In the

Supreme Court of the United States

John H. Poelker, Mayor of the City of St. Louis, Missouri.

and

R. Dean Wochner, M. D., Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri,

Petitioners,

v.

Jane Doe, and a Class,

Respondents.

No. 75-442

Washington, D. C.
January 11, 1977

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JOHN H. POELKER, Mayor of the City of St. Louis, Missouri, -and- R. DEAN WOCHNER, M.D., Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri, Petitioners, v. JANE DOE, and a Class, Respondents.	:	No. 75-442

Washington, D.C.
Tuesday, January 11, 1977

The above-entitled matter came on for argument at 1:43 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:

EUGENE P. FREEMAN, Deputy City Counselor, Room 314 City Hall, 1200 Market Street, St. Louis, Missouri 63103; for the Petitioners.

FRANK SUSMAN, Esq., 7733 Forsyth Boulevard, Suite 1100, St. Louis, Missouri 63105; for the Respondents.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-442, Poelker against Doe.

Mr. Freeman, I think you may proceed when you are ready.

ORAL ARGUMENT OF EUGENE P. FREEMAN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. FREEMAN: Mr. Chief Justice, may if please the Court:

The nature of this case generally involves the assertion of an indigent pregnant woman that she has a constitutional right to require a municipality to provide the surgeon and all hospital facilities to carry out her first trimester decision to be aborted. The city, after this Court's decision in Roe and in Doe v. Bolton, did not recognize a constitutional duty to provide such abortions but continued its policy against the establishment of an abortion service in its hospitals.

St. Louis has two general hospitals, and I say advisedly. The last time I left St. Louis it did. There is a debate going on right now whether to abandon one or not. And they are physically separated from the other department or governmental buildings. And through the years it has expressed or reflected the culture of the state which, as the Court well knows, Missouri has had a criminal abortion statute, and that

was infused within all of our civil governmental structure, including the hospitals. And that situation obtained up until the time of this Court's Roe and Doe decisions. And thereafter, although at that time there was considerable debate, confusion, addressed to the problem, but there was never any express, direct changing of the established hospital policy against abortion. And what I refer to as abortion is non-therapeutic or elective abortion.

This case arose over that policy in the hospital, and later changed by trial tactic, which I will allude to, by reason of the fact that an indigent lady appeared at the hospital, and our hospital does not allow practice by private physicians. In other words, all of the physicians in the hospital are governmental or city employees, and are selected through civil service procedure.

The lady appeared at the hospital and went to the GYN clinic and then was referred to the obstetrical clinic of the hospital. She was told that she was pregnant, and there is some dispute in the position of the parties as to whether she asked for a non-therapeutic or elective abortion at the time from the physicians there.

The physicians at the hospital, at the GYN and OB clinics, represent a dual position. Many years ago--and I think I am accurate in telling the Court that it was probably 20 to possibly 25 years ago--the City of St. Louis was in some

accreditation trouble, and the universities that provide medical schools in St. Louis came to the aid of the city, and St. Louis University was one of those, Washington University the other, and entered into an arrangement where the physicians of the staffs in the medical schools would staff the various services of the hospitals. And that was done with respect to the GYN and OB. And in this case there is a vestige of that by St. Louis University, which is a Jesuit, Catholic, institution, in City Hospital No. 1 as distinguished from another hospital called Homer G. Phillips Hospital, which is City Hospital No. 2, which was staffed by Washington University, which is a non-sectarian hospital.

Through the passage of the years the Homer G. Phillips Hospital, No. 2, encountered the difficulty of Washington University with its increased demand upon its own organic hospital facilities to the extent that physicians were not furnished, at least in sufficient amounts by Washington University to that hospital, where in the case of City Hospital No. 1, St. Louis University did maintain the OB and GYN services in the hospital in contention in this case. As I state, that is an accident of history.

The lady was refused her request of an abortion, after she was told she was pregnant, by several medical students who were associated with St. Louis University undergoing their training under the auspices or aegis of

St. Louis University under the instruction of senior physicians who headed the various services there, including these two, OB and GYN.

The reasons given at the time were the physicians' personal reluctance, their personal morality, or ethical positions against performing abortions on--in this case it happened to be principally a financial indication. The lady was without funds,--felt she could not with her husband unemployed--felt she could not support another child. In this case the physicians there felt that they could not render an abortion service to a woman because of that type of indication without any physiological indication.

The plaintiff or respondent here did not get the abortion, went to a private institution through, I believe, the arrangement of later counsel in the case, and she was aborted on August 27th. Five days before that, she had filed suit in the District Court, August 17th, and this was before service was had upon one of the defendants here.

The case proceeded without in fine developing each of the facts in it but attempting to allude to them as they come in because of the issues, the case developed three principal matters with two subordinate ones to one of them. And that is abortion on demand and the appellate abuse of discretion through the unreasonably overturning the District Court's findings and the appellate conviction and punishment

of the mayor, one of the petitioners here, of bad faith. And then there was the initial question of justiciability or the standing and mootness of the question when it was existent in the District Court.

There was a trial, an appeal on the justiciable controversy question, a reversal by the Eighth Circuit, with remand. There was a trial on the merits with a reversal by the Eighth Circuit and a remand, and then an ultimate two appeals after that on the question of the attorneys' fees in the case.

The Eighth Circuit's reasoning is based upon--its finding of a denial of Equal Protection is based upon an assumption that childbearing and abortion are equivalent and, therefore, to assist childbearing but not offer abortions is unequal treatment without legal justification. In the arguments of the other cases I think this question has been lightly touched, but I think I can provide a service to this Court by respectfully suggesting a different analysis or an enlarged analysis. I think I could suggest to the Court to contrast the universe of childbearing with abortion. I think the judicial point of view is required to be different in a case such as this than it has been in any of the other type of cases. Your Honors' attention in the abortion cases of Roe and Doe and Planned Parenthood v. Central Missouri and some of the others has been centered towards abortion. This case

involves something far more broad than abortion, and I think that by respectfully suggesting these things to Your Honors that it may be of help in Your Honors' analysis.

The Court will certainly recall that childbearing is a consummation of a person. It is a value of infinite worth, and event of incalculable consequences. Generation is its process and life is its end. Abortion is just the opposite. It is the prevention of the birth of a person. It is the obliteration of the possibility of a person. It is an interference with life, and death or non-existence is its end. Childbearing is a natural process. The attitude of the community, including the medical science it is associated with in part, is to support and assist childbearing, not to cause this natural phenomenon. Abortion, on the other hand, is an interruption and deliberate termination of this natural process, and thwarts it.

In objective logical extension, childbearing is essential for the continuation of the human race--the family, the community, the state, and the nation. Abortion is, in an objective, philosophical sense, genocidal.

Q Mr. Freeman, do you want us to overrule Wade and Roe?

MR. FREEMAN: Not in this proceeding, Your Honor. But I am trying to lay the basis to show the interest of the state in childbearing that is non-existent in abortion.

Q I was just interested in where you were going to end up.

MR. FREEMAN: Abortion is genocidal. Only its exception or antithesis, childbearing, allows for survival of mankind. From these essences society's and the individual's relationships to childbearing and abortion are totally different. They are unique in themselves and foreign to each other and hostile in some respects.

In childbearing a woman's objective is a live, healthy infant, the fulfillment of her womanhood, and a wife accomplishes her physical and spiritual function in the marital status. The father and husband realizes the establishment or enlargement of his family and realizes an important aspect of his manhood in the progeny of his family.

Q All of this is true with respect to the whole spectrum here, whether payment is made by the state or whether the city furnishes the service or whether it does not; is that not so?

MR. FREEMAN: That is true, Your Honor. But those considerations underlie the propriety and persuasiveness of the distinctions that the Constitution ought to recognize in the different treatment of abortion and childbearing.

Q As a matter of policy, as a matter of state policy, a state, quite apart from our Constitution but simply as a matter of policy or state policy, a state could have

either policy--could it not?--and states historically have had both policies. States have historically given bounties for large families, and states have historically--I am talking about states in the world, not necessarily the United States--but organized government, organized society has decided to give to encourage large families in some states in some points in history, and states equally have hit upon a policy of encouraging small families. And there are states today that are doing that, India and others. Each is a permissible, rational state policy. States have historically done both, have they not, as a matter of public policy?

MR. FREEMAN: I believe that is lately historically accurate, Your Honor, but I do not think that the fact that it occurs vitiates or denies the rationality underlying childbearing with respect to--

Q Either is a rational policy from the point of view of state policy, I would presume. At least each has historically been followed at one time or another by one nation or another; is that not true?

MR. FREEMAN: Yes, I believe.

Q Suppose, Mr. Freeman, that there were no hospitals in the State of Missouri and in the City of St. Louis except those maintained by public authority so that there was a monopoly. Would you suggest that all those hospitals could refuse under any circumstances to have abortions performed?

MR. FREEMAN: I think you force me to the logical position that that is probably right--

Q That they could refuse?

MR. FREEMAN: They could refuse abortion, Your Honor. But I believe in answer to Mr. Justice Stewart's question, there is another facet of the intellectual infestigation that is required, and that is here you have not only the interest of a woman in one disposition or the other; you have the interest of a child. These certainly must be constitutionally recognized. And it is dependent upon that choice of the woman.

The state is certainly, I would suggest, entitled to recognize these interests in childbearing where they are non-existent in abortion.

Q Do you not implicitly recognize the right to be treated in a public hospital when you point out, as I believe you do in your brief, that in Hospital No. 2 there are no barriers; is that right?

MR. FREEMAN: No, Your Honor. If you gathered that from my brief, I gave the Court a wrong impression.

Q Do the same barriers exist in both hospitals?

MR. FREEMAN: Let me detail a little of the facts in explanation or answer to your question. In a political campaign in a mayoral election in St. Louis, this question emerged. And both the existing mayor at the time and his

successor, who is one of the petitioners in this case, both stated that they were opposed to abortions, a political platform in their election. They made that statement publicly and broadly.

In the merits of this case the evidence showed in trial that the physicians of the city hospitals were unaware of this position of both the previous mayor and the mayor in existence at the time of the trial, at both hospitals; there is no evidence that the physicians at Hospital No. 2 knew anything about the city hospital policy, and certainly there is positive expressed evidence by the physicians themselves that they knew nothing about the policy in this particular case.

Q The policy was the same in both hospitals; I thought that was the question.

MR. FREEMAN: When I tried to fairly answer the question, Your Honor--

Q Yes or no.

MR. FREEMAN: --there was no insinuation of the policy by direct action of the mayor down to the operative level in either of the hospitals. But there was certainly an adopted position by the mayor which was known to the chief administrator of the hospital but nonetheless unkown to the operating physicians.

Q But is it not true that in Hospital No. 2 the

rule was not as strict as it was in Hospital No. 1?

MR. FREEMAN: I cannot answer that, Your Honor. There were no abortions performed, to my knowledge, in Hospital No. 2.

Q None?

MR. FREEMAN: None that I know of, no, sir. I think I might further enlarge on that answer by saying City Hospital No. 2 is largely staffed by persons of Spanish or Portuguese--

Q No, it has been a Negro hospital 20 years ago.

MR. FREEMAN: That is right, Your Honor, but I am talking about their physicians there now. And you have a Moslem and Catholic situation at City Hospital No. 2 that you do not have the--that influence. But, on the other hand, St. Louis University provides the physicians, the chiefs of staff, at City Hospital No. 1.

Q Then is it fair to infer from what you said that neither hospital as a hospital had a policy but depended upon the views of the staff? And in both hospitals apparently the staff had views had views--moral or religious views--that made them object to performing non-therapeutic abortions; is that correct?

MR. FREEMAN: I can certainly answer for City Hospital No. 1. I am trying my best from hearsay and so forth about City Hospital No. 2 because that was not litigated, nor did we investigate it in the trial at all, City Hospital No. 2.

Q But did City Hospital No. 1 have an official hospital policy?

MR. FREEMAN: Yes, it did. But, as I stated, it did not get down to physicians, and the policy itself is subject to the interpretation, as the mayor testified in the trial, that it is an ultimate question for the physician to determine whether the woman's life or her health is in danger.

Q But both the hospital and the staff in Hospital No. 1 presumably had a practice and a rule that they followed of not performing non-therapeutic abortions.

MR. FREEMAN: That is right, Your Honor.

Q That is clear in this case, is it not?

MR. FREEMAN: That is clear, yes.

Q What is the hospital apart from its staff? Doctors can perform the abortion; is that not right?

MR. FREEMAN: Administration is another level, Your Honor.

Q But they cannot perform abortion.

MR. FREEMAN: No, no. I meant to illustrate--

Q What the doctors individually decide is an individual decision of the physician, I thought you had told us earlier.

MR. FREEMAN: That is right. That is right.

Q If they all decide the same way, does that make it a policy of the hospital?

MR. FREEMAN: I would say that it would coincide with the policy of the hospital in this case. But I would not think it would be the causative factor of the policy of the hospital because the city recognizes the right of each physician to make up his own mind and practice medicine according to his own lights, at least to the extent of not providing abortions.

Q Does this record show that there is any doctor who was excluded from the staff because he would perform abortions, elective abortions so-called?

MR. FREEMAN: No, Your Honor. There was not up till the time of trial. Now, to be fair on that question, I understand since the Eighth Circuit declared that the city had the right, there were two successive physicians that volunteered their services for a part-time and did perform a limited number of abortions. But they left the staff after that, and my understanding now is that there are no physicians that will perform abortions, and that it is contracted out to a private facility.

This Court has recognized a limited privacy right of abortion and an absence of state power in the abortion context, but it did not diminish or degrade society's historical role in childbearing, nor did it create opposition or make any connection between childbearing and abortion.

The woman, the Court taught, does have an absolute

constitutional right to abortion, but the woman's constitutional--does not have, I meant to say--and it is related to her privacy interest and admits only of a limited right in abortion. Realization of her interest, this privacy right in abortion, occurs in a medical context in relation to her life or her health. Abortion determination is essentially a medical decision made by her physician for her life and health and in privacy. But in childbearing, the opposite is the case; where a woman is not in the abortion, that is, she has determined to bear children, whether she is pregnant at the time or not or antecedent or postpregnancy, she is in a totally different continuum that exists. No abortion decision or legal considerations arise for her or the state. The putative child's interest emerges, and it would seem to be very constitutionally considerable by the state.

The interest of the child would seem to emerge as a fundamental factor where the woman makes her election to enter childbearing or childbirth.

There is a perfect harmony that emerges that can at least be contemplated between the various interests. The mother, she is interested in the situation with respect to herself. The child certainly, the putative child. The father as a husband at least. And the community, state, and nation emerges at this point. All of these legal relations are perfectly accommodated to one another and without friction

or opposition to one another.

Q At all times, Mr. Freeman?

MR. FREEMAN: There can be situations, of course, Your Honor, postulated where maybe the father of the child has no desire or legal relationship to the child.

Q I was thinking of those occasions when, as there are some, when the mother's health is endangered and then the physician and the patient have to make a decision as between the two interests. So, I am merely asking whether at all times what you are saying is true.

MR. FREEMAN: Your Honor, if I understand your question accurately, I would say that my statement still holds true because once the woman has made the decision not to be aborted, that she has elected for childbearing, all the considerations of health and so forth are abstracted from her situation. The interest now lies in protecting her health in childbearing and the child that she is bearing and everyone associated with her, including the state.

Q If the decision is the other way, then what?

MR. FREEMAN: That is what I am trying to illustrate, that you are in a totally different context or continuum where the woman has made an abortion decision inconsistent with this Court's teachings--

Q Let us get away from the woman. The physician has advised it because her health, her life, will be in

danger. All I am trying to point out is, in contradistinction to your general statement, that sometimes the interests of the mother, the child, the father, are not always compatible, are they?

MR. FREEMAN: Your Honor, I may not be apprehending the thrust of your question. But, as I see it or what I am trying to say to the Court, that where the woman has made the election for childbearing, whether it is a threat to her health or not, different interests emerge that are compatible, whereas he has made the election, albeit within the teachings of the Court, the medical decision, but ultimately she is not going to be operated on unless she consents to it--in that sense that ultimate choice, there is a world of difference between abortion and childbearing, and these other interests irresistibly emerge in childbearing that do not emerge in abortion.

Q How about where it was an accident?

MR. FREEMAN: An accident in what way, Your Honor?

Q You know. [Laughter]

MR. FREEMAN: That is the way I thought you meant. The woman still must make the election. She still must determine--

Q She makes the election and she goes to the Hospital No. 1, and you say no. Am I right?

MR. FREEMAN: Your Honor is taking me into the

context of another situation. I was trying to illustrate not the--

Q Am I right that if it was an accident and she goes to Hospital No. 1 and she explained this accident, she does not get an abortion?

MR. FREEMAN: That is right, Your Honor.

Q And if she was raped, the same would be true?

MR. FREEMAN: She does not get an abortion, no.

Q You do not see a thing wrong with that?

MR. FREEMAN: I have not developed my argument to that point. But I believe that bears and can be explained in terms of Equal Protection.

Q Does not your argument end up there, whichever way you go?

MR. FREEMAN: No, it does not, Your Honor. It goes further than that.

Q You are going to make exceptions for that?

MR. FREEMAN: No. The abortion question I see is in a totally different universe than the question of child-bearing.

Q This is a childbearing of a child that is the result of a rape, and you say that the government is interested in that.

MR. FREEMAN: Yes, I believe so, Your Honor.

As a commentary on the situation of the difference

between abortion and childbearing, the time continuum of the several interests existent in childbearing commences and continues since before conception until adulthood of the child, which certainly is not the case in the question of abortion. You have the marriage, family health and counseling for the wife, parental care, medical and social, GYN and obstetrical care, birth, pediatric, postpartum, medical, and social services, educational formation of the child, moral training, school, formal school, and ultimately citizenship, that all revolve and are intimately connected with childbearing that are abstracted from the abortion question.

The Court of Appeals concluded that equivalency exists between abortion and childbearing. And this, I believe, results from an erroneous viewing that childbearing and abortion are surgical procedures. They both admittedly are surgical procedures, but that does not lead to the conclusion of the general equivalency. Factually and legally I believe that such a view is too limited and inaccurate.

Legally this Court has said that the nature of a woman's constitutional right is essentially a medical decision by a personal physician confined to matters that relate to her life or health. This Court has showed concern for a woman's life and health by insistence that her welfare be determined by a freely acquired, totally independent

professional medical judgment. It did not say--

MR. CHIEF JUSTICE BURGER: Your time is consumed now, Mr. Freeman.

MR. FREEMAN: I thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Susman, whenever you are ready.

ORAL ARGUMENT OF FRANK SUSMAN, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

In 1973 this Court in Roe v. Wade and Doe v. Bolton recognized for the entire nation the constitutional right of a woman to terminate a pregnancy. In the succeeding four years since that decision enormous benefits have accrued to the women of this country and, for example, the rates of septic abortion, illegal abortion, infant mortality through the use of amniocentesis, maternal mortality, and other comparable rates have all dropped precipitously. And yet there has been one segment of the female population of this country which has not benefited nor been allowed to share in these advantages that have come to pass, and that of course is the indigent female. This has occurred through two basic reasons.

One is the restriction on Medicaid payments, which occupied this Court's time this morning and part of this

afternoon in regard to the cases arising from the jurisdictions of Pennsylvania and Connecticut. And the second encumbrance from the public sector has been the foreclosure of public hospitals. To date less than 25 percent of the public hospitals in this country offer the procedure of abortion. And this segment of society, the indigent female, who has not been allowed to share in the advantages of this Court's decisions in 1973, contribute in large part to the fact--

Q By public hospitals you mean the governmentally operated hospitals that serve indigent patients?

MR. SUSMAN: For the purposes of this case, public hospitals tended to include only those basically owned by the government and operated by them. They do not include those which we sometimes call semiprivate or semipublic. They do not include sectarian institutions.

Q These are government owned and/or operated hospitals that serve indigent patients?

MR. SUSMAN: That is correct, Your Honor.

Q Is your 25 percent figure for public hospitals or all hospitals?

MR. SUSMAN: Public hospitals.

This segment of society that we are discussing, the indigent female, is the largest portion of that group which contributes to the fact that--

Q Would the particular problem of public hospitals go away if the Social Security Act or Medicaid required the payment for abortions?

MR. SUSMAN: No, it would not because the reasons that have foreclosed the public hospitals from providing abortions in the City of St. Louis have nothing to do with whether or not they will be reimbursed by Medicaid. And, in fact, the State of Missouri is presently under court order to do so as in regard of Singleton v. Wulff.

Q If a state was going to participate in Medicaid, what if it was required to pay for abortions?

MR. SUSMAN: If it were required to offer abortions--

Q Yes.

MR. SUSMAN: --then as to what the policy of the hospitals--

Q Then your problem would go away or not?

MR. SUSMAN: I am not sure because I do not know how the city would respond. They might decide not to participate in the program.

Q This would be just cities. I suppose by a state statute the state legislature decides whether to participate, does it not?

MR. SUSMAN: That is correct.

Q How has the city responded to the decision of the Court of Appeals in this case?

MR. SUSMAN: Since the second reversal by the Eighth Circuit, they have been performing abortions.

Q In the hospitals or by contracting them out, as your brother said?

MR. SUSMAN: Initially started by performing the procedures within the hospital facilities themselves but only within City 1. They have never offered abortions at City 2.

Then there was a period of time in which they had some difficulties, whether for reasons of their own or otherwise, I will not go into and the record does not support; but they stopped. They had some reasons--procuring physicians. And during that period of time, they contracted out with a private, not-for-profit tax-exempt facility, which is basically a clinic doing abortion procedures and nothing else. That also came to an end. And, as we stand here today, the City of St. Louis has reinstituted in City Hospital No. 1 its own program dor doing abortion procedures.

Q What about No. 2?

MR. SUSMAN: Number 2 has never done abortion abortion procedures and has no plans to do so. If a woman shows up at City 2--and, as you pointed out, Mr. Justice, that basically serves the black area of the City of St. Louis--

Q It always has.

MR. SUSMAN: Always has. That is correct. No question about it. She is referred to City Hospital No. 1

for the treatment.

Q Do you make any separate complaint of the fact, Mr. Susman, that abortions even under the Eighth Circuit mandate are available only at Hospital No. 1 and not at Hospital No. 2?

MR. SUSMAN: No, we do not. I do not think that because there is a constitutional obligation of the city through its public hospitals to provide abortions that that means they must do them at every hospital facility, assuming there is not some great inconvenience. I also do not personally believe that they could not fulfill this constitutional obligation by in fact contracting out with a private facility. I do not think you have a constitutional right to on-site procedures. I think their contracting out during this period of time we were previously discussing was in fact constitutional and did comply with the order of the Eighth Circuit.

It is this segment of society, the indigent female, which is the largest group and has contributed greatly to the fact that the illegitimacy rate in the City of St. Louis is presently 46 percent. One out of every two births is now illegitimate in the city.

The poor segment of society has always utilized the city hospitals as their sole source of receiving medical assistance, and the poor have neither the economic means nor

the sophistication to seek out a broad range of medical services, and they never have. The public hospital stands as the exclusive provider of medical services, the delivery of medicine, physicians, facilities, and related services. And yet, as this case demonstrates clearly and as the record showed, the public hospitals are the subject of political vagaries. They have become involved in the political campaigns for mayor and for lesser offices in the City of St. Louis.

This is not a case, as the petitioners attempted to state it, where we are seeking to imply that every woman has a right to an abortion at the public hospitals. We do not believe that there is an abligation of the state to furnish the exercise of any fundamental right, and clearly abortion has been held by this Court to be such a fundamental right.

We do not believe, for example, that there would be a constitutional right, a requirement, for the public hospitals of the City of St. Louis to offer maternity care. It is merely an Equal Protection argument. That if they offer maternity care, then they also must offer the procedure of abortion.

Q So, your whole constitutional argument is bottomed on the Equal Protection Clause of the Fourteenth Amendment, is it?

MR. SUSMAN: In large and almost exclusively, yes, sir, it is. This case really is merely a plea that the badge

of indigency not be used as some type of financial bludgeon to coerce the indigent to submit to the religious and moral philosophies of those in political control and those who manipulate the medical and financial dole.

Q In comparison with whom are your clients being denied equal protection?

MR. SUSMAN: Those indigent women, eligible for care at the city hospitals, who elect and wish to carry the pregnancies to term.

Q That is just a comparison between indigent, I take it.

MR. SUSMAN: This case is basically the class of indigents.

Q Yes, but indigency does not make the difference.

MR. SUSMAN: I do not believe it does, although the Eighth Circuit saw that as an additional Equal Protection denial.

Q Do you see it as discrimination as between two classes of pregnant, indigent women, do you?

MR. SUSMAN: Although the plaintiffs--

Q And one class gets medical care at the city hospital if they give birth or if they have a miscarriage, and the other class of pregnant women does not get care at the city hospital if they want to have an abortion. Are those the two classes?

MR. SUSMAN: I do not believe they are, Your Honor. I do not believe that the requirement of indigency really affects a class.

Q They are all indigent. The universe is indigent women or they would not be at the public hospital, as you defined it earlier.

MR. SUSMAN: That is not necessarily correct. Those who go to the public hospitals for treatment of any type and who can afford to pay are billed for the services rendered.

Q Then who are your classes? I will repeat my question. In comparison with whom are your clients being denied equal protection of the law?

MR. SUSMAN: I think to answer that we first have to identify who the clients are. I would say that the clients are the class of pregnant women who desire to terminate those pregnancies. And in comparison to them is the class of pregnant women who desire to carry those pregnancies to term.

Q Indigent and affluent?

MR. SUSMAN: Correct.

Q If they are affluent, they can realize their desire to have an abortion at the same price as they would have to pay at the public hospital.

MR. SUSMAN: More easily, yes.

Q They would go to the private hospital.

MR. SUSMAN: That is correct. They have that extra option.

Q How can you make that class then? How can you put them in your class?

MR. SUSMAN: Because I think there is still the Equal Protection denial, regardless of whether or not they are indigent.

Q How is the millionaire person, female, denied any protection if she goes to a private hospital in Switzerland and has an abortion? She cannot be in the same category, can she, with the indigent?

MR. SUSMAN: I think there is clearly an extra argument for the indigents. I think that is an extra argument for denial and a separate basis of denial of equal protection. But I think any woman, whether indigent or prosperous, has a right to equal treatment at the city hospital.

Q Do you need that?

MR. SUSMAN: As a purist legally, yes. As a practical matter, no.

Q Do you need that to win?

MR. SUSMAN: No, Your Honor.

Q I am really confused now. What comparison do you want us to make now?

MR. SUSMAN: I am asking for a comparison between

those women, regardless of their economic means, who have a right to treatment at the city hospital, who are pregnant and desire to terminate as opposed to those women who, regardless of means, have a right to treatment at city hospital and desire to carry to term.

Q When you say right to treatment, do you mean right to treatment under the practices of the city hospital?

MR. SUSMAN: And the charter in the operation of the institution, yes.

Q And the charter. A person who can pay will be treated, but they will collect from him.

MR. SUSMAN: That is correct. That has always been the practice, regardless of the treatment.

Q What you are saying is that the City of St. Louis as a governmental entity cannot maintain a hospital which declines to perform abortions.

MR. SUSMAN: Provided they perform simultaneously the full range of maternity services. And many public hospitals although not in the City of St. Louis but throughout this country, there are many public hospitals that do not have any maternity departments whatsoever, but they have closed them down for a variety of reasons. Our legal theory would not allow us to bring a case against such a public hospital and demand that they offer abortion procedures if they do not simultaneously offer the treatment of maternity and delivery.

Q Mr. Susman, you say that you want your clients to be freed from the prejudices and moral judgments of the majority. And yet if we sustain your argument here, if that majority in St. Louis City or St. Louis County, whatever, feels strongly enough about it, they can simply cut off the rendering of any sort of maternity service.

MR. SUSMAN: That is correct.

Q Could they cut out just furnishing any kind of maternity services without payment but still furnish the service if somebody could pay?

MR. SUSMAN: Yes, I believe they could.

Q Is there any First Amendment issue in this case, or has there ever been?

MR. SUSMAN: I think there is a First Amendment issue, but it has not been raised. It has been raised in many previous abortion cases, and no court to date, to my knowledge, has seen fit to recognize it but always choosing other alternative grounds, and for that reason it was not raised. It is clearly there lurking.

Q But if it is not raised, we perhaps are not permitted really to look at your argument about the religious views of the majority in the community and that sort of thing.

MR. SUSMAN: That is true, but I have not raised such arguments, Your Honor.

Q You mentioned them in passing at least.

MR. SUSMAN: The only religious view involved here, or moral view, is that of petitioner Poelker, who testified at trial that the only reason for the imposition of the policy of his edict that there be no abortions performed in the public hospitals of the City of St. Louis was that in his personal belief abortion is murder. He further testified that he had never made any investigations or studies whatsoever as to whether they had the necessary facilities, whether the personnel there was willing to do it, whether they could offer them, what the effect would be on other services offered, whether there was any possibility of contracting out with a private facility to do them. He never made any investigations or study. He had a sole reason, and that was he thought it was murder, and that is why he issued the edict.

Contrary to the statements of my brother counsel, two of the four physicians who examined and treated and talked with Jane Doe when she appeared on her visits to the City Hospital, two of the four clearly stated to her that the hospital policy would not allow it to be done there. All four of the physicians are students, classing them together. Two were students, two were actually physicians at the time. All four testified that they had personal moral beliefs against providing the procedure. One of the doctors, the one in charge, the chief resident of OB/GYN, even refused to give to Jane Doe a statement as to the existence of her pregnancy so

that she could take the statement elsewhere and seek relief. He would not even give her such a statement. He said that was his policy, never to give statements of pregnancy to any woman who desired an abortion.

All of these persons, whether students or physicians, are associated with St. Louis University, which the trial court itself stated clearly, and there was no dispute, that it was a Catholic university. But the trial court further stated that no one associated with that university would ever perform an abortion. In fact, it was introduced into evidence--and it appears in the record--that the faculty manual, St. Louis University, prohibits anybody associated with the university doing an abortion. And a Jesuit so testified. And that if you did such a procedure, you would be subject to loss of appointment, contract, and tenure for doing so.

Q What if in fact in a small town all of the doctors in the public hospital had those religious beliefs. Do you think the Constitution compels the city to compel them to perform abortions?

MR. SUSMAN: Absolutely not. And I would be the first to come here and defend any individual physician's right--nurse's or orderly's--to refuse on their personal religious and moral grounds to participate in such a procedure which violates their religious principles.

Q Then where would you end up in that kind of

hypothetical case, where the only people on the hospital staff and the only competent people they can get on the hospital staff have those religious beliefs?

MR. SUSMAN: I think there has to be--and the word "reasonable" gets tossed around so much with lawyers and judges--but I think there has to be reasonable efforts to procure the services of individuals who do not share those personally held beliefs.

Q No, my hypothesis is those reasonable efforts have been made and they cannot find anybody competent who is willing to work in that hospital as doctors on the staff who do not hold those religious beliefs.

MR. SUSMAN: Then you are weighing in the balance, in my opinion, the choice of compelling a physician to do this procedure which he is personally opposed to for religious or moral reasons as against, on the other side of the balance, compelling the woman who wants the abortion to travel some indeterminate distance to procure it elsewhere. And putting those two in the balance, in my opinion, it would weigh in favor of the physician who does not want to participate. She must travel.

Q Or the town has a constitutional duty to subsidize the travel of the woman; is that it?

MR. SUSMAN: That is also a realistic possibility. But I would again point out here that ever since the Eighth

Circuit Court of Appeals ruled in this case, the city has been furnishing this procedure, has been able to find physicians because they have gotten them from Washington University, which is a non-sectarian institution. In fact, Washington University has always maintained its own clinic, which does outpatient terminations of pregnancy. They could not provide the physicians before because St. Louis University was contracted to provide all OB/GYN services. Obviously you are playing with a stacked deck, or you were in the past.

Q Mr. Susman, you seem to me to have admitted that if the deck were stacked by the physicians's religious and moral convictions, that would be permissible. But when you look at the mayor's and supervisors' moral convictions, you say that is intolerable even to consider it as a factor.

MR. SUSMAN: I think the mayor is entitled to his personal opinions. He does not have to participate in any abortion decision. But he does not have the right by edict to forbid the performance of abortions within the public hospital institutions.

Q If it is a complete justification for the doctor, why is it not a factor that might be considered by the hospital administration?

MR. SUSMAN: This was not a factor considered by the administration.

Q I thought you said the whole reason for it was

their religious and moral opposition to abortions.

MR. SUSMAN: Of the physicians because--

Q Maybe I misunderstood you. I thought the mayor himself was opposed on moral and religious grounds.

MR. SUSMAN: That is correct. Perhaps I do not understand your question.

Q It seems to me that if that is a legitimate consideration for a doctor, why is it not also at least a legitimate--maybe it should not be controlling--but at least a legitimate consideration for another government representative?

MR. SUSMAN: Because I can draw a vast distinction between the opinion of a doctor who must participate in the actual procedure and perform it as opposed to the mayor having his private beliefs. He does not have to participate in it. He can believe anything he wants. Nobody is asking him to participate or perform one.

Q Let us say that these are private strongly held beliefs that he has publicized and on the basis of which he has been elected to office to run the hospitals by a majority of the people.

MR. SUSMAN: I do not believe that that is a legitimate reason or rationale for the government or the City of St. Louis in this case to justify the deprivation of women's constitutional rights to an abortion, as stated by this Court

in Roe and Doe. First of all, I think the standard is clear that we are talking about a compelling state interest, and the moral beliefs of the mayor do not, in my mind, constitute a compelling state interest.

Q Mr. Susman, what do we have in this record to show exactly--is there anything in writing about this policy?

MR. SUSMAN: It was admitted. There was no question that the policy--

Q My question was, Is there anything in writing--

MR. SUSMAN: No.

Q --written down?

MR. SUSMAN: No, it was not.

Q It was not an ordinance, it was not a regulation of the hospital?

MR. SUSMAN: It was not an ordinance. It was not a hospital regulation.

Q There is nothing written.

MR. SUSMAN: No, sir.

Q And the edict you say that the mayor issued, is that in the record?

MR. SUSMAN: It is in quotations as to what the edict was. No, that is not in the record. There is testimony from the mayor that he did issue such an order to his co-defendant petitioner, Dr. Wochner, who is Commissioner of Hospitals and testified that he would have wanted to perform the procedures

and thought they ought to be performed but could not because of the mayor who appointed him and--

Q What I am trying to get is just what do we set aside that the city did?

MR. SUSMAN: I think there are two things.

Q We set aside the fact that two employees refused to do the job--four employees; is that right?

MR. SUSMAN: I think it becomes less a question of setting aside than taking the tack chosen by the Eighth Circuit and imposing an affirmative duty upon the petitioners to allow and to provide the necessary facilities and personnel and resources on a comparable basis as they are provided for those who choose maternity.

I think there is some serious question as to whether the edict, for lack of a better word, of the mayor or the petitioner Poelker in this case really had much legal substance.

Q That is exactly what I am talking about. So, if that has no legal substance, what do we do? We enjoin these four people from doing it?

MR. SUSMAN: No.

Q I see they have gone by now.

MR. SUSMAN: Yes.

Q They have graduated, have they not?

MR. SUSMAN: Two of the students have graduated.

Q Normally we have an ordinance we declare unconstitutional. We have a statute or we have an order of a state agency. Here I am trying to find out what was done by the state that was wrong.

MR. SUSMAN: Ignoring for the moment the legality or the illegality of the mayor's edict, the record clearly demonstrates that the co-petitioner, Dr. Wochner, relied upon it in not providing abortions, which he chose to do were it not for the edict. So, number one, I think that petitioner Wochner can be directed to ignore this edict, legal or illegal, and be allowed to proceed to offer these procedures, that physicians be obtained as they have been since November of 1974, several months after the Eighth Circuit ruled, and they have been providing these procedures.

Q What case do we have that is like this? We have an amorphous thing up here that everybody admits and all. We do not get jurisdiction by consent between parties.

MR. SUSMAN: I understand that, but what we do have are the uncontroverted facts that abortions have never been performed in the City Hospitals of St. Louis. We also have the uncontroverted fact that there were two things that prevented these abortions from being provided, and one was the mayor's--

Q This was in one hospital you are talking about.

MR. SUSMAN: The edict applied to both.

Q I thought you said there was nothing in this

record about two, and it was not in the case.

MR. SUSMAN: There was no evidence as to the practice of two because there was only one identifiable named plaintiff, and she only went to City Hospital No. 1. But the mayor's edict, the record shows, applied to both hospitals. The staffing procedure only applied to City Hospital No. 1, that hospital at which Jane Doe appeared and attempted to procure the medical services desired by her.

Q Are the doctors in the city hospital in St. Louis state officers under the laws of Missouri?

MR. SUSMAN: I do not believe they are. They are employees, independent contractors--

Q I said, are they state officers?

MR. SUSMAN: I do not believe they are.

Q In quotes.

MR. SUSMAN: I do not believe they are, Your Honor.

Q So, where do you get your state action?

MR. SUSMAN: State action comes not in the individual practices of those physicians but again through the mayor's policy and, number two, the staffing procedure which allows it to be staffed in such a manner that you will never have a physician who does not have moral principles against performing abortions. The state action is not in the individuals who actually comprise the staff but the policy of the state that allows it to be staffed in such a fashion. It is the staffing

policy that was attacked, not the staff per se. And that policy clearly is state action.

Again the petitioner Poelker never offered any justification, nor was there any in the record, nor has counsel indicated any in argument, other than the mayor's personal beliefs that resulted in this policy that presently exists.

I do not think there is much reason to devote much time to the issue of standing, which is one of the other three issues in this case, because I think that is clearly decided under the prior decisions of this Court.

I would briefly mention the attorneys' fee issue. Although counsel did not have time to argue it orally, I would suggest that all of the arguments included in their brief are completely undercut and obviated by the recent passage of Public Law 94-559, allowing for attorneys' fees under the original appellate court theory of private attorney general. I think under the holding of Bradley v. Richmond School District it is retroactive. I think the legislative history which we furnished to the Court by reference in a letter updating our brief shows that it was intended to be retroactive. There have been two decisions to date, one by the Northern District of Mississippi, on December 14, 1976, and one by the United States Court of Appeals, the Eighth Circuit, last Thursday, January 6th, both holding in fact that this

public law is retroactive.

Q If you win.

MR. SUSMAN: Correct. Absolutely. Prevailing party only.

Q Then you are concerned with fees only in the District Court?

MR. SUSMAN: And in the Appellate Court. They were awarded at both levels.

Q Were they finally ordered in both levels?

MR. SUSMAN: They were, Your Honor. In fact, the Appellate Court fees were awarded first, and then it was remanded to the District Court for awarding of counsel fees. So, chronologically the appellate fees came first. All of these fees presently now in the registry of the court have been paid in.

In conclusion, while it is true that the policies of the petitioners have not totally foreclosed abortions for women of low and marginal incomes in the City of St. Louis, the effect upon their access to services has in fact been devastating. For no other reasons than the petitioners' hospital policies, they have been denied the equal protection in the making of a constitutionally protected choice. They have suffered in fact the cruel coercion of financial support to choose carrying to term although against their desires and against in many cases their best interests of life and

health. To ignore the economic bait forces them to rely upon the charity and beneficence of the private medical sector for assistance, a degrading alternative.

Lastly we would note that to deny the indigent women the same rights of access to control over their own reproduction fosters a perpetuation of the cycle of poverty generation after generation and denies them an opportunity to escape and to rise above the conditions of their environs.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. Thae case is submitted.

[Whereupon, at 2:43 p.m., the case was submitted.]

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