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Amici for Appellees: Brief for Bioethicists for Privacy as Amicus Curiae Supporting Appelles Brief for Bioethicists for Privacy as Amicus Curiae Supporting Appellees

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AMICI FOR APPELLEES

Brief For Bioethicists For Privacy as *Amicus Curiae* Supporting Appellees†

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Amicus is an ad hoc group of 57 philosophers, theologians, attorneys and physicians . . . who teach medical ethics to medical students and physicians. The members believe that permitting competent adults to make important, personal medical decisions in consultation with their physician is a fundamental principle of medical ethics, and that the doctor-patient relationship deserves the constitutional protection the Court has afforded it under the right of privacy.

I. THE CONSTITUTIONAL RIGHT OF PRIVACY IS A FUNDAMENTAL RIGHT THAT PROTECTS MEDICAL DECISIONMAKING

In *Griswold v. Connecticut*,[1] the Court, in striking down a state statute forbidding married couples from using contraceptives, stated, "[w]e deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system."[2] In explaining this fundamental constitutional right of privacy the Court recognized that there are decisions that are so personal, so private, and that so profoundly affect the individuals who must live with the consequences, that the state has no power to interfere in those decisions, absent a compelling interest. Since *Griswold*, the Court has applied the right of privacy

† This is a summary of the "Brief For Bioethicists For Privacy As *Amicus Curiae* Supporting Appellees." The brief may be found at Congressional Information Service Microfiche, United States Supreme Court Records and Briefs, *Webster v. Reproductive Health Services*, Card No. 42.

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[1] 381 U.S. 479 (1965).

[2] *Id.* at 486.

to protect an unmarried person's right to decide "whether to bear or beget a child,"[3] and decisions whether or not to terminate a pregnancy.[4]

When the State of Missouri and the United States as *amicus curiae* ask the Court to overrule *Roe v. Wade*, they are asking that the most private decision that can be made by any individual be removed from that affected individual and turned over to a state legislature. We submit that the Court should not take such action.

In *Griswold*, the Court recognized that the private relationship between a husband and wife prevented the state from intruding on their contraceptive decisions. In *Roe*, the Court recognized the privacy of the doctor-patient relationship. While *Roe* further defined a woman's right to make reproductive decisions, it also recognized that the pregnant woman required the advice and counsel of a licensed physician. Thus, in *Roe* the Court concluded that during the first trimester "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated."[5] Later the Court stated that during the first trimester "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician."[6] The Court also pointed out that its decision "vindicates the right of the physician to administer medical treatment according to his professional judgment" up until the point that compelling state interests justify intervention.[7] Finally, the Court pointed out that the abortion decision is "inherently, and primarily, a medical decision" for which "basic responsibility" rests with the physician.[8]

Thus, as *Griswold* protected the privacy of the marital relationship, *Roe* protected the privacy of the physician-patient relationship. "The right of privacy has no more conspicuous place than in the physician-patient relationship . . . ."[9] In this relationship, both the physician and the pregnant woman must agree that the termination of pregnancy is appropriate in order to have this medical procedure performed. Whether abortion is an appropriate option for a particular patient is, by definition, a decision that must be made by the doctor and the patient in each case. It is the right to make particularized personal decisions that is at the core of *Roe* and its progeny, and it is this right that Missouri and the United States desire to destroy.

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[3] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).
[4] Roe v. Wade, 410 U.S. 113 (1973).
[5] *Id.* at 163.
[6] *Id.* at 164.
[7] *Id.* at 165-66.
[8] *Id.* at 166.
[9] Doe v. Bolton, 410 U.S. 179, 219 (1973) (Douglas, J., concurring).

In *Doe v. Bolton*,[10] the Court found that the restrictions Georgia had placed on abortion violated both the patient's and the physician's freedom. For example, Georgia's requirement that two other physicians must agree with a woman's personal physician's judgment that an abortion is appropriate, and that a hospital committee of at least three other doctors must concur in the abortion decision, violated the privacy protection of both the doctor and patient. In the Court's words, "[t]he woman's right to receive medical care in accordance with her licensed physician's best judgment and the physician's right to administer it are substantially limited by this statutorily imposed overview."[11]

Since *Roe*, the Court has reviewed a large body of legislation designed to deny patients and physicians their right to make personal and professional judgments about how best to deal with a patient's pregnancy. As even the United States concedes, "*Roe* and its progeny have resolved most of the central questions about the permissable scope of abortion regulation . . . ."[12] Through sixteen years of constitutional adjudication the Court has provided lawmakers with a consistent and coherent set of constitutional guidelines in this area. Laws that recognized and protected the physician-patient relationship have been upheld, and laws designed to weaken or destroy that decisionmaking unit have been struck down.

Thus, in *Planned Parenthood of Missouri v. Danforth*,[13] the Court readily upheld a general informed consent provision, even as it applied to the first trimester, because not only did it not burden the abortion decision, it enhanced the physician-patient relationship. On the other hand, the Court has struck down provisions requiring physicians to recite a "parade of horribles" because it intruded "upon the discretion of the pregnant woman's physician."[14] Under this statute every physician was made an agent of the state who was required to recite the state's anti-abortion message to every patient, regardless of her individual need or desire.

A similar statute was involved in the Court's most recent case on abortion law. The Court reiterated that forcing a physician to provide prescribed information "makes him or her in effect an agent of the state in treating the woman and places his or her imprimatur upon both the materials and the list."[15] The Court summarized the situaton aptly:

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[10] *Id.*

[11] *Id.* at 197.

[12] Brief for the United States as *Amicus Curiae* Supporting Appellants at 21 n.15, Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989).

[13] 428 U.S. 52 (1976).

[14] City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 445 (1983).

[15] Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 763 (1986).

"All this is, or comes close to being, state medicine imposed upon the woman, not the professional medical guidance she seeks, and it officially structures — as it obviously was intended to do — the dialogue between the woman and her physician."[16]

The controversy that rages over abortion is not resolvable through reason, logic or majority vote. It is an emotional issue governed by one's background, religious upbringing and moral beliefs. The post-*Roe* state statutes were not health or safety laws, but rather means to control physicians and their patients so that a particular legislature's philosophical position could be imposed on pregnant women and their physicians. The Court in *Roe* recognized this problem when it pointed out that there is great diversity of opinion among philosophers, theologians and scientists about when life begins. It further recognized that the judiciary is certainly in no position to resolve this issue.[17] This is equally true of legislatures. As a result, the Court concluded that "we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake."[18]

The pre-*Roe* world to which Missouri and the United States would like us to return is a world in which the state would have essentially absolute discretion to permit or outlaw abortions. Thus, women who were pregnant as a result of rape could be required to maintain their pregnancies and be forced to go through labor and delivery of the rapist's unwanted child. Women who would become blind, paralyzed or suffer other grave injury as a result of the continuation of their pregnancy could be compelled by state legislatures to suffer such harm. Parents who, as a result of genetic counseling and testing, know that their child will be born with a genetic disease that will cause it to die a slow, painful death, could be required to carry that pregnancy to term. These examples are not based on wild speculation about what the state of the law *might be* if *Roe* were overturned — it is based on what the state of the law *actually was* at the time of *Roe*. Prior to *Roe*, abortions were outlawed in a majority of cases unless the *life* (not health) of the pregnant woman was jeopardized by the continuation of the pregnancy.[19]

The abortion cases are not just about abortion, but about the very basis of what it means to be a free person in a free society. If the state can make reproductive decisions on behalf of any individual, what decision is it precluded from making? If legislatures are allowed to impose without restraint value judgments that deeply and directly affect individual citizens, what is left of personal freedom? Without the right of

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[16] *Id.*

[17] *Roe*, 410 U.S. at 159.

[18] *Id.* at 162.

[19] *Id.* at 117-18.

privacy, what constitutional principle would prevent states from reimposing restrictions on contraceptive distribution and use, since unfertilized ova constitute *potential* human life?[20] Indeed, because both Missouri and the United States argue that the state should be free to determine when life begins, a state could choose any point in time it pleases — conception, live birth, the time the ovum develops or three years of age. There is no scientific answer to this question; any value judgment on this point is as "rational" as any other. However, just as the Court found that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority,"[21] it should also conclude that one's constitutional rights are not destroyed magically because of any arbitrarily state-defined point at which "life begins."

II. THE DOCTOR-PATIENT RELATIONSHIP CONCERNS PRIVATE MATTERS AND IS PROTECTED BY THE RIGHT OF PRIVACY

The central question before the Court was whether personal medical care decisions should be made by patients and their physicians, or by the state. The doctor-patient relationship is highly valued in our society. The importance of the doctor-patient relationship to individual citizens increases in proportion to advances in medical science. These advances have made the consequences of many medical interventions increasingly dramatic in the lives and deaths of individual citizens and their families. The importance of who makes the treatment decision increases as the complexity of the options and the severity of the impact of treatment on the individual patient increases. *Roe* properly took full account of changing medical science. The central premise of *Roe* and *Doe*, that inherently personal medical decisions, including those involving abortion, should be made in the context of a doctor-patient relationship protected from governmental dictates, remains sound jurisprudence.

It is in the informed consent context, and its respect both for the rights of individual patients and the integrity of the medical profession, that *Roe*'s placement of the abortion decision with "the woman and her physician" is properly understood. Neither party has total or arbitrary power, but both must agree and consider the decision appropriate and reasonable before it can be acted on. *Roe* properly assumed that:

> "states would subject the woman's wishes to interpersonal testing within a clinical relationship, by treating abortion as a

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[20] Doe v. Bolton, 410 U.S. 179, 217 (1973) (Douglas, J., concurring).

[21] Planned Parenthood Ass'n v. Danforth, 428 U.S. 52, 74 (1976).

> medical procedure. . . . A medical decision, at its best, is made between a patient and a doctor who acts pursuant to professional values, ones developed out of clinical encounters and subjected to peer criticism within a regimen of professional education, research, and ethical study."[22]

Of course, such an interpersonal dialogue can only take place in an atmosphere in which the physician is free to exercise his or her best professional judgment and discuss with a patient all of the information, including treatment options, relevant to the patient's decision. Section 188.205 of the Missouri statute[23] before the Court, however, would prohibit such dialogue. That section 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."[24] The term "encourage or counsel" is so vague that reasonable people would be unable to distinguish between lawful and unlawful behavior. It does not merely prohibit coercing a woman to have an abortion. Rather, the state uses words that describe the personal discussions between a woman and her physician about the management of her pregnancy. Other courts have agreed that this language prohibits physicians from talking to their patients.

In section 188.210, Missouri attempted to make it "unlawful" for a publicly-employed physician or other health care personnel to "counsel or encourage a woman to have an abortion not necessary to save her life." In this appeal, Missouri abandoned any defense of this direct prohibition against counseling patients by physicians. Instead Missouri sought to achieve the same result by different means in section 188.205. This section certainly prohibits any publicly-employed physician from counseling or encouraging abortions because it is unlawful to expend public funds for that purpose, and the physician's salary is derived from state funds. Thus, its impact is identical with the second sentence of section 188.210. In fact this section has an even wider impact than 188.210 because it applies not just to public employees, but to anyone who receives state funds.

The statute both silences physicians and forces patients to remain ignorant, erecting a state-created barrier between a woman and her physician. Under the statute, for example, a physician, public or private, who receives state funds would be unable to honestly respond to a pregnant woman whose health is endangered by the pregnancy when

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[22] R. GOLDSTEIN, *Mother-Love and Abortion: A Legal Interpretation* 81 (1988); *see also* A. JONSEN, M. SEIGLER & W. WINSLADE, CLINICAL ETHICS 62 (2d ed. 1986).

[23] MO. ANN. STAT. § 188.205 (Vernon Supp. 1989).

[24] *See id.*

she asks, "Doctor, what do you think I should do?", if his honest answer would be, "I would recommend you have an abortion."

By attempting to silence certain physicians, Missouri seeks to prevent them from performing their ethical and legal obligations to their patients consistent with existing medical science, and thereby deprive patients of information they need in order to decide whether to have a child. In this regard the state of Missouri promotes ignorance, viewing an uninformed patient as a desirable result. There are medical conditions for which abortion is one of the reasonable medical procedures that should be discussed. For example, Tay-Sachs disease is a genetic disorder that occurs in one in four pregnancies when both husband and wife are carriers of the gene. The disease "is characterized by motor weakness, usually beginning between three and six months of age. . . . [D]eafness, blindness, convulsions, and generalized spasticity are usually in evidence by 18 months of age. . . . [T]he child develops a state of decerebrate rigidity, with death usually resulting . . . by three years of age. No specific therapy for Tay-Sachs disease is available."[25] As abortion is the *only* way to prevent this tragedy, a physician who informs a couple of the existence of prenatal testing to detect it, and discusses the option of abortion with them, would be violating the proscription against "counseling or encouraging" abortion. Without the option of prenatal screening, many at-risk couples would simply choose to abort all pregnancies. "In fact, since more than 95% of all prenatal diagnostic tests are negative, the overwhelming majority of such testing helps lead to the birth of children that might not otherwise have been born."[26] Thus the irony is that any law that inhibits physicians from counseling pregnant women about the availability of genetic testing and the option of abortion may actually increase the number of abortions performed.

Because section 188.210 prohibits publicly-employed physicians from *performing* abortions, it is essential that they be permitted to refer a patient in need of an abortion to a physician who is willing and able to do so. Yet, such a medically appropriate referral would violate the proscription against encouraging and counseling, because abortion is a probable outcome of the referral. At the same time, failure to refer the patient to the second physician would be negligent medical practice which could harm the patient.

A consistent series of decisions since *Roe v. Wade* permit individuals to refuse various medical interventions.[27] Many of these decisions are

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[25] S. ELIAS & G. ANNAS, REPRODUCTIVE GENETICS AND THE LAW 63 (1987) and sources cited therein.

[26] *Id.* at 83.

[27] *See, e.g., In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976); *In re*

based in part on the constitutional right of privacy which enables individuals to make important personal medical decisions for themselves. In a widely cited case, for example, the New Jersey Supreme Court decided that, were she competent, Karen Ann Quinlan, a young woman in a permanent coma, would have the authority under the constitutional right of privacy to decide to have the mechanical ventilator that sustained her life removed.[28] Because she was incompetent, the court ruled that her parents could act on her behalf. In *Quinlan*, as in many similar cases decided since, the state argued that it, not the patient, should make the decision whether or not to employ an intrusive, and often futile, medical intervention.

Without the shield of the constitutional right of privacy, citizens would have no protection from such state interventions in private medical matters, because states would be free to legislate virtually any restrictions on individual treatment decisions that even a bare majority of legislators wished. This is particularly important today when new forms of medical treatment and knowledge require patients to make controversial choices. Since 1973, physicians have learned to fertilize human eggs in a petri dish and transfer the resulting embryo to the wife for gestation, to accurately detect severe fetal handicaps such as anencephaly and neural tube defects, and to maintain patients who cannot breath on their own in a permanent coma for months and even years.

We have already witnessed examples of how state power can be misused in a way that increases the suffering of its citizens when the right to make personal medical decisions is not treated as a fundamental constitutional right. In one example, a competent pregnant woman who was dying of cancer was forced to endure a cesarean section against her will, and that of her family and physicians, by a judge who thought that the state's interest in potential human life outweighed any interest she might have in refusing surgical intervention.[29] After the forced surgery — which was, in effect, a forced abortion of a non-viable fetus — both mother and child died.

In a second example, with facts virtually identical to those in *Quinlan*, a Missouri trial court found that it had sufficient evidence, based on the patient's prior statements and her family's testimony, that the patient would not wish to receive treatment if she were in a permanent coma. The court ruled that treatment should therefore be stopped in

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Storar, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266 (1981); Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977).

[28] *In re Quinlan*, 70 N.J. 10 at 39, 355 A.2d 647 at 663.

[29] *In re* A. C., 533 A.2d 611 (App. D.C. 1987), *vacated*, 539 A.2d 203 (D.C. 1988).

accordance with her "constitutionally guaranteed liberty."[30] The Missouri Supreme Court overruled the trial court's finding and, disregarding the patient's previous statements and her parent's wishes, turned over her medical treatment decisions to employees of the state. This means that for the rest of her life the people who know and love her most are relegated to the role of passive observers. The Missouri Supreme Court's decision was based in part on its reading of the preamble of the abortion statute at issue in this case.

These examples demonstrate that state interference is not hypothetical. State medical treatment decisions are at best arbitrary and impersonal, and at worst cruelly at odds with a patient's wishes and well-being. This leads inexorably to the conclusion that personal medical decisions should be made by those who are most affected by them, in the context of a constitutionally protected doctor-patient relationship.

If the state is given absolute control of a decision as personal and private as the decision whether or not to continue a pregnancy, based on its interest in "potential human life," then it could certainly control these other decisions. If the Court adopts such a statist notion of decisionmaking, then the value of "personhood" will have been significantly demeaned for all citizens. Having control over these most important and private decisions is an essential element not only of freedom, but of being a person. As the Massachusetts Supreme Judicial Court put it: "The constitutional right to privacy, as we conceive it, is an expression of the sanctity of individual free choice and self-determination as fundamental constituents of life."[31]

Missouri does not claim that its power is limited to prohibiting abortion. Its sole interest is in protecting *potential* life, rather than *existing* human life. What is most remarkable about virtually all of the briefs submitted to the Court on behalf of Missouri is that they imply that the United States is composed exclusively of state governments and fetuses; women and their physicians are treated as almost irrelevant, and the relationship between a pregnant woman and her physician is ignored.

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[30] Cruzan v. Harmon, 760 S.W.2d 408 (Mo. 1988), *cert. granted sub nom.* Cruzan v. Director of Missouri Dep't of Health, 109 S. Ct. 3240 (U.S. July 3, 1989) (No. 88-1503).

[31] *Saikewicz*, 373 Mass. at 742, 370 N.E.2d at 426.