# ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

# THE SUPREME COURT
# OF THE
# UNITED STATES

CAPTION: WILLIAM L. WEBSTER, ATTORNEY GENERAL OF MISSOURI, ET AL., Appellants v. REPRODUCTIVE HEALTH SERVICES, ET AL.

CASE NO: 88-605

PLACE: WASHINGTON, D.C.

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IN THE SUPREME COURT OF THE UNITED STATES

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WILLIAM L. WEBSTER, ATTORNEY :
GENERAL OF MISSOURI, et al., :
Appellants, :
v. : No. 88-605
REPRODUCTIVE HEALTH SERVICES, :
et al., :
Appellees. :

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Washington, D.C.

Wednesday, April 26, 1989

The above-mentioned matter came on for oral argument before the Supreme Court of the United States at 10:00 o'clock a.m.

APPEARANCES:

WILLIAM L. WEBSTER, Attorney General, State of Missouri; on behalf of the Appellants

CHARLES FRIED, Special Assistant to the Attorney General; on behalf of the Appellants

FRANK SUSMAN, St. Louis, Missouri; on behalf of the Appellees



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C O N T E N T S

P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE REHNQUIST: We will hear argument now in No. 88-605, William L. Webster versus Reproductive Health Services. By General Webster.

ORAL ARGUMENT OF WILLIAM L. WEBSTER

ON BEHALF OF THE APPELLANTS

MR. WEBSTER: Mr. Chief Justice and may it please the court, this case represents a direct appeal that involves a 1986 Missouri statute defining the rights of the unborn and regulating abortion in Missouri. Missouri's appeal involves three basic areas for this court's review: The first, the constitutional boundaries on the limitations of public funding; the second, the effect of and the facial constitutionality of legislation declaring that life begins at conception; and, third, the ability of a state to require a physician to perform tests and to make and record findings when determining viability. Finally, we have asked this court to reconsider the standard of review to be applied to state abortion regulation.

Since 1973 this court has reaffirmed Roe versus Wade's mandate, state and lower Federal courts have repeatedly interpreted that mandate, frequently strictly against the states. One result is that the

states have effectively been forbidden, not only to prohibit abortion but usually to regulate abortion in any significant way.

We would begin with the public funding area where the Eighth Circuit upheld that portion of Missouri's law which declared unlawful the expenditure of public funds for the purpose of performing or assisting in an abortion but struck down three subsequent sections. The court declared first of all Section 188.205 relating to the expenditure of public funds for abortion advocacy, facially unconstitutional. We would contend to the court as we have at every level that this particular section, which we have appealed, does not go to the speech but rather is directed at the entities responsible for expending public funds.

QUESTION: Mr. Webster, is that the argument you made below?

MR. WEBSTER: There were three sections.

QUESTION: Yes I know. Is that the argument you made with regard to this section?

MR. WEBSTER: Yes. Yes. We have suggested throughout that this language is directed towards those individuals responsible for the expenditure of public funds, that it is not directed to any physician or any health care provider. We would note that much of

Appellees brief treats it as if the subsequent two sections are still before the Court dealing with public employees and other health care providers and speech in public facilities.

But that's not what we have brought here. We contend the government is certainly not obligated in and of itself to become an advocate for abortion. This court was very explicit in Meyer when it concluded that a state is not required to show a compelling interest for its policy choice to favor child birth, normal child birth over advocacy of abortion.

QUESTION: So some part of the decision below you don't appeal, especially in the speech area?

MR. WEBSTER: There are two provisions in the speech area that are not before this court. One dealt with the speech of public employees and the other the speech in public facilities. The only issue that remains --

QUESTION: So you don't challenge the judgment below in that respect?

MR. WEBSTER: We have not challenged those. We have not brought those before this court. We also deal with the question of public funding in hospitals and the use of public employees. We contend here that the Eighth Circuit struck down Missouri's prohibition of

the use of public facilities and public employees improperly. We suggest that they ignored the language of this court in Poelker and Maher. These statutes that the state is defending are clearly within the authority recognized by the abortion funding decisions of this court and especially by Poelker.

The lower court chose to rely on its own precedent of Nyberg versus City of Virginia. We contend that that is clearly wrong. In essence, the court in Nyberg has contorted Roe to create an abortion right in public hospitals, requiring those public facilities to provide abortions if, in fact, the patient has the capacity to pay. And it seems to us a convoluted result to suggest that if you can afford an abortion, we have to provide one for you in a public facility but if you lack the financial capacity to provide an abortion, that the state and other public governmental entities are not obligated to provide those services for you.

QUESTION: General Webster, can I ask you one clarifying question? What is the consequence of a violation of that section? If the doctor should go ahead and do it, is he committing any kind of a misdemeanor or crime?

MR. WEBSTER: We have a separate specific statute in Missouri which prohibits abortions which

occur at viability. Any post-viability abortion would be prohibited under Missouri statute.

QUESTION: I am just asking if one violates Section 205 or 210 or 215, is there any sanction for violation?

MR. WEBSTER: To my knowledge there is no sanction for violation.

QUESTION: It is not a misdemeanor? What is the state's method of enforcement then?

MR. WEBSTER: The language here is directed towards those bodies that expend the public funds.

QUESTION: Right.

MR. WEBSTER: Public funds whether it's related to encouraging or counseling or the expenditure of public funds for the performance of abortion. I would presume that the remedy would be injunctive relief to prevent either the facilities from performing those services or to prohibit the expenditure of the funds themselves to be appropriated to that facility.

QUESTION: What if a doctor who had a patient in a public hospital went ahead and performed in the first trimester, performed an abortion. Is there any sanction against the doctor if he did that?

MR. WEBSTER: This particular chapter, 188, carries a general Class A misdemeanor penalty for

violations of the initial sections, but there is no operative language in the 1986 statute.

QUESTION: So it would be a misdemeanor then?

MR. WEBSTER: Arguably it would be a misdemeanor.

QUESTION: What is your opinion? Don't you know?

MR. WEBSTER: My opinion is that there is no language in that section which was adopted here which would suggest that it would make it a criminal offense, only that it is directed to those bodies expending the public funds themselves.

QUESTION: Is it your opinion as the chief law enforcement officer of the state that it would not be a misdemeanor?

MR. WEBSTER: We wouldn't view that violation as a misdemeanor, no.

QUESTION: Is there any enforcement provision other than injunctive relief? If the doctor went ahead and did it and you don't enjoin him in time, that would be the end of it?

MR. WEBSTER: That is the only enforcement power that we would presume contained in the language which was enacted in the 1986 statute.

QUESTION: Wouldn't it be grounds for

discharge or cause?

MR. WEBSTER: It is conceivable the hospital board could if somebody violated the policy of that facility, seek to discharge that particular employee. We don't --

QUESTION: The statute says it shall be unlawful. I assume it is grounds for discharge.

MR. WEBSTER: We would presume that would be an opportunity available.

QUESTION: I might also be the official who expends the funds knowing they are going to be used in violation of the statute is liable for the funds. I would assume so. That is certainly the case at the Federal level, that if you make an unauthorized expenditure, it comes out of your pocket.

MR. WEBSTER: That certainly would be one of the appropriate remedies. But the directives here go to those bodies that are responsible for the expenditure of the funds themselves and merely say as a matter of the public policy of the state of Missouri that we are not going to appropriate those funds for the purpose of encouraging, counseling, performing and assisting or in this case the use of public facilities.

We believe that the result of Nyberg is contrary to the precedent of this court in both Poelker

and Maher and also in Harris where it has been suggested that governmental bodies do not have to appropriate their funds in that manner. The court has also, the lower court has also, challenged what we contend to be a preamble of this particular statute, a declaration that life begins at conception which is found in Section 1.205.1.

The District Court held this preamble was in conflict with the essence of Roe. We believe this is clearly wrong. The District Court also relied on language in Akron which suggested a state cannot adopt one theory of life, at least when life begins, for the purpose of justifying its regulation of abortion. We have suggested from the outset in this case that these findings are part of the statutory preamble and do not serve as any substantive right. They impose no substantive responsibility.

And I believe it is worth noting that there were a number of sections in this chapter that were also enacted in 1986 which have not been challenged, that affect tort law, affect the criminal law. The one area we contend they do not affect is the regulation of abortion.

There is specific language which suggests that abortion conduct would be exempt because this exempts

from the ambit of the preamble any area that has been declared subject to the rights, privileges and immunities of the U.S. Constitution, decisional law and the Missouri Constitution.

The operative sections which do have effect remain unchallenged by the Appellees, but the findings have been struck down. States have historically undertaken legislative action in non-abortion related areas without violating anyone's constitutional rights for as long as we have had a Constitution. The statute does not in any way affect a woman's constitutional right to choose abortion over child birth. The statute does specifically exclude abortion and the court seems to be attempting here to try and divine what the legislators' motivations might have been with language which we contend has no operative effect.

The Eighth Circuit has invalidated an abstract, philosophical statement of the legislature because apparently they don't agree with it and that seems to be the type of direction that we are seeing in a number of the lower courts.

We contend this declaration doesn't affect anyone, that it was clearly improperly struck down at the lower court level and that legislative bodies around this country should be entitled at least in the

non-abortion area to have a philosophical statement of when they contend life begins.

QUESTION: You also contend there is no case or controversy on that point, I take it?

MR. WEBSTER: We have raised that issue at every level, Your Honor. There is also a provision of the statute that was struck down which deals with the requirements to conduct tests to make findings to determine viability.

The District Court upheld the first sentence of Section 188.029 which requires a doctor before performing an abortion, if he has reason to believe that that woman is carrying an unborn child that has reached 20 weeks or more of gestational age, to first determine if that child is viable. That language has not been appealed.

That is the standard which is articulated here. The physician, if they think the child is viable, think the child has reached 20 weeks of gestational age, will make a determination of viability. The District Court, however, then severed the second sentence of 188.029 relying on dictum from this court found in Colautti and on that basis they said the legislatures of this country cannot proclaim any single factor as a measure of viability.

We have said at the outset under Roe that Missouri and every other state has an important and legitimate interest in the fetus throughout pregnancy. And even adopting the Roe standard, certainly that interest becomes compelling at viability. This court has said so.

We contend the states should be permitted to protect viable unborn children by requiring physicians in their best medical judgment to undertake such tests as are necessary to provide findings of gestational age and weight.

The lower court's result would make this obligation of the state to protect that viable fetus frankly mere verbiage. If the state cannot be required to make and record findings in the process of determining if a child is viable, then, frankly, they have very little opportunity to determine whether viability has actually been found. There are two other points we want to make here --

QUESTION: Could I interrupt for a minute? It is not just age and weight as you mention, but also lung maturity.

MR. WEBSTER: There are three facts.

QUESTION: And there is a good deal of evidence that that is, number one, useless information

and, number two, very difficult to find without some risk to the pregnant woman.

MR. WEBSTER: Your Honor, there are three factors and lung maturity is one of them: gestational age, fetal weight and lung maturity. But as we have suggested in our brief and to the lower court, we feel there are two distinguishing characteristics that separate this from Colautti. The first is that this imposes on physicians a standard of care. It says they are supposed to use the ordinary care, degree of care, skill and proficiency commonly exercised by skillful, careful and prudent physicians under same or similar circumstances, and to the extent a particular test would be inappropriate, it would not comply with that standard of care.

We also suggest in the language that they are only supposed to perform such tests as are necessary to make findings of gestational age, weight and fetal lung maturity, and to the extent a test would not be necessary, to the extent it would show nothing, and we have conceded at 20 weeks amniocentesis would not be appropriate, it would clearly not be a necessary test.

QUESTION: It doesn't make such findings to the extent they are necessary. It says to the extent they are necessary to make a finding of the lung

maturity.

MR. WEBSTER: We believe, we believe it clearly is a common sense reading of this, a common sense construction, to say that if a test would not demonstrate anything, it would not be in the normal standard of care which this statute in the section which remains upheld imposes on that physician. We are not suggesting which test they use, first of all. We are merely suggesting that they make and record findings.

And to the extent one test can make determinations for the first two areas, gestational age and fetal weight, and we believe the uncontroverted record below is that ultrasound after 20 weeks can benefit in making such findings, that at least those two findings are relevant and should be upheld. We are really not at the point to concede fetal weight because we believe the language does distinguish for those tests that are necessary.

QUESTION: Let me be sure I understand. You are saying the doctor if he thinks it is unnecessary doesn't have to perform the lung test?

MR. WEBSTER: We are contending, Your Honor, that if that test would not be dispositive, if it wouldn't tell them anything by definition, it cannot be a necessary test.

QUESTION: What if he has determined fetal age without determining weight? Why would the weight be necessary?

MR. WEBSTER: We have only --

QUESTION: How do you distinguish weight and lungs?

MR. WEBSTER: We believe these are three relevant objective medical findings that should be recorded.

QUESTION: I am assuming the doctor who makes a determination, doesn't think the second or third tests are necessary. Does he have to perform them anyway?

MR. WEBSTER: Well, this statute would require them to make findings, not necessarily record tests but make findings, and the language in the lower court --

QUESTION: You have to make findings on the lung too?

MR. WEBSTER: The language of the lower court in the testimony --

QUESTION: What is your view on what the statute means?

MR. WEBSTER: My view, first of all, is that the ultrasound technology which was discussed at the lower court can make a finding for both gestational age and fetal weight.

QUESTION: I understand that. My question is if the doctor doesn't think it is necessary, does the statute require him to make the finding on A, weight, and B, lungs?

MR. WEBSTER: No.

QUESTION: On neither?

MR. WEBSTER: I don't believe that it requires an unnecessary test. To the extent they can determine that a fetus is viable with the first finding, I don't think their ordinary skill would require them to go beyond that. If they made the determination that at that point the fetus is viable, I don't believe they need to go beyond that.

QUESTION: Say they make the determination that it is not viable?

MR. WEBSTER: Then I believe it would be appropriate, given the state --

QUESTION: Not whether it's appropriate. The question is whether the statute requires it.

MR. WEBSTER: I believe the statute would require them to go forward.

QUESTION: With all three tests?

MR. WEBSTER: At least with the next test to determine whether or not the fetus is viable, yes, Your Honor.

QUESTION: How about with the third test?

MR. WEBSTER: If the first two tests don't indicate viability, they would need to, and if there was some indication --

QUESTION: The woman appears to be more than 20 weeks into the pregnancy. Does the doctor have to perform the lung test?

MR. WEBSTER: Only if in his ordinary skill and care he has --

QUESTION: He thinks it is not necessary. The question is whether the statute requires him to do it even if he doesn't think it is necessary.

MR. WEBSTER: I don't believe the statute requires the physician to perform any tests that would be unnecessary.

We would finally suggest in this area that if Roe is the standard that is to be applied to the states, and if the dependence -- viability is going to be that bright line that states are supposed to depend on, then at a minimum we believe states should have a right to ensure a reasonable effort to determine viability and in this area we are not telling the physician what kind of test to require, we are not even requiring him to use these tests and have them to be determinative of viability.

We are merely requiring that a physician, usually a pro-abortion physician, make findings and record them. I would reserve the balance of my time.

CHIEF JUSTICE REHNQUIST: Very well, General Webster. Mr. Fried?

ORAL ARGUMENT OF CHARLES FRIED

ON BEHALF OF THE APPELLANTS

MR. FRIED: Thank you Mr. Chief Justice and may it please the court. Today the United States asks this court to reconsider and overrule its decision in Roe v. Wade. At the outset, I would like to make quite clear how limited that submission is. First, we are not asking the Court to unravel the fabric of unenumerated and privacy rights which this court has woven in cases like Meyer and Pierce and Moore and Griswold. Rather, we are asking the Court to pull this one thread. And the reason is well stated by this Court in Harris and McRae; abortion is different.

It involves the purposeful termination, as the Court said, of potential life. And I would only add that in the minds of many legislators who pass abortion regulation, it is not merely potential life but actual human life. And though we do not believe that the 14th Amendment takes any position on that question, we think it is an utter non sequitur to say that, therefore, the

organized community must also take no position in legislation and may not use such a position as a premise for regulation.

QUESTION: Your position, Mr. Fried, then is that Griswold versus Connecticut is correct and should be retained?

MR. FRIED: Exactly, Your Honor.

QUESTION: Is that because there is a fundamental right involved in that case?

MR. FRIED: In Griswold against Connecticut, there was a right which was well established in a whole fabric of quite concrete matters, quite concrete.

It involved not an abstraction such as the right to control one's body, an abstraction such as the right to be let alone, it involved quite concrete intrusions into the details of marital intimacy. And that was emphasized by the Court and is a very important aspect of the Court's decision.

QUESTION: Does the case stand for the proposition that there is a right to determine whether to procreate?

MR. FRIED: Griswold surely does not stand for that proposition.

QUESTION: What is the right involved in Griswold?

MR. FRIED: I beg your pardon?

QUESTION: What is the right involved in Griswold?

MR. FRIED: The right involved in Griswold as the court clearly stated was the right not to have the state intrude into, in a very violent way, into the details, inquire into the details of marital intimacy. There was a great deal of talk about inquiry into the marital bedroom and I think that is a very different story from what we have here.

QUESTION: Do you say there is no fundamental right to decide whether to have a child or not?

MR. FRIED: I think that that question --

QUESTION: A right to procreate? Do you deny that the Constitution protects that right?

MR. FRIED: I would hesitate to formulate the right in such abstract terms and I think the Court prior to Roe v. Wade quite prudently also avoided such sweeping generalities. That was the wisdom of Griswold.

QUESTION: Do you think that the state has the right to, if in a future century we had a serious overpopulation problem, has a right to require women to have abortions after so many children?

MR. FRIED: I surely do not. That would be

quite a different matter.

QUESTION: What do you rest that on?

MR. FRIED: Because unlike abortion, which involves the purposeful termination of future life, that would involve not preventing an operation, but violently taking hands on, laying hands on a woman and submitting her to an operation and a whole constellation --

QUESTION: And you would rest that on substantive due process protection?

MR. FRIED: Absolutely.

QUESTION: How do you define the liberty interests of the woman in that connection?

MR. FRIED: The liberty interest against a seizure would be involved. That is how the Court analyzed the matter in Griswold. That is how Justice Harland analyzed the matter in his dissent in Poe v. Ullman which is, in some sense, the root of this area of law.

QUESTION: How do you define the interest -- the liberty interest of a woman in an abortion case?

MR. FRIED: Well, I would think that there are liberty interests involved in terms perhaps of the contraceptive interest, but there is an interest at all points, however the interest of the woman is defined, at all points it is an interest which is matched by the

state's interest in potential life.

QUESTION: I understand it is matched but I want to know how you define it?

MR. FRIED: I would define it in terms of the concrete impositions on the woman which so offended the court in Griswold and which are not present in the Roe situation.

Finally, I would like to make quite clear that in our view, if Roe were overruled, this Court would have to continue to police the far outer boundaries of abortion regulation under a due process rational basis test and that that test is muscular enough, as Chief Justice Rehnquist said in his dissent in Roe, to strike down any regulation which did not make adequate provision --

QUESTION: Mr. Fried do I correctly read what your brief says at page 12, footnote 9, that Griswold is a Fourth Amendment case?

MR. FRIED: Is, I beg your pardon?

QUESTION: Is a Fourth Amendment case?

MR. FRIED: It is a case which draws on the Fourth Amendment. It is not itself a Fourth Amendment case. It is a 14th Amendment case. But I would like to emphasize that the Court would have ample power under our submission to strike down any regulation which did

not make proper provision for cases where the life of the mother was at risk.

I think the important thing to realize is that when Roe was decided, it swept off the table regulations in the majority of American jurisdictions, including regulations recently promulgated by the American Law Institute, and declared a principle which said that it was unfair and unreasonable to regulate abortion in ways that most western countries still do regulate abortion.

We are not here today suggesting that the Court would, therefore, allow extreme and extravagant and bloodthirsty regulations and that it would lack the power to strike those down if they were presented to it. But it is a mistake to think that alone, among government institutions --

QUESTION: Mr. Fried, is there a difference between the court's power in the case of an abortion that would be life threatening to the woman and an abortion that would merely cause her severe and prolonged disease? Is there a constitutional difference?

MR. FRIED: I think that is a matter of degree and it is perfectly clear that severe health effects shade over into a threat to the life and I cannot promise the court that our submission would dispense the

Federal courts from considering matters like that, but I also very much doubt that the Court would be presented with many such situations.

What is necessary is for the Court to return to legislatures an opportunity in some substantial way to express their preference, which the Court says they may express, for normal childbirth over abortion, and Roe v. Wade stands as a significant barrier to that.

QUESTION: Does your submission suggest that a public hospital, in a state that permits abortion, could not allow abortions?

MR. FRIED: It is quite clear that a public hospital may under this court's decision in Maher and in Harris and McRae, may do as Missouri has here done and say that public funds cannot be expended.

QUESTION: Suppose there is a state that permits abortions and they are done in public hospitals. Do you think that is a -- you say that there is human life involved, that is destroyed in abortions? Is there some problem about the state permitting abortions?

MR. FRIED: Oh, no, I think there is not. As I have indicated, I think the Constitution takes no position on this point. There is a certain logic in some of the provisions which say that there should be,

that there should be protection further back. But the country's experience and the court's experience under the constitutionalization of that issue has been so regrettable that I could not in conscious recommend that it be constitutionalized in some other way at another point in the spectrum.

Now, if the Court does not in this case in its prudence decide to reconsider Roe, I would ask at least that it say nothing here that would further entrench this decision as a secure premise for reasoning in future cases.

On the issue of stare decisis, it seems greatly labored -- I thank the Court for its attention.

CHIEF JUSTICE REHNQUIST: Thank you Mr. Fried. Mr. Susman?

ORAL ARGUMENT OF FRANK SUSMAN

ON BEHALF OF THE APPELLEES

MR. SUSMAN: Mr. Chief Justice, and may it please the court, I think the Solicitor General's submission is somewhat disingenuous when he suggests to this court that he does not seek to unravel the whole cloth of procreational rights, but merely to pull a thread. It has always been my personal experience that when I pull a thread, my sleeve falls off. There is no stopping. It is not a thread he is after.

It is the full range of procreational rights and choices that constitute the fundamental right that has been recognized by this court. For better or for worse, there no longer exists any bright line between the fundamental right that was established in Griswold and the fundamental right of abortion that was established in Roe. These two rights, because of advances in medicine and science, now overlap. They coalesce and merge and they are not distinct.

QUESTION: Excuse me, you find it hard to draw a line between those two but easy to draw a line between first, second and third trimester.

MR. SUSMAN: I do not find it difficult --

QUESTION: I don't see why a court that can draw that line can't separate abortion from birth control quite readily?

MR. SUSMAN: If I may suggest the reasons in response to your question, Justice Scalia. The most common forms of what we generically in common parlance call contraception today, IUDs, low dose birth control pills which are the safest type of birth control pills available, act as abortifacients. They are correctly labeled as both.

Under this statute, which defines fertilization as the point of beginning, those forms of

contraception are also abortifacients. Science and medicine refers to them as both. We are not still dealing with the common barrier methods of Griswold. We are no longer just talking about condoms and diaphragms.

Things have changed. The bright line, if there ever was one, has now been extinguished. That's why I suggest to this court that we need to deal with one right, the right to procreate. We are no longer talking about two rights.

QUESTION: Do you agree that the state can forbid abortions save to preserve the life of the mother after the fetus is, say, eight months old?

MR. SUSMAN: If I understand the question, Justice Kennedy, I think the health rights of the woman always are supreme at any stage of pregnancy.

QUESTION: Suppose the health rights of the mother are not involved? The life or health of the mother is not involved, can the state prohibit an abortion after the fetus is eight months old?

MR. SUSMAN: Yes, I am willing to recognize the compelling interest granted in Roe of the state in potential fetal life after the point of viability.

QUESTION: But that is a line drawing, isn't it?

MR. SUSMAN: Yes, it is. But that is a line that is more easily drawn. I think there are many cogent reasons for picking the point of viability which is what we have today under Roe.

First of all, historically both at common law and in early statutes, this was always the line chosen. Whether it was called quickening or viability, there is little difference time-wise.

QUESTION: Well there is a difference, is there not in those two?

MR. SUSMAN: Technically between those two definitions, Justice O'Connor, yes. Quickening had less of a medical significance. It was the woman could first detect movement.

QUESTION: When the fetus was first felt by the mother?

MR. SUSMAN: A kick, yes, absolutely, approximately two or three weeks before what we would consider viability today. The second good reason, I think, for remaining with viability as our dividing line in this context, Justice Kennedy, is that it is one that the physician can determine on a case-by-case basis without periodic recourse to the courts.

Thirdly, it is a point in time that the physician can determine with or without the assistance

of the woman. It is a medical judgment, I agree, and not a medical fact. One cannot pinpoint viability to a day or to an hour or to a second.

I would suggest again, as I indicated, that the line has now been erased. It is interesting also to note at the same time that the definition of conception or fertilization chosen by this statute does not even comport with the medical definition. The definition of conception promulgated, for example, by the American College of Obstetricians and Gynecologists, starts a week later than the definition that this section has chosen to use.

It is at all stages of procreation, whether before or after conception, that the standards of what constitute fundamental liberty are amply satisfied. Procreational interests are, indeed, implicit in the concept of ordered liberty and neither liberty nor justice would exist without them.

It is truly a liberty whose exercise is deeply rooted in this nation's history and tradition. I think it is somewhat ironic that the sole historical source cited by the Solicitor General in his brief in an effort to dispute this fact is a work by Mr. James Mohr, "Abortion in America."

And yet Mr. Mohr, along with 280 other

eminent historians in this country have filed a brief supporting the position of the Appellees when it comes to the historical history.

30 percent of pregnancies in this country today terminate in abortion. It is a high rate. It is a rate that sometimes astounds people, but it is a rate that has not changed one whit from the time the Constitution was enacted through the 1800's and through the 1900's. That has always been the rate.

It is significantly less than the world-wide rate. Worldwide, 40 percent of all pregnancies terminate in abortion. Abortion today is the most common surgical procedure in the United States with the possible exception of contraception.

It remains today, as it was in the days of Roe 17 times safer than childbirth, 100 times safer than appendectomy, a safe procedure, minor surgery.

I suggest that there can be no ordered liberty for women without control over their education, their employment, their health, their childbearing and their personal aspirations. There does, in fact, exist a deeply rooted tradition that the government steer clear of decisions affecting the bedroom, childbearing and the doctor-patient relationship as it pertains to these concerns.

QUESTION: It is a deeply rooted tradition, but surely abortion was regulated by the states in the 19th century and in the 20th century?

MR. SUSMAN: Yes, but I think it is necessary to go back and examine, as the historical brief does and other works, as to the reasons those regulations were enacted. Similarly, they were not done to protect the fetus. Those were not the purposes.

If you look, for example --

QUESTION: If you say there is a deeply rooted tradition of freedom in this area, that suggests that there had been no legislative intervention to me. What you are -- that simply is not the fact.

MR. SUSMAN: I think we can look to a deeply rooted tradition as opposed to black and white issues, as opposed to slavery and yet we have much legislation. In fact, following this court's opinion in Brown in 1954, almost every southern state without exception passed legislation directly in conflict with that opinion.

So the fact that legislation has been enacted does not in my mind --

QUESTION: I am not talking about legislation post-Roe against Wade. I am talking about legislative regulation of abortion in the 19th century and the 20th

century before Roe against Wade. You may be right that that is unconstitutional under Roe against Wade but I don't see how you can argue that there was a deeply-rooted tradition of no regulation.

MR. SUSMAN: Because I think you have to examine the period before the regulations came into effect. Every state adopted anti-abortion legislation in the 1820's and the 1830's and the 1840's. But before that time it went without regulation.

It was accepted, it was not a crime at common law, as Roe and other works have recognized.

QUESTION: That certainly is not uncontested. You mentioned the historical brief. There is more than one historical brief here and one filed by the Association for Public Justice just simply contradicts your history and quotes authorities back to Blackstone and Cook saying that at common law abortion was unlawful.

MR. SUSMAN: I think --

QUESTION: And also contradicting your contention that the whole purpose was to protect the mother and not to protect the fetus.

MR. SUSMAN: I understand there are briefs on both sides. But when one tries to compare the large number, as we are all aware, of the amicus briefs filed

in this case, I think it is necessary to examine as to whether or not these briefs are filed by organizations whose primary purpose is to be opposed to abortion or they are filed by organizations which have been around for 100 years which we consider to be reputable on a large number of issues.

I can't personally, for example -- there is disagreement on medical issues in this case clearly. I personally cannot put as much stock in a brief by Wyoming Nurses for Life as I can in briefs by the AMA and ACOG, the American Public Health Association, American Public Hospital Association and other organizations of similar vein.

QUESTION: But these briefs cite cases and they give quotations. Those cases can readily be consulted and there are a lot of cases and there are a lot of quotations. And even without the brief, I know that there was regulation in the 20th century of abortion. I mean, that is just a common knowledge.

MR. SUSMAN: Justice Scalia, I would not submit that the briefs do not disagree with each other. I do not dispute that. You or I or others might dispute as to whether the facts disagree, but the fact that different parties put different slants or different perspectives or interpretations on those facts

certainly, I could not disagree with.

QUESTION: Let me inquire -- I can see deriving a fundamental right from either a long tradition that this, the right to abort, has always been protected. I don't see that tradition. But I suppose you could also derive a fundamental right just simply from the text of the Constitution plus the logic of the matter or whatever.

How can -- can you derive it that way here without making a determination as to whether the fetus is a human life or not? It is very hard to say it just is a matter of basic principle that it must be a fundamental right unless you make the determination that the organism that is destroyed is not a human life. Can -- can you as a matter of logic or principle make that determination otherwise?

MR. SUSMAN: I think the basic question, and of course it goes to one of the specific provisions of the statute as to whether this is a human life or whether human life begins at conception, is not something that is verifiable as a fact. It is a question verifiable only by reliance upon faith.

It is a question of labels. Neither side in this issue and debate would ever disagree on the physiological facts. Both sides would agree as to when

a heartbeat can first be detected. Both sides would agree as to when brain waves can be first detected. But when you come to try to place the emotional labels on what you call that collection of physiological facts, that is where people part company.

QUESTION: I agree with you entirely, but what conclusion does that lead you to? That, therefore, there must be a fundamental right on the part of the woman to destroy this thing that we don't know what it is or, rather, that whether there is or isn't is a matter that you vote upon; since we don't know the answer, people have to make up their minds the best they can.

MR. SUSMAN: The conclusion to which it leads me is that when you have an issue that is so divisive and so emotional and so personal and so intimate, that it must be left as a fundamental right to the individual to make that choice under her then attendant circumstances, her religious beliefs, her moral beliefs and in consultation with her physician. The very debate that went on outside this morning outside this building and has gone on in various towns and communities across our nation, is the same debate that every woman who becomes pregnant and doesn't wish to be pregnant has with herself.

Women do not make these decisions lightly. They agonize over them. And they take what we see out front and what we see in the media and they personalize it and they go through it themselves and the very fact that it is so contested is one of those things that makes me believe that it must remain as a fundamental right with the individual and that the state legislatures have no business invading this decision.

Let me address particular sections, if I may, for a moment. I would start with the public funding question. I think the difficulty with the Attorney General's argument in this case is a question of how you interpret the provision.

I would remind the Court that both lower courts interpreted this provision to cover the speech aspects between the physician and the woman. And if the Court accords to those lower courts the due deference under Frisby that is due, then that would be the interpretation.

The language is identical in 205 as it is in 210 and as it is in 215. There is no difference. And yet the Attorney General would suggest to you that it does not mean what it says and what it says is: "No public funds shall be expended for the purpose of counseling or encouraging." It does not say, as the

Attorney General suggests, that no public funds shall be appropriated for a program specifically designed to encourage or counsel to have an abortion.

This is not the first time in the last 24 hours that we have heard persons from the Missouri Attorney General's Office suggest interpretations of statutory or constitutional language that is not there on the clear face with the literal reading of the English words used.

QUESTION: Mr. Susman, I guess the states courts never had a chance to interpret their own state statute.

MR. SUSMAN: No.

QUESTION: And I guess the statute is subject to a narrowing construction.

MR. SUSMAN: I think any statute is always subject to a narrowing construction depending how far one wants to perhaps distort the language that is there. Yes, I don't think I have ever seen a statute that I couldn't agree with, that it might be subject to narrowing construction.

The question then, the test that comes into play is whether or not that is so obvious or the language is so clear that no lower court, state or Federal, could reasonably arrive at that kind of

construction and I believe that that's what you have here. I mean, certainly the lower courts -- and again, that's the purpose of this court, to review those decisions. But neither lower court had the slightest problem with interpreting the plain language.

QUESTION: I thought there should typically try to be a construction that would avoid constitutional difficulties, not encourage them.

MR. SUSMAN: I absolutely agree with that principle, but then what you always have is just how far do you bend over backwards to accommodate that principle? Again, lawyers are capable of interpreting any set of words in different words, often more ways than there are lawyers interpreting them.

QUESTION: To whom is this admonition directed, no public funds shall be spent to --

MR. SUSMAN: No public funds shall be expended.

QUESTION: Who is that directed to?

MR. SUSMAN: I have to assume and in my opinion because certainly the answer is not clear, that it is to everyone associated, every public official, every public facility, who in any way handles and deals with public funds. And, of course, the definition of public funds, as the court is aware, is extremely

broad. It even includes Federal funds that come into the state treasury.

QUESTION: And I suppose it includes any employee in a public hospital that is being paid by public funds, I suppose.

MR. SUSMAN: Absolutely in my opinion.

QUESTION: Including doctors.

MR. SUSMAN: Right. But before we touch upon this issue and where we are sort of hedging here is involving the free speech aspects which have been suggested in the various briefs. It is not necessary to reach that hurdle until one surmounts the obstacle of the fact that the language is vague. And both lower courts also found --

QUESTION: Mr. Susman, let me interrupt you there. If we assume because the Attorney General didn't really know, that there are no criminal sanctions attached to this and if we read the statute the way that we would read it, merely a restriction on what agencies may do in supporting programs, is there any possible constitutional objection to it?

MR. SUSMAN: Yes, because I think Justice Kennedy hit the nail on the head clearly in my mind, that were a physician to violate the proscription of this section and being a publicly paid employee, he

would necessarily be discharged.

QUESTION: It does not even apply to a physician if I understand your opponent's submission. He says it just applies to appropriation committees and funding agencies, they shall not set up a program; and that a physician -- he says this, if we agree with it, this is how I understood him -- if a physician should give such advice, that would not violate this section. That is what he says. If that's true, why haven't you won all you really care about in this issue?

MR. SUSMAN: If his interpretation is correct, then I think it remains almost a total mystery as to what this section does mean or how it will be applied.

QUESTION: It just applies to fiscal officers who are drafting programs on how to spend state money. They just should not adopt a program advocating abortion and if that's all it means, I don't see how it can be unconstitutional.

MR. SUSMAN: I would agree, but when I read the section and I read the two that follow, that's not what it says to me. But I agree with you.

QUESTION: I presume in order to comply with the section a fiscal officer when he approves a program has to make sure that there are directives issued that people won't give advice on abortion.

MR. SUSMAN: That is a different question.

QUESTION: Can he possibly be complying with this program unless he issues such a directive? And would not the failure of a doctor in a hospital to comply with the directive be cause for dismissal?

MR. SUSMAN: Absolutely.

QUESTION: I can't imagine that it wouldn't.

MR. SUSMAN: I agree 100 percent. And that's once -- if we overcome and do not affirm this, the lower court's opinions on vagueness, we are directly --

QUESTION: If there are no criminal sanctions, why does vagueness apply?

MR. SUSMAN: I think it applies for two reasons.

QUESTION: What is the authority from this court?

MR. SUSMAN: I think the fact that there is a heightened standard because it touches upon --

QUESTION: What case authority?

MR. SUSMAN: In all candor, I am having a block. I will try to come back to it. But I think the fact that --

QUESTION: That would be a common situation in trying to answer that question.

MR. SUSMAN: I understand that and I

apologize.

(Laughter)

MR. SUSMAN: The Eighth Circuit talks in terms of a heightened scrutiny because it touches upon two things. It touches upon the free speech aspects of both the physician and the patient and, secondly, it clearly touches upon the second fundamental right in addition to speech, of abortion.

And on the basis of those two connections, they felt that heightened scrutiny was appropriate.

QUESTION: Did they cite a case from this court for that proposition? Well, go on.

MR. SUSMAN: If I may.

The Appellees would suggest to this court that states are not free to constrict the spectrum of available knowledge at the expense of women's health, that this section on its plain face prohibits physicians and other health care providers from giving advice concerning abortion. And there was ample testimony at trial contained in the record and referred to in the brief that physicians are frequently put in the position of having to affirmatively advocate and recommend termination of pregnancy.

That women come with conditions that are frequently less than immediately life threatening --

diabetes, renal failure, cardiovascular problems, a whole host of conditions and they come pregnant. And the physician would normally explain the options. And then the doctors testified at trial, particularly Dr. Pearman who is a publicly paid employee and he said: And then they turn to me next and they say to me: Doctor, what would you do? What is best for me?

And he said: Without reservation in those circumstances, and when he thinks it is appropriate, he openly recommends and advocates that they terminate their pregnancy. And we suggest that this is the very kind of language that is prohibited here, that the state has chosen to say there are certain subjects you can't talk about.

This is one of those cases in which receiving half a loaf of medical information may be much more deadly than none, half advice. The parade of horribles --

QUESTION: He could give the advice, he could tell the patient up front, I am not permitted because I have this directive that comes from the officer that dispenses the money, I am not permitted to advise that you have an abortion. I recommend that you consult someone who is able to give that advice. He could say that. He doesn't have to give the bad advice. He could

say: Short of that option, what I would recommend is this but in your condition, I would recommend that you consult someone who is able to provide you advice concerning abortion. I am not able to do that.

MR. SUSMAN: I --

QUESTION: Because my freedom to do so has been abridged by this statute.

QUESTION: Yes, he could even add that.

MR. SUSMAN: I think the suggestion that the physician say to the woman who has been coming to years to this established health care system, to this physician, to this hospital, now you must go elsewhere because the state tells me I can't talk about it, is a new obstacle. It is not the kind of obstacle such as subsidy that we saw in Maher and McRae.

QUESTION: Why is it any different from the physician who says to the woman who is his long time client at this hospital, you need an abortion. I am sorry, I cannot perform the abortion. You will have to go somewhere else to get it done. That is lawful, isn't it?

MR. SUSMAN: No, I do not believe so, because I think that creates an obstacle that did not previously exist.

QUESTION: Have we not upheld the withholding

of funding for public money for abortion?

MR. SUSMAN: I cannot in my mind compare this with the withholding of funding which created as this court said repeatedly, no new obstacle. Women were poor before and by denying them a subsidy we are not creating any obstacle that did not previously exist.

I would point out in interpreting this section as the lower courts have done -- forget the lower courts. Both the Missouri Department of Health and Truman Medical Center in Kansas City, both the head person in each case issued a directive and their own interpretation of this section was: No more discussion about abortion, period. You may not discuss the subject.

And this was from the state's Department of Health that the letter went out. So this isn't something in the abstract that I am suggesting to you that the construction that the lower courts found was something that they had to stretch for. It wasn't.

On this last -- lastly on this point, I would point out if we go back to the term, the parade of horribles that was referred to in Akron, where certain types of information were imposed upon a physician, that he had to tell the patient, and this which court said could not constitutionally stand, that in comparison

here to the horrible of medical ignorance, this one is much worse.

I would address the next section which the Attorney General refers to as the preamble, which I think is a misnomer. The statute doesn't call it a preamble. And, in fact, there are other sections in reality, such as I would point out that Section 188.010 is probably more aptly a section that qualifies more as a preamble to this act than does 205.

What troubled me perhaps the most about this section is that if the state is free to adopt a definition of when human life begins, which they have, and they have picked out conception as that time, then clearly there is nothing to prevent a second state from picking birth as when human life begins, and a third state from picking viability, and a fourth state from picking 12 weeks.

QUESTION: Are those first three options ones on which reasonable people could disagree?

MR. SUSMAN: Yes, but I think even on the fourth option. Let's say state number four.

QUESTION: Do you have any authority in our jurisprudence other than the cases following from Roe versus Wade that tells a state it cannot adopt a proposition that reasonable people agree with?

MR. SUSMAN: No, but I think the problem here is that the --

QUESTION: So this is unique to Roe?

MR. SUSMAN: I think this is somewhat unique. I think the adoption of Section 205, first of all, it clearly is not necessary in order to regulate abortion or to grant property rights or tort rights to fetuses. It is not necessary to have that proposition to do so. Other states have clearly done so without making these types of purported legislative findings.

And, therefore, if it is totally unnecessary to do that, which we maintain that it is, then what they really have done is to adopt a particular religious belief about which there is clearly no consensus and placed it into the law of the land of the state of Missouri. It really does serve no purpose.

I would point out that the Solicitor General in its brief agrees that the impact of this on abortion is quite uncertain at page 8 at footnote 5, does not quite buy entirely the state's position that this has no impact whatsoever.

The lower courts address mainly in the point of impact as to whether or not the additional clause, the additional section that says anything we do here must be subject to the supremacy clause, to the

Constitution to the decisions of this court, not necessarily at all to the decisions of any lower Federal courts because that was excluded but at least to the decisions of this court they make it subject.

But clearly I think as the message of the lower courts was, whether you have that additional disclaimer or not, it exists. It is a point of law whether you codify it or not.

QUESTION: Mr. Susman, if it doesn't serve any purpose, what harm does it do?

MR. SUSMAN: Because I am not totally convinced it serves no purpose, as the Solicitor General was not totally convinced.

In fact, typical examples. There is another clause, if the court will recall, that prevents certain civil causes of action against pregnant women, but it does not in any way prohibit criminal causes of action for things that pregnant women might do during the course of their pregnancy. This section has already been used by a circuit court in the City of St. Louis to force a caesarian operation.

QUESTION: I know about that. What does that have to do with this case? I don't see that.

MR. SUSMAN: It is only an example of how it can be used.

QUESTION: Yeah, it might be used in a tort action against a street car company.

MR. SUSMAN: It would be used to prevent in vitro fertilization. Clearly that would be murder under this section.

CHIEF JUSTICE REHNQUIST: Thank you Mr. Susman. General Webster, do you have rebuttal? You have two minutes remaining.

QUESTION: While you are getting ready, General Webster, I would like you to answer Justice Scalia's question whether in the funding provision, the funding officer would have a duty to promulgate regulations that would prevent a doctor, a state employee from performing abortions and the like. I think you heard the colloquy earlier.

REBUTTAL ARGUMENT OF WILLIAM L. WEBSTER

MR. WEBSTER: Turning first to your question, Your Honor, we have suggested all along that the language relating to funding only directs and only goes to those officers of public funding. To the extent you have an employee that goes outside the boundaries of a program, whether it is this particular program or any other governmental program, I am presuming that they would be subject to the disciplinary actions that they could take against any public employee.

My colleague raises three or four issues that I would like to briefly touch on. First of all, he discusses at length the issue of contraception and while it raises interesting questions, we do not believe those are questions that are found in this particular case. The preamble does not cover abortion. This court has historically viewed contraception on a somewhat different standard.

The separate statutory provision in this case --

QUESTION: But he makes the very good point that it is impossible to distinguish between abortion and contraception when you define abortion as the destruction of the first joinder of the ovum and the sperm.

MR. WEBSTER: Your Honor, and it may well be appropriate for this court to review that question at some point. But we are suggesting that it is not before the court with this particular preamble, that it would take a separate statutory enactment on the part of the State of Missouri to do that. Right now the only language we have dealing with the prohibition of abortions as a procedure deal with post-viability abortions.

QUESTION: Before the court on the question of

whether, as the Solicitor General argues, you can overrule Roe versus Wade without endangering our law concerning contraception.

MR. WEBSTER: We think overruling Roe versus Wade and going to a different standard, whether it is a rational basis standard, an undue burden standard, would not affect contraception or that threshold question in the State of Missouri.

QUESTION: But the preamble would make your prohibition against abortions in public facilities apply to things like installing an IUD and that sort of thing.

MR. WEBSTER: Your Honor, we would contend that is not the case. We believe it would take an additional specific statutory enactment by the Missouri general assembly to do that. The only language we have now found in Chapter 188 is silent as to abortions before viability and we certainly wouldn't construe that the preamble alone --

QUESTION: The language about performing or counseling about abortions doesn't only talk about post-viability abortions, does it?

MR. WEBSTER: Your Honor, yes, there is a specific statute and it only prohibits abortions in a post-viability setting.

QUESTION: No, no, no, that's not my question. The provisions at issue in this case, one of them that you've argued, prohibits the funding of paying people, on the public payroll to perform abortions. The concept of what an abortion is is affected by your preamble.

MR. WEBSTER: As far as public --

QUESTION: Yes, public funding.

MR. WEBSTER: As far as public funding is concerned.

QUESTION: So it does relate to the very issues in this case.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Webster. The case is submitted.

(Whereupon, at 11:00 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

ALDERSON REPORTING COMPANY, INC. hereby certifies that the attached pages represent an accurate stenographic reporting and proofreading of the electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

William L. Webster, Attorney General of Missouri et al. v Reproductive Health Services et al.

Case No. 88-605

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BY Karen Brynteson

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