain to subjects unrelated to abortion, they violate the Missouri Constitution's requirement that "[n]o bill should contain more than one subject. . ." Mo. Const. art. III, § 23. The Court of Appeals, however, found it unnecessary to reach that issue. J.S. at A65 n.8; 851 F.2d at 1077 n.8.

Nevertheless, this Court has announced a strong policy of "avoiding the unnecessary adjudication of federal constitutional questions" where state law might provide "independent

8 Indeed, the provisions of the Act requiring Missouri's laws to be construed to protect the unborn remain in place and in effect. Mo. Rev. Stat. § 1.205.2.

support" for the judgment below. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 294-95 (1982). Moreover, this Court has recognized that the federal courts of appeal are in a better position than it to resolve questions of local law. *Id.* at 293.

Plaintiffs, therefore, urge this Court to affirm the judgment below or to remand this issue for consideration of alternative state grounds to support that judgment.

III. THE COURT OF APPEALS' INVALIDATION OF MO. REV. STAT. § 188.029, WHICH REQUIRES PHYSICIANS TO MAKE FINDINGS AS TO GESTATIONAL AGE AND FETAL WEIGHT AND LUNG MATURITY IN DETERMINING VIABILITY, IS CORRECT UNDER PRINCIPLES ANNOUNCED BY THIS COURT, AND THE STATE'S OBJECTIONS TO THE HOLDING BELOW DO NOT MERIT PLENARY REVIEW

Mo. Rev. Stat. § 188.029 requires a physician who has "reason to believe" a patient requesting an abortion is twenty or more weeks pregnant to conduct such "tests as are necessary to make a finding of the gestational age, weight, and lung maturity" of the fetus and enter those findings in the patient's medical record.[9] The Court of Appeals found the constitutionality of this requirement foreclosed by this Court's pronouncement 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.' " J.S. at A59; 851 F.2d at 1074 (quoting *Colautti v. Franklin*, 439 U.S. 379, 388-89 (1979)).

The factual findings of the District Court which the Court of Appeals affirmed illustrate why the imposition of inflexible requirements in this medical context is unconstitutional: they serve neither the best interests of the patient nor the State's interests, compelling or otherwise. Extensive evidence at trial showed that forcing physicians to make these findings could

9 The District Court upheld the requirement that physicians determine viability at this stage of gestation. J.S. at A34; 662 F. Supp. at 421.

lead to added expense and health risks to the woman that were justified neither by state interests in maternal health nor protection of potential life. J.S. at A60 n.5; 851 F.2d at 1075 n.5. The evidence showed that: (1) tests for fetal weight are expensive and inaccurate and yield little useful information until much later than twenty weeks of pregnancy, and (2) amniocentesis, the only known test for lung maturity, is an invasive procedure which raises the costs and risks to both the woman and the fetus, including risks resulting from the delay required to schedule the procedure, without yielding information useful to the determination of viability until *at least* the twenty-eighth to thirtieth week of pregnancy. *Id.*; J.S. at A36-38 and nn.39-46; 662 F. Supp. at 422-23 and nn.39-46.[10]

The State does not dispute these factual findings or conclusions. It argues rather that the courts below misread the language of the statute and that the language does not require any particular medical test. J.S. at 21-22.[11]

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10 Abortions past the twenty-eighth week of pregnancy are virtually non-existent. *See, e.g.*, Spitz *et al.*, *Third-Trimester Induced Abortions in Georgia, 1979 and 1980*, 73 Am. J. Public Health 594 (1983).

11 The State argues that amniocentesis will produce "no finding" on lung maturity at twenty weeks of pregnancy and it is therefore not a test " 'necessary to make a finding' " of lung maturity. J.S. at 21-22. The fact is, however, that the statute unequivocally requires physicians to make "findings" and record those findings in the patient's record; it contains no exception for circumstances where the "findings" invariably will be negative. If the only way to make those findings is through an invasive test such as amniocentesis, or an expensive one such as fetal weight determination, then the statute requires those tests. Moreover, even if the State is right that the statute requires only tests that will yield a positive "finding," it has failed to suggest what relevance findings of fetal weight or lung maturity have to viability or dispute the evidence at trial that, until thirty weeks of pregnancy, no test is relevant other then ultrasonography to determine gestational age. J.S. at A37; 662 F. Supp. at 422-23. The utter lack of evidence to establish a relationship between the findings required by § 188.029 and the State's interest in preserving fetal life indicates this statute is unconstitutional, whether judged under a "strict scrutiny" or a "rational basis" test.

This argument does not provide a basis for plenary review. This Court "defer[s] to the construction of a state statute given it by the lower federal courts . . . to reflect our belief that district courts and courts of appeal are better schooled in and more able to interpret the laws of their respective States." *Frisby v. Schultz*, 108 S. Ct. at 2500 (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985) (citations omitted)). *See also Virginia v. American Booksellers Association, Inc.*, 108 S. Ct. 636, 643 (1988) ("[T]his Court rarely reviews a construction of state law agreed upon by the two lower federal courts").

The judgment of the Court of Appeals, therefore, should be affirmed.

IV. THE COURT OF APPEALS CORRECTLY HELD THAT WHILE THE STATE HAS THE RIGHT TO CHOOSE NOT TO PAY FOR THE PERFORMANCE OF ABORTIONS, THE STATE CANNOT BAR ABSOLUTELY ACCESS TO PUBLIC FACILITIES BY WOMEN AND THEIR PERSONAL PHYSICIANS FOR THE PERFORMANCE OF ABORTIONS

The Court of Appeals adjudicated the restrictions on the use of public funds, public facilities, and public employees to perform or assist an abortion in precise harmony with this Court's holdings in *Maher v. Roe*, 432 U.S. 464 (1977), *Poelker v. Doe*, 432 U.S. 519 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980). Those cases held that the Constitution does not require the government to expend public funds to pay for abortions. Thus, in *Poelker*, where an indigent woman challenged a city policy of not allowing abortions to be performed in city-owned hospitals, this Court said:

> For the reasons set forth in our opinion in . . . [*Maher*] we find no constitutional violation by the city of St. Loui in electing, as a policy choice, to provide *publicly financed* hospital services for childbirth without providing corresponding services for nontherapeutic abortions.

432 U.S. at 521 (emphasis added).[12] Accordingly, the Court of Appeals upheld the Act's ban on the use of public funds for the purpose of performing or assisting an abortion. J.S. at A82; 851 F.2d at 1084.

Neither *Maher*, *Poelker*, nor *Harris*, however, authorizes the Act's ban on the use of public facilities or employees for the performance of abortions. These aspects of the Act bar access by women and their doctors to all facilities and employees that meet a broad definition of "public,"[13] even when, as here, no public funds are involved in the actual performance of, or assistance in, the procedures. J.S. at A76 n.14; 851 F.2d at 1082 n.14.

In *Maher*, this Court reasoned that a decision on allocation of funds was constitutional, because it "places no obstacles . . . in the pregnant woman's path to an abortion." 432 U.S. at 474. As the Court of Appeals recognized, the facilities and employees bar here is just such an obstacle:

> To prevent access to a public facility does more than demonstrate a political choice in favor of childbirth; it clearly narrows and in some cases forecloses the *availability* of abortion to women.
>
> . . . .
>
> [S]uch a prohibition could prevent a woman's chosen doctor from performing an abortion because of his unprivileged status at other hospitals or because a private hospital

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12 Although the city policy barred paying as well as non-paying abortion patients, *Poelker* dealt with the policy as it applied to the plaintiff, an indigent woman seeking a publicly-funded abortion. This Court confirmed this point when it said the issue was "identical in principle" to that decided the same day in the companion case of *Maher v. Roe*, 432 U.S. 464 (1977), which dealt with a state's refusal to provide Medicaid benefits for abortions. *Poelker*, 432 U.S. at 521.

13 Mo. Rev. Stat. §§ 188.200 (1) and (2); J.S. at A90. This definition includes Truman Medical Center in Kansas City, Missouri, a hospital performing 97% of all post-fifteen week in-hospital abortions in Missouri. J.S. at A51 n.57; 662 F. Supp at 428 n.57.

> adopted a similar anti-abortion stance. Such a rule could increase the cost of obtaining an abortion and delay the timing of it as well.[14]

J.S. at A75-76; 851 F.2d at 1081 (emphasis added). *Cf. Doe v. Bolton*, 410 U.S. 179, 193-95 (1973); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. at 433-39 (prohibiting abortions from being performed in non-hospital facilities limits their availability).

There is a clear line between the right of a state, as recognized in *Maher*, *Poelker*, and *McRae*, to restrict funds from being used to finance abortions, and the right of a woman to be free of state-imposed obstacles on access to an abortion in a facility falling within the Act's broad definition of "public." By upholding the Act's public funds restriction while striking down the Act's public facilities and public employees restrictions, the Court of Appeals adhered firmly to that line.

This Court has already twice denied review of this issue in a series of cases arising out of the Eighth Circuit. *Nyberg v. City of Virginia, Minnesota*, 495 F.2d 1342 (8th Cir.), *appeal dismissed, cert. denied*, 419 U.S. 891 (1974); *motion to vacate injunction denied*, 667 F.2d 754 (8th Cir. 1982), *appeal dismissed, cert. denied*, 462 U.S. 1125 (1983). The second series of *Nyberg* decisions arose out of an attempt by the *Nyberg* defendant to vacate, in light of *Poelker*, an injunction against its policy of barring abortions in a city hospital. The Eighth Circuit Court of Appeals refused to lift that injunction on the same basis that it had invalidated the Missouri Act. *Nyberg*, 667 F.2d 754. This Court considered that issue unworthy of review then, 462 U.S. 1125, and nothing has changed to render it worthy of review now. The judgment of the Court of Appeals should be affirmed.

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14 The State does not dispute this conclusion.

V. NO CASE OR CONTROVERSY REMAINS BETWEEN THE PLAINTIFFS AND THE STATE WITH RESPECT TO MO. REV. STAT. § 188.205, WHICH MAKES IT UNLAWFUL FOR PUBLIC FUNDS TO BE USED FOR THE PURPOSE OF ENCOURAGING OR COUNSELING A WOMAN TO HAVE AN ABORTION; IF A CASE OR CONTROVERSY DOES EXIST, THEN THE COURT OF APPEALS' JUDGMENT SHOULD BE SUMMARILY AFFIRMED.

The Act contains restrictions on counseling or encouraging a woman to have an abortion that apply to public funds (§ 188.205), public employees (§ 188.210), and public facilities (§ 188.215). Plaintiffs, who include three physicians who fit the Act's definition of "public employees" and who practice also as private physicians in "public facilities," challenged all three restrictions as violating their rights as well as their patients' rights. All three restrictions were considered and invalidated together by the lower courts. *See, e.g.*, J.S. at A66-73; 851 F.2d at 1077-80.

The State has not appealed the Court of Appeals' judgment that the public employees and public facilities restrictions are unconstitutional. It has appealed only the public funds restriction, and argues that "§ 188.205 does not implicate the First Amendment rights of any person. Section 188.205 merely directs officials not to expend public funds under their control . . . . The statute . . . does not forbid anyone from discussing the subject of abortion." J.S. at 24-25.

Therefore, the public employees and public facilities rulings of the Court of Appeals—rulings the State has not appealed—protect the plaintiffs and their patients. While plaintiffs are not prepared to agree that the public funds restriction "does not implicate the First Amendment rights of any person," *id.*, plaintiffs are not aware of any circumstance where the restriction will raise either First or Fourteenth Amendment concerns which are not already settled by the Court of Appeals' public employees and public facilities rulings. Therefore, on the record in this case, there is no longer a case or controversy between

plaintiffs and the State.[15] Accordingly, plaintiffs suggest that this Court vacate the judgment of the Court of Appeals as to the unconstitutionality of the public funds restriction on counseling or encouraging, and remand that issue for further proceedings in light of the State's decision not to defend further the public employees and public facilities restrictions on counseling and encouraging, and in light of plaintiffs' suggestion that a case or controversy no longer exists.

Should this Court believe that a case or controversy nonetheless exists, then the judgment of the Court of Appeals should be summarily affirmed because a restriction on counseling or encouraging is a classically vague and viewpoint discriminatory restriction on speech in violation of the First Amendment, and also violates the repeatedly recognized Fourteenth Amendment right of a woman to choose abortion in consultation with her physician.

Vagueness. The State does not dispute the Court of Appeals' finding that the "encouraging or counseling" ban, read literally, fails to give fair notice of what speech relating to abortion will or will not fall within the zone of proscribed conduct.[16] As

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15 The Solicitor General urges plenary review of this appeal because of what he believes are its implications for two federal programs where there are restrictions on counseling for or performance of abortions. His concerns are unfounded. There is no longer a case or controversy about counseling restrictions tied to public funds; and the Court of Appeals upheld the public funds restriction on performance of abortions. *See supra* note 5. *See also* Section IV, *supra* p. 9.

16 The State argues that the Court of Appeals should have accepted its interpretation of the Act as reaching only "affirmative advocacy." This suggestion, however, ignores the basic principle that it is not the function of the federal courts to adopt narrowing constructions of state laws unless they are reasonable and readily apparent from the language itself, *see Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972), or, are "authoritative" narrowing constructions rendered by state courts or enforcement agencies. *See Kolender v. Lawson*, 461 U.S. 352, 355 (1983). The Court of Appeals found that the State's narrowing construction was not readily apparent, *see* J.S. at A68-69 and

the Court of Appeals said about the word "counsel," it is "fraught with ambiguity; its range is incapable of objective measurement."

> In such circumstances, the threat to the exercise of constitutionally protected rights is tangible; possible targets of the statute are chilled into avoiding even speech that is normally afforded the utmost protection under the Constitution.

J.S. at A68; 851 F.2d at 1078.[17] *See also Baggett v. Bullitt*, 377 U.S. 360, 366-67 (1964).

Viewpoint Discrimination. Judge Arnold, concurring in the result reached by the other two members of the Court of Appeals panel, said that the Act, in banning speech which encourages or counsels a woman to have an abortion, while providing no bar to speech which discourages abortion or counsels against it, "sharply discriminate[s] between kinds of speech on the basis of their viewpoint," and is therefore "flatly inconsistent with the First Amendment." J.S. at A83; 851 F.2d at 1085.

As this Court said in *City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the prohibition on viewpoint discrimination is absolute:

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n.10; 851 F.2d at 1078-79 and n.10, and the Attorney General's self-serving statement made in the context of this litigation is not an "authoritative" construction: it does not bind a state court or an agency which hears actions to enforce the statute.

17 The Court of Appeals cited evidence on the record that the Director of a facility whose activities would be immediately affected has already directed his staff not to make " 'any. . . comment relative to abortion.' " J.S. at A69 n.11; 851 F.2d at 1078 n.11. In addition, it cited testimony the District Court heard from a physician who is the director of the perinatology service at Truman Medical Center, and specializes in counseling women with high risk pregnancies, that the statutory language would leave him uncertain how to distinguish between lawful and unlawful discussions with women about abortions necessary to preserve their health. J.S. at A71 n.12; 851 F.2d at 1079-80 n.12, citing 662 F. Supp. at 425-26.

> It has been clear since this Court's earliest decisions concerning the freedom of speech that the state may sometimes curtail speech when necessary to advance a significant and legitimate state interest . . . . [T]here are some purported interests—such as a desire to suppress support for a minority party or an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas—that are so plainly illegitimate that they would immediately invalidate the rule. The general principle that has emerged from this line of cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.

Id. at 804 (citations omitted).

The fact that the viewpoint discrimination involves only the use of public funds creates no exception to this absolute ban. Thus, in *FCC v. League of Women Voters*, 468 U.S. 364, 383-84 (1984), when this Court struck down a ban on editorializing by publicly-funded radio stations on the basis that it was a "regulation of speech . . . motivated by nothing more than a desire to curtail expression of a particular point of view," even the dissent noted:

> This is not to say that the Government may attach *any* condition to its largess; it is only to say that when the Government is simply exercising its power to allocate its own public funds, we need only find that the condition imposed has a rational relationship to Congress' purpose in providing the subsidy and that it is not primarily 'aimed at the suppression of dangerous ideas.'

Id. at 407 (Rehnquist, J., dissenting).

Fourteenth Amendment Violation. This Court has " 'stressed repeatedly the central role of the physician . . . in consulting with the woman about whether or not to have an abortion.' " *City of Akron*, 462 U.S. at 447 (quoting *Colautti v. Franklin*, 439 U.S. at 387). As the Court of Appeals recognized, the restriction on counseling or encouraging is "an

obstacle in the path of women seeking full and uncensored medical advice about alternatives to childbirth." J.S. at A72; 851 F.2d at 1080. It is a textbook example of the "state medicine" condemned in *Thornburgh*, 476 U.S. at 763, and thus violates the Fourteenth Amendment.

VI. *ROE V. WADE* SHOULD NOT BE RECONSIDERED

The State asserts that this appeal presents the question of whether *Roe v. Wade*, 410 U.S. 113 (1973), should be reconsidered. J.S. at 11. The State offers little support for requesting this extraordinary relief other than its subsequent assertion that if the provisions of the Act involved in this appeal "are unconstitutional under *Roe v. Wade* and its progeny as the Court below maintains, . . . *Roe v. Wade* should itself be reconsidered." J.S. at 11. The Solicitor General's brief *amicus curiae* also wistfully opines that, "if the Court is prepared to reconsider *Roe v. Wade*, this case presents an appropriate opportunity for doing so." Brief For The United States As *Amicus Curiae* at 12.[18]

In *City of Akron*, this Court was also presented with arguments that *Roe* "erred in interpreting the Constitution." 462 U.S. at 419. This Court rejected those arguments, and "reaffirm[ed] *Roe v. Wade*." *Akron*, 462 U.S. at 420. In doing so, the Court enumerated the "especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe v. Wade*," as follows:

> That case was considered with special care. It was first argued during the 1971 Term, and reargued—with exten-

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18 With his brief *amicus curiae*, the Solicitor General submitted a copy of his previous *amicus* brief, filed in *Thornburgh*, 476 U.S. 747, setting forth his views on this issue. Plaintiffs call to the Court's attention that these views were directly answered in a brief *amici curiae* filed in *Thornburgh* by eighty-one members of Congress. The views of the Solicitor General, expressed in his *Thornburgh* brief, should only be considered here if, at the same time, the answering views are also considered.

More significant, of course, is the fact, as pointed out above, that this Court has rejected the Solicitor General's views. *Thornburgh*, 476 U.S. at 759.

> sive briefing—the following Term. The decision was joined by the Chief Justice and six other Justices. Since *Roe* was decided in January 1973, the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy. *See Connecticut v. Menillo*, 423 U.S. 9 (1975); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Beal v. Doe*, 432 U.S 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Harris v. McRae*, 448 U.S. 297 (1980); *H.L. v. Matheson*, 450 U.S. 398 (1981).

462 U.S. at 420 n.1.

Again, in *Thornburgh*, the Solicitor General, among others, urged this Court to overrule *Roe v. Wade*. But the *Thornburgh* Court held: "[a]gain today, we reaffirm the general principles laid down in *Roe* and in *Akron*." 476 U.S. at 759. In doing do, this Court noted that "[t]he constitutional principles that led this Court to its decisions in 1973 still provide the compelling reason for recognizing the constitutional dimensions of a woman's right to decide whether to end her pregnancy." *Id.*

Neither the State nor the Solicitor General has offered anything new or different to justify reconsidering what this Court "considered with special care" in 1973, and has explicitly reaffirmed many times since then. Moreover, as outlined above, the issues raised by the State on this appeal hardly call into question the settled constitutional underpinnings of the decision below. " '[I]t should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.' " *Thornburgh*, 476 U.S. at 759 (quoting *Brown v. Board of Education*, 349 U.S 294, 300 (1955) (citations omitted)).

The larger implications of the State's and *amicus curiae's* suggestions should not be overlooked. Turning back the clock fifteen years to a time when the States were free to criminalize abortion would reinstitute the untold misery and deaths of

thousands of women from illegal operations and reverse startling improvements which the legalization of abortion has made in both maternal and infant mortality and morbidity. Legal, safe abortion is a choice now exercised by one of every four pregnant women in the United States, including half a million teenagers, women seeking to break the cycle of poverty through control of their own reproduction and family size, victims of rape, incest, AIDS, and drug abuse, and women whose fetuses are afflicted with serious genetic and congenital disorders. These benefits to human health and welfare have generated support for the principles of *Roe v. Wade* from national medical and public health organizations. Courts in other countries have cited *Roe v. Wade* when lifting restrictive laws within their own jurisdictions. *See, e.g., Morgentaler v. Her Majesty The Queen*, 1 S.C.R. 30, 44 D.L.R.4th 385 (Canada S. Ct. 1988). The State and the Solicitor General have offered no excuse or justification for such an upheaval of settled legal principles. Their suggestion should be rejected.

CONCLUSION

For all the foregoing reasons, the judgment of the Court of Appeals should be affirmed with respect to Mo. Rev. Stat. §§ 1.205.1 (1) and (2), 188.029 and those portions of §§ 188.210 and 188.215 which forbid the performance of abortion by public employees in public facilities. Alternatively, this case should be remanded as to §§ 1.205.1 (1) and (2) for consideration of state law grounds to support the judgment. The judgment with respect to § 188.205, in so far as it relates to the expenditure of public funds to encourage or counsel abortion, should be remanded for further proceedings in light of plaintiffs' suggestion of the absence of a case or controversy, or alternatively, affirmed.

Respectfully submitted,

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