In the

# Supreme Court of the United States

Thomas E. Singleton, etc.,

Petitioner,

v.

George J. L. Wulff, Jr., et al.,

Respondents.

No. 74-1393





Washington, D. C.
March 23, 1976

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| THOMAS E. SINGLETON, etc., Petitioner, v. GEORGE J. L. WULFF, JR., et al., Respondents. | No. 74-1393 |

Washington, D. C.,

Tuesday, March 23, 1976.

The above-entitled matter came on for argument at 1:15 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

MICHAEL L. BIOCOURT, ESQ., Assistant Attorney General of Missouri, Supreme Court Building, Jefferson City, Missouri 65101; on behalf of the Petitioner.

FRANK SUSMAN, ESQ., Susman, Schermer, Willer & Rimmel, 7733 Forsyth Boulevard, Suite 1100, St. Louis, Missouri 63105; on behalf of the Respondents.

# C O N T E N T S



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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in Singleton against Wulff, 1393.

Mr. Boicourt, you may proceed. You may raise that lectern if you'd like, if it would be more convenient.

ORAL ARGUMENT OF MICHAEL L. BOICOURT, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BOICOURT: That's fine, Your Honor.

Mr. Chief Justice and may it please the Court:

This matter comes on for hearing upon the grant by the Court of a writ of certiorari to the United States Court of Appeals for the Eighth Circuit, limited to two specific questions.

The first issue is whether the respondents, who are two St. Louis physicians licensed to practice medicine in Missouri, have standing to challenge in the federal courts the constitutionality of a Missouri State statute, which provides that benefit payments may be made to eligible needy persons for medical assistance, including medical assistance for family planning services; but that such family services shall not include abortions, unless same are medically indicated.

The second issue over which the Court has accepted certiorari is where the Eighth Circuit had jurisdiction to take under consideration and determine the constitutionality of a State statute on appeal from an order of the district court

dismissing a complaint for lack of standing.

A three-judge panel of the United States District Court for the Eastern District of Missouri dismissed Count II, which we are now concerned with -- the other two Counts not having been appealed to the Court of Appeals -- a respondent's complaint, on the basis that although the issue itself may have been judiciable, the two physicians who brought the lawsuit were not the proper parties to allege in the federal courts that this particular statute was unconstitutional.

This order granting the petitioner's motion to dismiss was appealed to the United States Court of Appeals for the Eighth Circuit.

The Eighth Circuit Court found, first, that the district court was incorrect in its decision on standing and reversed the action of the district court in finding that these two physicians did not have standing.

But the court below did not stop at that point. The court went on to determine that it had jurisdiction to reach the merits of the respondent's constitutional claim on the basis that the State statute challenge was so obviously constitutional as not to require remand.

After the court then took up the merits, the constitutional merits of the original complaint, the lower court ruled that this particular statute was facially unconstitutional, in violation of the equal protection clause.

Count II, with which we're concerned, of the plaintiff's complaint, which was filed in the Eastern District of Missouri, included all necessary allegations in order to invoke the three-judge district court statute passed by Congress.

The allegation was that the language in the Missouri statute that medical benefit payments will not be made to eligible needy persons for family planning services for abortions, unless such abortions are medically indicated, was unconstitutional.

Respondents purported to bring their action on their own behalf and on behalf of an entire class of duly licensed physicians in Missouri presently performing or desiring to perform abortions upon women, minors and adults, who are eligible for Missouri State Medicaid assistance.

In response to the complaint, petitioner filed a motion to dismiss which, among other things, raised the point that the respondent-physicians did not have a sufficient standing to adjudicate the constitutionality of this particular statute.

The only factual matters which went on the record before the district court ruled on that motion to dismiss was a limited number of answers to interrogatories by the petitioner, in which he noted that he knew of no official interpretation of the challenged language and that no medically

indicated abortion payments had been made over a period of three months. And affidavits of the doctors, attached to their suggestions in opposition to our motion to dismiss, to the effect that they were unsure as to what the statutory language meant, how it would be interpreted, and that this uncertainty as to its interpretation chilled their ability to practice medicine as they deemed most expertise.

This was the entire record on which the Court of Appeals based its decision to dismiss on the basis of standing. And that was the entire cord that went to the Eighth Circuit when the respondent doctors in this case chose to appeal that order.

QUESTION: Mr. Boicourt, does the record show whether or not the payments in question would have gone to the patient and then to the doctor, or would have gone directly to the doctor?

MR. BOICOURT: As I understand the system, Mr. Justice Rehnquist, the patient makes application for the Medicaid benefit payments, and sends that in to the State. The State then, on behalf of the patient, sends the money itself directly to the treating physician.

At the time that the Eighth Circuit took up this matter on appeal, petitioner had never filed an answer. No meaningful discovery had been conducted by either party. The record before the Eighth Circuit, pertaining to the

constitutionality of this statute consisted solely of conclusory allegations included in the original complaint in the district court.

The district court had not conducted a hearing into the constitutionality of this statute, and had made absolutely no pronouncement as to its beliefs concerning the statute's constitutional merits.

In addition, the petitioners had never had the opportunity -- the petitioner -- to present evidence to brief or to argue the constitutional claims included in the original complaint.

Nevertheless, the court below not only reversed on the issue of standing, but went on to find that it had jurisdiction to hold that the statute was facially unconstitutional.

QUESTION: Was there no reference in the oral argument to these issues?

MR. BOICOURT: In the Eighth Circuit, Your Honor, the petitioner did not brief or discuss the merits below, believing that it was an appeal solely from an order dismissing for lack of standing.

The respondents did brief rather extensively, whether or not the statute was constitutional or not. Again it would be our point that their brief and argument concerning that matter was not responsive to the purposes of the appeal.

That is, that appeal from a final order dismissing for lack of standing; not on the basis that the statute was unconstitutional.

QUESTION: Well, you were on some notice, though, I take it, that since they were the appellant, that they were at least urging the unconstitutionality of the statute before the Eighth Circuit.

MR. BOICOURT: We certainly got their brief first, and they did brief the constitutionality of the statute.

However, as I say, we did not feel that was responsive to the notice of appeal itself or to what the district court did.

If the Court should agree, on appeal, with the district court that these physicians do not have sufficient standing to adjudicate this matter, it will not be necessary, in my opinion, for the Court to reach the second issue. The respondents, in effect, will be out of court and any consideration as to the merits will then be moot.

In regard to standing, the question before the Court is not, in an abstract sense, with the Section 208.152(12), the Revised Statutes of Missouri, is or is not unconstitutional, or whether the issue of its constitutionality is a judiciable question; again in an abstract sense.

Rather, it is necessary that the respondent-physicians allege and have support in the record before the Court that they are the proper parties to litigate in the federal courts

this constitutional claim.

The only personal interest which I believe the respondents can claim is the existence of some degree of confusion as to the source of payments for abortions performed on a specific class of present and prospective patients.

And if the respondents, even with the best of intentions, are expressing only their moral indignation at the statute, or if they are trying to represent the interest of pregnant welfare women who they feel are being discriminated against by the statute, even if they are prospective patients, that is not enough for them to have standing to use the federal tribunals and to take up the dockets of the federal court to adjudicate this issue about which they have no personal interest.

I do not believe that the federal courts should become the forum for morally righteous crusades.

QUESTION: Well, don't the doctors make any claim that they would have gotten money through this plan if the section which they claim was unconstitutional were stricken, and that they didn't get the money without it?

MR. BOICOURT: The actual claim in their complaint, Your Honor, was that they did not know what the interpretation of this section was, and therefore they were deterred in the practice of medicine, not knowing whether they may or may not be paid by the State of Missouri for abortions performed on

eligible welfare recipients.

QUESTION: The thought being that if they were to be paid, they would have done --

MR. BOICOURT: Certainly the inference is made in their complaint that they would be the ultimate source of welfare moneys paid out by the State of Missouri, but for the existence of the statute.

However, in regard to whether or not they might be the ultimate recipient of Medicaid moneys paid by the State of Missouri, I still think that the traditional standing requirements arising out of Article III of the Federal Constitution requires that they be able to show a personal and direct detriment which arises out of the alleged unconstitutionality.

Now, any monetary detriment to the respondent-physicians in this case is indirect. It doesn't arise out of any alleged unconstitutionality; it arises out of the prospective decisions by patients and prospective patients regarding abortions, which decision on behalf of the patients may or may not be affected by the existence of this statute.

In other words, if this statute is to be attacked on the grounds of its unconstitutionality, and if the federal courts are to accept that attack as a justiciable question and consider it, the proper parties to adjudicate the matter are not the respondent-physicians, but, rather, they are the pregnant women who are most directly affected by the

conjecture and operation of this statute.

I think it's obvious from a reading of the multitude of cases cited in both briefs that pregnant women have certainly been able to participate in the federal court process involving abortion litigation. I think it is even more apparent that they are protected in this participation by the use of such names as Roe and Doe, to protect them from any embarrassment arising out of their supporting their constitutional right to abortion.

I think that, given the protection that this Court has found that it can give to the anonymity of women desiring to participate in abortion litigation, is certainly unnecessary for the federal courts to entertain litigation which is brought by persons not within the direct personal causation line of the statute and constitutional provisions concerned and what they desire to have be done.

In Roe and Doe, the Court determined that the constitutional right to privacy was broad enough to encompass a woman's decision, whether or not to terminate her pregnancy.

Well, that's the woman's right to privacy, that is protected by the Constitution. Certainly she can consult with a physician to assist her in exercising her decision-making process. But it's still her right which is protected by the Constitution, her privacy.

To be sure, in Doe vs. Bolton, physicians were found

to have standing to participate in the litigation, but not on the basis of a constitutional right to privacy; rather, on the basis that they were to suffer direct personal detriment from the existence of statutes under which they could be criminally prosecuted in the State courts in Georgia.

The challenged Missouri statute does not subject the physician-respondents to any criminal prosecution. The status of respondents is more closely akin, I believe, to the childless married couple in Roe vs. Wade who asserted that if the wife became pregnant in the future, they would desire an abortion; like that childless married couple, respondents may choose to perform abortions on indigent women, and those women, if eligible, may choose to apply for medical assistance as a means for providing that respondents are paid.

QUESTION: Mr. Boicourt, if you prevail here, what is likely to happen? Would we go back and start all over again with a proper plaintiff?

MR. BOICOURT: Well, that would be up to the people who are pushing the particular legislation, Your Honor. I think it is likely that they will seek out plaintiffs who are proper parties to litigate the constitutionality of the statute.

QUESTION: What do you gain, then, in the long run?

MR. BOICOURT: Well, for one thing, what we really want to gain -- that comes up under the second issue -- we

want to have a hearing on the constitutionality of the statute.

Secondly, we don't think that the State of Missouri, or the officials of the State of Missouri should be subjected in the federal courts to crusading type lawsuits, like this one is.

QUESTION: Well, isn't it --

MR. BOICOURT: It's a matter not only of gaining in this case, but in the future --

QUESTION: Isn't it going to be just as much of a crusading type of lawsuit if you have a female patient plaintiff in addition to the doctors?

MR. BOICOURT: Well, a crusading --

QUESTION: I've heard that accusation before.

MR. BOICOURT: To that extent, Your Honor, but if the State is to be, and we are, constantly subjected to lawsuits, in order to keep this to a reasonable minimum, I think that the federal courts should require that the people who bring those lawsuits satisfy the traditional standing requirements of Article III of the Federal Constitution.

QUESTION: Well, my question was premised on the event of your prevailing here. I just wondered what you were hoping to gain in the long run.

MR. BOICOURT: Well, again, Your Honor, it probably is not as much an existence of what we gain in this particular case, is that principle it stands for, that if the State is to

be sued in the federal courts, the proper parties only will be the ones who will be entertained.

QUESTION: Mr. Boicourt, while you are paused for a moment, would you help me on the procedure here again? I know you covered it, but I'm a little bit lost.

MR. BOICOURT: Yes, sir.

QUESTION: Now, what, exactly, is the posture of Counts I and III?

MR. BOICOURT: Counts I and III were also dismissed, but were not appealed.

QUESTION: Were not appealed in --

MR. BOICOURT: And the petitioner in this case was not a defendant with regard to Counts I and III.

QUESTION: Because as to the standing question, there would have appeared to have been standing for the doctors in those counts, I take it you wouldn't have --

MR. BOICOURT: They were dismissed on other grounds.

QUESTION: On other grounds.

MR. BOICOURT: Not a case of controvery in both cases.

QUESTION: I see.

MR. BOICOURT: Both federal Medicaid laws and Missouri State statutes are designed to afford optimum relief to eligible persons whose applications for Medicaid assistance is denied, or is aggrieved, or whose interest in their

application for Medicaid assistance are aggrieved in that interest, because the statutory framework provides that they have a right to seek a hearing, it specifically provides that, and that if they are not satisfied with that hearing, they have a specific right to appeal to the appropriate court.

The physicians are not in any way -- in the Federal Medicaid laws or in the State statutes which enforce Medicaid laws in Missouri, physicians are not covered, they are not covered in any manner; no mention is made of their right to participate in a hearing, or their right to object to the failure of an application for Medicaid assistance to go through.

I think it's clear that the statutory framework which Congress and the State of Missouri has created is designed on behalf of poor people.

It logically follows that the welfare recipient, the poor person, should be the one, and was intended by Congress and the Missouri Legislature to be the one, who could challenge the portion of that statutory framework which he or she found to be objectionable, which he or she believed to be unconstitutional.

Nor do the constitutional provisions under which respondents claim the statute to be unconstitutional protect the interest they assert. I think the lack of standing is very clear in light of the second portion of the test that this

Court created in the Data Processing and Barlow cases. I do not believe that the respondents' standing can be made to stand up under the zone-of-interest test.

In the first place, Roe and Doe said that the right to privacy encompassed a woman's freedom to the abortion alternative to her pregnancy. Certainly the physician who performs that pregnancy does not share that right to privacy. He may consult with her and give her assistance in making her decision, but the constitutional right to privacy which is protected by Roe and Doe cannot be said to extend to the physician.

Therefore, I do not think the respondents in this case can maintain that they are within the zone of interest protected by the due process clause and the right of privacy it includes.

The court below, when it reached the merits, found that this statute denied the equal protection clause, because it discriminated against women who chose the abortion alternative to their pregnancy.

Well, if, in fact, this statute does constitute invidious discrimination, and we do not concede that -- we'd like to have our hearing -- the people discriminated against are the poor women who want to have an abortion rather than take their pregnancy to term.

I do not think that the respondents can maintain

that they are within the zone of interest protected by the equal protection clause in that regard.

QUESTION: It's clear that the district court saw no constitutional question, is it?

MR. BOICOURT: No, I don't think that's clear at all, Your Honor. The district court, in fact, empaneled a three-judge court. If it had found no substantial constitutional question, one judge could have taken care of that.

QUESTION: I didn't get the last; the --?

MR. BOICOURT: If the judge who empaneled the three-judge court had thought --

QUESTION: How did it get to the Court of Appeals if they decided the case on a constitutional ground? The three-judge --

MR. BOICOURT: It would not have gotten to the Court of Appeals, in that case.

QUESTION: Beg pardon?

MR. BOICOURT: Excuse me. Would you please repeat your question, Mr. Chief Justice?

QUESTION: When the case first went into the district court, it went to a three-judge court, did it not?

MR. BOICOURT: Yes, Your Honor.

QUESTION: And then what did the three-judge court do?

MR. BOICOURT: They dismissed for lack of standing.

QUESTION: Well, then, that was a -- essentially the same as the action of a single district judge, was it not?

MR. BOICOURT: Under Gonzalez, it certainly was, Your Honor.

QUESTION: And so, otherwise, it couldn't have gone to the Court of Appeals in this posture, could it? It came directly here.

MR. BOICOURT: That's correct.

QUESTION: But then you pointed out the Court of Appeals immediately took on the constitutional question, which the district court did not reach.

MR. BOICOURT: Yes, Your Honor. Of course, I think---

QUESTION: But you think that their proper procedure should have been on that issue, if they were going to decide it, to send it back to the three-judge court and tell them to reach the constitutional issue?

MR. BOICOURT: Yes, Your Honor, I think it should have been remanded to the three-judge court to reach the constitutional allegations in the complaint.

I think that -- excuse me.

QUESTION: You don't give up your standing point, do you?

MR. BOICOURT: No.

QUESTION: Well, you don't have to give it up to take that position.

MR. BOICOURT: No, I'm not giving up the standing point, and I was covering the standing point first, because if -- if the Court should agree with me on the standing matter, I don't think it's necessary to consider what the Court of Appeals did with regard to reaching the merits.

I think that question does make a good transition into the second issue, which is pending before the Court today on this grant of certiorari.

To say the least, the record pending before the Eighth Circuit was a very limited one on which to reach the merits of respondents' claim that this particular statute was unconstitutional.

The case had never reached the stage in which the three-judge court -- before the three-judge court in which the petitioner would have had a chance to defend on the merits; the fact the petitioner never even had an opportunity to file an answer.

The district court had only been called upon to rule upon the procedural matters raised in our motion to dismiss. It had never considered, except perhaps reading the conclusory allegation in the complaint, the constitutional questions concerned.

28 U.S.C. 1291 provides that a court of appeals shall have jurisdiction from all final decisions of the district

courts of the United States.

Well, I respectfully submit that the only final decision before the Eighth Circuit was one dismissing a complaint for lack of standing. Because the district court certainly never considered anything other than the standing of the physicians with respect to what they did to Count II of the complaint.

When the Eighth Circuit determined that it could reach the merits, it proceeded to do so. I believe that it began to exercise original jurisdiction, which had not been conferred upon it by Congress.

Furthermore, the complaint, which raised the constitutional issues, made every allegation necessary for a three-judge district court to be empaneled; and, in fact, the complaint specifically requested that a three-judge district court be empaneled. Congress has mandated that with regard to such complaints, that in the first instance they be considered by a three-judge district court with direct appeal to the Supreme Court.

As the matter now stands, in the first instance, the constitutionality of this statute has been considered only by the Eighth Circuit. And certainly I can see nowhere in the congressional scheme of federal court jurisdiction where the Eighth Circuit has jurisdiction, to step into a matter on an issue like standing on appeal, and reach a decision on

the merits.

The Sixth Circuit was called upon to do the same thing as the Eighth Circuit has done in this case in Roe vs. Ferguson, a statute extremely similar to the statute we have here, and again the three-judge district court had not reached the question of the statute's constitutionality. The Sixth Circuit considered and rejected an argument in that case that the constitutional issue involved -- that is, the constitutionality of the statute -- had been clearly settled or resolved.

I think the Sixth Circuit correctly remanded their case to a three-judge district court, so that --

QUESTION: You think, then, that a limited grant, limited to questions one and two, the issue of the correctness of the constitutional determination is before us?

MR. BOICOURT: To this extent, Your Honor, --

QUESTION: What I'm trying to get at, may we reach and pass upon whether the court of appeals correctly decided the constitutional question?

MR. BOICOURT: No, Your Honor, I don't think you could reach that. But I think it becomes relevant because the respondents are alleging that the constitutional issue is so clear, so clearly settled by the federal courts, that there is no reason --

QUESTION: Well, if we were to disagree with the

conclusion on the constitutional question, you suggest we can't express that disagreement, but would have to send it back to the three-judge court, to let it grapple with the constitutional question first?

MR. BOICOURT: Yes, Your Honor, under the statutory scheme set up by Congress, I do think that's the case.

QUESTION: Actually, if you had sought to challenge the constitutional ruling of the court of appeals, you would have come here by appeal and not by certiorari, would you not have?

MR. BOICOURT: As I understood the statute, Your Honor, either one would have been acceptable. That although -- I could have raised on certiorari or appeal the constitutional question; but on appeal I could not have raised questions that were not of a constitutional magnitude. And there were other questions in regard to standing and their jurisdiction to reach the merits, that I was not sure about what the Court would say about reaching the constitutional magnitude.

QUESTION: So, really, the effect of the Eighth Circuit passing on the constitutional question here is that if they decided adversely to the State, the State can come here on appeal; but if they decided in favor of the State, the original plaintiff can come here only on certiorari.

MR. BOICOURT: That is correct.

QUESTION: The court of appeals did not issue an injunction, they didn't issue a declaratory judgment, they didn't issue anything, did they?

MR. BOICOURT: The court of appeals declared the statute to be unconstitutional.

QUESTION: It just said so in its opinion, it didn't issue one, a declaratory judgment as such, did it?

MR. BOICOURT: No, Your Honor, --

QUESTION: In a separate --

MR. BOICOURT: -- it did not.

QUESTION: Was anything different from the opinion filed? Was there a declaratory judgment? No. No injunction was filed.

MR. BOICOURT: That is true, Your Honor. But I don't think that we should allow the court of appeals merely by not saying in its opinion, "we hereby enjoin the State" to avoid the clear legal rule that they have only appellate jurisdiction. Because certainly the State is going to abide by a ruling on the constitutionality of one of their statutes.

QUESTION: Well, they -- as I remember, they said in their opinion that they expected you to abide by it, didn't they?

MR. BOICOURT: They certainly did.

QUESTION: That's right.

MR. BOICOURT: And I --

QUESTION: I'm not quarreling with that, but I mean it's so strange for them to take an action which, if they were a district court, they would have had to issue an injunction or a declaratory judgment. But sitting as a court of appeals, they do the same thing, but they don't -- on the other hand.

MR. BOICOURT: Exactly, Your Honor.

QUESTION: I'm confused.

MR. BOICOURT: This Court has never decided, and had not decided at the time the Eighth Circuit rendered its opinion, whether a State must provide payments to indigents for non-therapeutic abortions. They also provide pregnancy payments for those who take them to term.

Now, -- excuse me, Your Honor; I see that my time is up.

MR. CHIEF JUSTICE BURGER: Mr. Susman.

ORAL ARGUMENT OF FRANK SUSMAN, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. SUSMAN: Mr. Chief Justice and may it please the Court:

This statute providing, as it came out in oral argument during the appellate hearing, it was clear that what the State means for medical reasons, therapeutic abortions, only those abortions which were necessary to preserve the life or health were to be reimbursed under this statute.

QUESTION: Well, before you get to that, won't you tell us about the jurisdictional question. What authority did the court of appeals of the Eighth Circuit have to deal with the constitutional question here?.

MR. SUSMAN: We agree with the petitioner that the Hornbook type of black letter law is clearly that issues not decided below will not be decided on appeal; and yet, as we attempt to point out in our brief, there are exceptions which have been accepted by every circuit to this general black letter rule.

QUESTION: Well, apart from that issue, can the court of appeals set aside a State statute? On constitutional grounds.

MR. SUSMAN: While the three-judge federal statutes would appear to give the jurisdiction solely to the three-judge district court panel, we would --

QUESTION: "Would appear to".

MR. SUSMAN: I'm sorry?

QUESTION: You say "would appeal to".

MR. SUSMAN: Right.

We would suggest that in the unusual situation that occurred here, that once the matter is before the court of appeals, and assuming for the moment that it is a clear matter, that in the judicial economy and the administration of justice there is nothing to be gained by sending it back, the

very purpose of the three-judge panel, so that one single judge does not have the authority in which to set aside a State statute, has certainly not been obviated in this case, because --

QUESTION: Well, was there a district judge on the three- -- on the court of appeals panel?

MR. SUSMAN: No, there certainly was not.

QUESTION: So it didn't -- it wasn't even a de facto three-judge district court, was it?

MR. SUSMAN: No, it was not. So we would only contend that the purpose of the three-judge panel, not to give that type of power to one judge, has not been ignored or avoided here, because three federal judges did rule on the issue.

QUESTION: But in most cases isn't the other party given the right to answer?

MR. SUSMAN: Yes, --

QUESTION: In most cases.

MR. SUSMAN: That is correct.

QUESTION: And they didn't have a right to answer here.

MR. SUSMAN: There was no answer filed by the petitioner in this case at any stage of the proceeding. Although we cite in our brief several other cases in which courts of appeals also ruled on the merits, in which one side or the other, the defendants below at least, had never filed

an answer. Because filing that answer could in no way contribute to the case, because the issue was so clear.

QUESTION: Well, it just means --

MR. SUSMAN: They did --

QUESTION: The federal government -- I guess we get to the point eventually where the court can just read a statute and declare it unconstitutional.

MR. SUSMAN: The court of appeals in this case did issue a judgment declaring the statute unconstitutional.

QUESTION: Where is the judgment?

MR. SUSMAN: in the last -- if this may be considered a judgment, in the last paragraph --

QUESTION: In the last paragraph of the opinion.

MR. SUSMAN: That's correct.

QUESTION: It's not a judgment.

MR. SUSMAN: No, that is all that they said. They didn't --

QUESTION: That's all they said. And they put the State under that bind by saying we expect you to follow this.

MR. SUSMAN: That's correct, they did not issue an injunction.

QUESTION: That's kind of peculiar, isn't it?

MR. SUSMAN: It was difficult to find cases on either side of this issue, --

QUESTION: I imagine so.

MR. SUSMAN: -- on this point.

QUESTION: In this, as I understand it, your clients are suing on behalf of "their patients"?

MR. SUSMAN: That is correct.

QUESTION: And we don't know whether they've got patients or not, do we?

MR. SUSMAN: Well, they state in their verified complaint that they do have patients, they have been refused patients; it wasn't something hypothetical. They also filed affidavits to the exact same effect. The petitioner took time and got an order from the court, giving him additional time in which to file --

QUESTION: Well, where do you get the right to get a patient's right to get money from a third party? You actually want money; isn't that all you want?

MR. SUSMAN: No, that is not all.

QUESTION: Well, what else do the physicians want, other than money?

MR. SUSMAN: Respondents want to assert their patients' rights to equal protection under the laws with regard to getting the State --

QUESTION: Which is money.

MR. SUSMAN: I'm sorry?

QUESTION: Which is money.

MR. SUSMAN: That is not correct. Well, that is

all, the only remedy of this particular statute would be funds with which to pay.

QUESTION: That's what I mean.

MR. SUSMAN: Right.

QUESTION: So that's all they're after, is to get money.

MR. SUSMAN: Right. Otherwise, they would be denied access to any abortions.

QUESTION: So they won't get the money.

MR. SUSMAN: Right. Public hospitals in the City of St. Louis presently do not provide procedures.

QUESTION: Well, they don't have any right to the money at this stage, do they?

MR. SUSMAN: Who, the doctors?

QUESTION: The physicians.

MR. SUSMAN: Yes. They have already submitted hundreds of applications, which all have been denied.

Now, one payment was made in the year and a half between the time the statute was enacted and --

QUESTION: Well, then, why are they suing on behalf of the patients?

MR. SUSMAN: To assert their patients' rights, constitutional rights to --

QUESTION: To pay them? To pay them.

MR. SUSMAN: To pay them and to have free access to

abortions. Rather than have to rely on the physician's charity to perform it without any compensation.

Because there is no other source or avenue for them to obtain these procedures. If the physicians would not do it for free, there is no place else they can obtain it.

QUESTION: Mr. Susman, I don't read your Count II of your complaint as alleging a right on behalf of the patients. It very clearly alleges a right on behalf of the physicians and surgeons. At least that's what it says.

MR. SUSMAN: I apologize that I do not have a copy -- I'll accept your reading; I do not have a copy of the complaint with me.

QUESTION: It's in the Appendix. And then your theory, as I understood the complaint, was that (a) they won't get paid and (b) their ability to perform these services for people on welfare is chilled, because they don't know whether those people will be able to get paid. So it affects their practice, rather than the patients. That's what the complaint seems to say. Your argument is quite different here, though.

I mean, I just want to know, what is your theory?

MR. SUSMAN: When standing became an issue, we also asserted or attempted to assert in the appeal that they had the right to assert their patients' constitutional right to abortion as part of their standing. They have standing not

only in their own right, but on behalf of their patients.

Those --

QUESTION: Do you still assert a constitutional right on behalf of the doctors?

MR. SUSMAN: Yes.

QUESTION: You do in your complaint. Would you articulate it for us, please?

MR. SUSMAN: Certainly.

QUESTION: The constitutional right of the doctors, not of the patients.

MR. SUSMAN: I think there's a line of cases in which individuals, whether physicians or otherwise, have a right of liberty to pursue a lawful profession and to earn a living. I think doctors have a particular right -- well, of course, part of it -- it's very hard to separate, and that's one of the standing arguments. That the confidential relationship between a physician and a woman in regard to abortion procedures is basically inseparable; it's very hard to distinguish and segregate out the respective rights of each. Because it is a joint decision under the wording of Roe and Doe.

The cases, the abortion cases, not -- ignore for the moment all those cases which provide criminal penalties; all statutes adopted subsequent to 1973. In every one of those cases, even the ones that had no criminal penalties, doctors

were held to have standing to assert their own rights and those of their patients.

In other Medicaid context, other than abortion, doctors and the providers of medical services, institutions, hospitals, nursing homes, have all been consistently held to have standing to assert the right to Medicaid payments on behalf of the people that they treated.

The Petitioner has cited not a single case of abortion or of Medicaid nature in which physicians were not held to have standing to assert these type of payment rights on behalf of their patients.

QUESTION: You're speaking now about standing. I was wondering about constitutional rights on behalf of the doctors. What constitutional right does a doctor have to claim entitlement to a medical fee provided by the State for people who can't afford to pay their own fees? What constitutional right?

MR. SUSMAN: He may not have any constitutional right, but I think he has other interests. The court of appeals, for example, made specific holdings that, in two ways, that, No. 1, this statute which excluded payment for abortion, No. 1, infringed upon his medical practice and, No. 2, caused him economic hardship. And both of those factors they considered to give him separate standing. Each, independently, was enough to give him standing in the opinion

of the court of appeals.

The financial detriment that he experienced, and also the fact that his right to practice medicine was being infringed upon.

QUESTION: You can have Article III standing to stay in court, but I was addressing my inquiry primarily to what sort of relief the doctors were entitled to as a matter of constitutional right.

MR. SUSMAN: Separate and apart from their patients, I am not sure if they --

QUESTION: Yes.

MR. SUSMAN: I am not sure if they have any right to relief on a constitutional basis.

QUESTION: Well, that was my inquiry. Thank you.

QUESTION: Mr. Susman, in your complaint you allege that your clients are physicians residing and engaged in the practice of obstetrics and gynecology and so forth; now, the State, I take it, never had an opportunity to traverse or deny those allegations, because of the fact that it never had a chance to file an answer.

MR. SUSMAN: Only in one way did they have an opportunity to deny, because all of those allegations that you refer to in the complaint were repeated in affidavits filed by the respondents. And the Petitioner specifically requested an opportunity from the court to file a counter-

affidavits, and was given leave to do so and never chose not to.

QUESTION: Well, as I read the district court's memorandum of May 31st, I thought it was treated as a motion to dismiss. Are you suggesting it was in fact a motion for summary judgment?

Page 40 of the tan Appendix.

MR. SUSMAN: Page 40? I'm sorry --

QUESTION: Well, at least that's what I'm reading. I'm sure you know the record much better than I do. I was just reading the district court's memorandum of May 31st.

MR. SUSMAN: There was a motion -- as a recall, a motion of summary judgment filed by the respondents, although I -- I really don't recall, the affidavits may well have been filed in opposition to the motion to dismiss, as opposed to being in support of a motion for summary judgment.

QUESTION: Well, I can see how you could use affidavits to oppose a motion to dismiss, where you're trying to bring in facts that you didn't plead in your complaint, but that isn't the same thing as giving the defendant a chance to deny the material allegations which really go to standing here, that you made in your original complaint.

MR. SUSMAN: You Honor, I do not recall whether or not there was a motion for summary judgment filed at this time. From a look at the chronological list of entries, it would appear that there was not.

QUESTION: So it did go off on a motion to dismiss?

MR. SUSMAN: That is correct.

As to standing, we feel that, again as we indicated, that Petitioner has not cited a single case dealing either with abortion or Medicaid in which physicians were not held to have standing on behalf of their patients' rights. There are numerous cases in which they were held to have such standing, and many of these are in no way analogous to Doe vs. Bolton, because they are not in a criminal context.

There are also some --

QUESTION: The problem I have, Mr. Susman, is -- on your reliance on the patients' rights as distinguished from the reliance on the physicians' economic rights, is I don't find any allegation either in the complaint or in the affidavits in support that indicate that any welfare patient was ever denied an abortion by any of your clients.

MR. SUSMAN: Your Honor, I believe that statement does appear both in the complaints and in the affidavits.

QUESTION: In I and III with respect to the services. I'm talking about Count II now.

MR. SUSMAN: Yes, sir.

QUESTION: You say that the refusal to get paid deters the plaintiff from the practice of medicine in the manner he considers to be the most expertise. But that doesn't say he refuses to perform abortions.

MR. SUSMAN: In paragraph 9, both affidavits being identical --

QUESTION: Right.

MR. SUSMAN: Paragraph 9 on page 32 of the Appendix, the affidavit by Respondent George J. L. Wulff, Jr., he states that he has provided, and anticipates providing abortions in the future, and that he has been refused and anticipates future refusals of payment.

QUESTION: That says he hasn't been paid. But I'm saying how did that affect his patients? As I understand that, it's saying that he's been doing it for nothing.

MR. SUSMAN: That's correct.

QUESTION: Well, then, how is that -- does that adversely affect his patients?

MR. SUSMAN: It would not adversely affect those patients upon whom he had to date rendered services, except that he may well have a private contract right back against them for payment. Which, I admit, it would have a greater effect upon the patients.

QUESTION: He may well have, but he hasn't alleged that he has; he didn't say so in his affidavit.

MR. SUSMAN: That is correct.

QUESTION: It seems to me that you're limited to whatever standing you have as a doctor, who says, "I want to do a lot of work, and perhaps I won't get paid for it."

Which may or may not be sufficient, but I really don't see your claim on behalf of the patients, because I don't see that you have anywhere alleged that any patient on welfare ever failed to get an abortion when needed.

If I'm wrong, I just want to be sure you correct me.

MR. SUSMAN: No, I do not believe there is -- I agree with you there is not a specific allegation to that effect. I think perhaps common sense would lead us to believe that doctors will not continue providing services for free.

I think particularly in light of the fact public hospitals are not doing --

QUESTION: Can we rely on common sense --

QUESTION: -- [inaudible] -- does it?

MR. SUSMAN: No, it is not.

QUESTION: I just wondered, can we rely on common sense about doctors in general, or do you have the burden of saying, "This doctor in particular is able to assert this particular" --

MR. SUSMAN: Yes, I think the respondents have that burden.

I think the doctors, physicians have standing not only in their own right as we previously indicated, but also on behalf of their patients, both the right to practice medicine, which several lower courts have held, both the economic interest, which we've already discussed. We also believe

that they have the logical nexus which is necessary.

We think the general rule as far as deciding the question on appeal, which has not been decided below, is basically that an appellate court does not lack the power to do what plainly ought to be done, and that appellate court's decision to consider the merits in the case upon appeal, although not decided below, is a matter of judicial discretion, and is not really a limit on jurisdictional power. Basically that was the holding in Mercury Motor Express.

In a decision, a recent decision out of the Seventh Circuit, authored by Justice Stevens, Fitzgerald vs. ? Memorial Hospital, in that case a single judge dismissed for lack of standing and yet the court of appeals went on in that case, there was even a dissent and so the issue was not even as clear as perhaps it should be regarded in this case. But the court of appeals went on to rule on the constitutional merits.

QUESTION: Was that a three-judge district court decision?

MR. SUSMAN: No, it was not below.

The factors to be considered, as found by the various circuits, --

QUESTION: May I ask -- I gather, if you prevail here, and there's affirmance on the two questions as to which certiorari was granted, what happens to the judgment on the

merits in the court of appeals?

MR. SUSMAN: I would think that if both of the issues are affirmed, as far as the merits, this particular case is over. It may not be binding on other -- on future litigation in other States; but as far as this particular litigation and as it applies to Missouri, the issue would be resolved. It would be a final judgment.

QUESTION: This, because we limited the grant?

MR. SUSMAN: That is correct.

QUESTION: And notwithstanding that a three-judge district court has never exercised its authority to declare a State statute unconstitutional?

MR. SUSMAN: That is correct. But I'm assuming Justice Brennan's remarks that both issues were to be affirmed.

QUESTION: Right.

MR. SUSMAN: The factors that the various circuits have looked at, we suggest, as to when an appellate should rule on the merits when the issue has not been decided below, are all present here. They include some of the following: The summary judgment nature of the proceedings. Petitioner never chose to contest -- ignoring for the moment whether or not he had the opportunity to file an answer -- never chose to contest in oral argument in the court of appeals or in his brief any of the factual context --

QUESTION: Well, he filed a motion to dismiss and the motion to dismiss was granted.

MR. SUSMAN: That is correct, Your Honor.

QUESTION: And that was the only motion that was granted.

MR. SUSMAN: By the district court; that is correct.

QUESTION: Well, why isn't that all that was before the court of appeals?

MR. SUSMAN: I think the answer to why that was not all that was before the court of appeals is because respondents moved on their own initiative to attempt, in every way possible, to bring the merits before the court of appeals, both in their brief and in oral argument, which they did, and which the court of appeals, either rightly or wrongly, and of course it's for the Court to decide, but they did accept.

Certainly counsel for Petitioner and Petitioner were forewarned that the merits were going to be -- there was going to be every effort to contest them and to argue them on appeal. Some 80 or 90 percent of the Appellants' brief constituted the merits.

QUESTION: All I'm saying is what was before the court was the granting of a motion to dismiss.

MR. SUSMAN: That was the only ruling by the district court.

QUESTION: And that was all that was before the court

of appeals.

MR. SUSMAN: We would argue that that was not all that was before the court of appeals.

I am not in position to say whether the court of appeals acted correctly or not, but certainly the respondents made every effort to bring the merits before them, and they -- for the various reasons, and we think the reasons that other circuits have done exactly the same thing in like cases chose in this particular case to exercise their discretion, which we believe they had, and to rule on the merits.

QUESTION: Well, you can't escape probable burden, counsel, of sustaining what -- trying to sustain what the court of appeals did. That's what the case is all about.

QUESTION: You merely -- I don't think you mean what you say, that other circuits have done the same thing in like cases. There aren't any other precedents for a court of appeals deciding a constitutional issue which should normally be presented in the first instance to the three-judge district court, is there?

MR. SUSMAN: No, there are not. We could not find any cases on either side on those specific facts with --

QUESTION: I thought that was a case opposing your position in the Court of Appeals for the Eighth Circuit, the position in the Sixth Circuit.

MR. SUSMAN: The Sixth Circuit was asked to do

basically the same thing.

QUESTION: Yes. And declined to, didn't it?

MR. SUSMAN: They did. They sent it back to the panel for determination of the constitutional merits.

But we would suggest that whether or not the court of appeals decided to send it back or to retain it and decide it on their own initiative is a matter of discretion to be exercised, and the fact that the Sixth Circuit and the Eighth Circuit reached opposite conclusions as to the exercise of that discretion in no manner bespeaks that there was an abuse of discretion by either circuit. And that the test to be utilized here is whether or not they abused their discretion in ruling upon the merits.

QUESTION: Well, do you think the court of appeals was exercising appellate jurisdiction or original jurisdiction?

MR. SUSMAN: I'm not quite sure. I haven't seen, in all the commentaries and texts in other cases in which issues are decided which weren't decided below, I have never seen a discussion as to which classification of rubric this might fall in.

QUESTION: But, in any event, whether it was exercising original jurisdiction or appellate jurisdiction, it was doing so quite inconsistently with the three-judge court legislation, which gives jurisdiction to a three-judge federal court

to enjoin a State statute on a constitutional basis, and gives appellate jurisdiction to this Court to review that constitutional determination; and the one court to which it doesn't give either original or appellate jurisdiction is the court of appeals. Isn't that correct?

MR. SUSMAN: I think clearly it's inconsistent with the letter of the three-judge panel law. I do not feel that it is inconsistent with the intent. Because this Court has repeatedly stated that the purpose of that is to remove from a single judge the power to set aside State legislation. And here three judges had the opportunity to rule.

QUESTION: What's the citation to the Sixth Circuit case, the style of it?

MR. SUSMAN: Just a moment, Your Honor.

In the Sixth Circuit, Grover vs. Ferguson, 515 Fed 2d 279, Sixth Circuit.

QUESTION: 515, 279.

MR. SUSMAN: That's correct.

QUESTION: Thank you.

QUESTION: Mr. Susman, in the Eighth Circuit's opinion, they state this: "We are urged by appellants" -- that would be your side of the case -- "to reach the merits of this case rather than remand to the three-judge court."

I take it, therefore, you weren't surprised as counsel when they did reach the merits?

If you urged it upon them to do so.

MR. SUSMAN: I would be -- we certainly urged upon them to do it. I can't say that we weren't surprised; we were greatly surprised.

QUESTION: Was there opposition at the time that the issue had not been passed upon by the district court?

MR. SUSMAN: Was there opposition to?

QUESTION: Yes, when you were arguing before the court of appeals.

MR. SUSMAN: I can't really recall in oral argument whether or not -- the Petitioner will have to, counsel for the Petitioner will have to speak for himself.

But, again, we would take the position that because, as Justice Rehnquist pointed out, our brief was filed first and dealt almost exclusively with the merits, our oral argument dealt almost exclusively with the merits, that in effect Petitioner had his chance to stand up and take his swings, he had his chance at bat, and chose --

QUESTION: Well, maybe he also read the three-judge district court statute and had a right to think that you had no business to brief that issue, and thought that the court, the three judges on the court of appeals would probably be aware of that, too.

MR. SUSMAN: That is certainly a possibility, Your Honor.

QUESTION: If the court of appeals for the Eighth Circuit had come out the other way, Mr. Susman, it seems to me you very likely would have had a pretty arguable complaint that at that point all you would have had here was the right to petition for certiorari, whereas if a three-judge district court had decided the case, you would have had a right of direct appeal on a decision here on the merits.

MR. SUSMAN: That is correct, yes.

QUESTION: So that it does twist around the statutory system a little bit to have the court of appeals pass on it.

MR. SUSMAN: The only reasons we would urge this Court to affirm what the court of appeals in the Eighth Circuit did is that if one examines the different reasons or justifications, and again, as Justice Stevens pointed out, no case exactly on constitutional issues has been done, but in other areas where they have ruled on the issue, clearly not decided below -- in fact the only issue constitutionally, perhaps, is the Fitzgerald case itself.

But if you look at the justifications for the reasons, they say why we're going to go ahead and rule on the merits, or rule on an issue not decided below -- and there are many: the summary judgment nature of the proceedings, the clarity to principle, the fact that it affects a lot of people, and all the recognized exceptions; every one of those, we would argue, applies to this case.

QUESTION: What if in this case the resident judge in St. Louis, the convening judge, had refused to convene a three-judge district court, saying the issue is so insubstantial I won't even hear it, and you would then appeal to the court of appeals on a Goosby v. Osser claim, that it was substantial and should have been a three-judge court.

Should the court of appeals, hearing a Goosby v. Osser contention, say, Well, not only was this substantial, but we know the answer. Well, why send it back to the district court, we'll just tell them the answer right now: it's not constitutional.

MR. SUSMAN: Certainly for consistency, if not for any other reason, I would agree that they would have that authority in a given case which fit the facts and circumstances of the type of case that ought to be decided on that basis, between --

QUESTION: Well, actually at page 27, doesn't what Mr. Justice Rehnquist just suggested, isn't it implied in this paragraph: The statute in question is obviously unconstitutional, and it is our view that the case might well have been decided by one federal judge; accordingly, we choose to make final determination of this case.

MR. SUSMAN: That is exactly true, because in fact prior --

QUESTION: It may be exactly true, but neither

a single judge nor three judges --

MR. SUSMAN: Right.

QUESTION: -- ever passed on the constitutional question.

MR. SUSMAN: Well, that is not exactly correct.

Prior to this decision which came down in December 31 of 1974, some 15 other federal judges had passed on the identical issue of whether excluding abortion from Medicaid payments was a denial of equal protection. Since the decision of December 31, '74 -- and this, of course, is only in retrospect, -- an additional 11 judges have so held. And this is all --

QUESTION: All outside the Eighth Circuit?

MR. SUSMAN: Yes, sir.

No, not all outside, some were.

QUESTION: Well, I mean before this one.

MR. SUSMAN: Some of the 15 were within the Eighth Circuit. Some.

QUESTION: Were they within Missouri in the Eighth Circuit?

MR. SUSMAN: No. None.

QUESTION: None of them.

MR. SUSMAN: In addition, --

QUESTION: It might well have happened that the panel you caught on the C.A.Eight might not have included a

Missouri judge. It happened that you did catch one, a Circuit judge, but no district judge.

MR. SUSMAN: In addition to those 15 judges who had ruled on the exact equal protection argument of the Medicaid exclusion, there was also a host of other federal judges who had ruled on the exact equal protection argument in the public hospital context, and we would submit that there could be no distinction between the two. Because the same argument is that if a public hospital or if the State through Medicaid provides maternity services, then the right of equal protection means they must also provide abortion services.

QUESTION: Now, going back to my other question, I take it, then, that the Eighth Circuit didn't do this entirely sua sponte?

MR. SUSMAN: No, they were -- they were urged by appellants, respondents to do so. Quite clearly.

QUESTION: Just to restate your ultimate argument, if I may, your point really is that the defense is so frivolous that it really wasn't a three-judge court case at all. That it could have appropriately been decided by a single judge in the district court, because the defense is frivolous and therefore there was no substantial federal question?

MR. SUSMAN: While I agree with that argument, I do not think that that statement is synonymous with the situations

under which a court of appeals can rule upon an issue not decided below. I think this is a case where they could rule, but --

QUESTION: No, I appreciate that, but the way you get out of a three-judge court problem is by saying this is the kind of issue that a single judge could have decided, and therefore you rely on this analogy of other court of appeals decisions.

MR. SUSMAN: That, and I think there are two other ways to get out.

The first being the fact that the intent and the meaning and purpose of the three-judge court has not been obviated here, because three federal judges did --

QUESTION: Well, that's an entirely different argument. I see. Yes.

QUESTION: The first argument is sort of a Bailey v. Patterson argument.

MR. SUSMAN: That's right. It was a Bailey v. Patterson situation.

The second possible way out would be that, in light of Steffel ?, that the appellants-respondents did not appeal the denial of injunctive relief, and therefore have waived the request for injunctive relief, and therefore, even if necessary to remand, it may well now go back, in absence of any request for injunctive relief, to a single district judge.

So I offer you three possibilities.

I think I'll stop.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:14 o'clock, p.m., the case in the above-entitled matter was submitted.]

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