No. 88-605

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

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

BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICUS*

All active Catholic Bishops in the United States are members of the United States Catholic Conference ("Conference"), a nonprofit corporation organized under the laws of the District of Columbia. The Conference advocates and promotes the pastoral teachings of the Bishops in such diverse areas as education, family life, health care, social welfare, immigration, civil rights, criminal justice, and the economy. When permitted by court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and its people throughout the United States. Of the values that the Conference seeks to promote through its participation

in litigation, respect for human life is of the highest importance.

In this case the Court has accepted a unique challenge —whether to continue the wholesale invalidation of regulatory efforts directed at abortion, or to begin a process of reasoned reconsideration of its jurisprudence in this controversial area. Because the exercise of that "right" imperils vital and fundamental interests of many, not merely the concerns of women and their physicians, this Court should review its basic approach to abortion cases. The Conference is concerned that affirmance of the judgment below will further confuse the legal landscape and derogate other fundamental rights, most especially those of countless unborn children. Because the federal right created in *Roe v. Wade*, 410 U.S. 113 (1973), underlies jurisdiction in this case, this Court may begin the process of reconsideration without further delay.

Through their counsel, the parties have consented to the appearance of this *amicus*.

SUMMARY OF ARGUMENT

In 1973, this Court held that its privacy jurisprudence "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe v. Wade*, 410 U.S. at 153. It did so, however, recognizing that this kind of decision involved more than the decisions given constitutional protection in its earlier privacy cases from *Meyer v. Nebraska*, 262 U.S. 390 (1923), to *Griswold v. Connecticut*, 381 U.S. 479 (1965). *Roe v. Wade*, 410 U.S. at 159. In abortion there is involved the termination of a life and the infringement of other persons' and the state's interests. For this reason, the Court held open the possibility that these interests could not only be balanced against, but even subrogate, the now protected choice of abortion. In sixteen years of constitutional experience, that prospect has never meaningfully materialized.

In his concurring opinion in *Roe v. Wade* and *Doe v. Bolton*, Justice Douglas discussed the nature of "liberty" as including "*autonomous control over the development and expression of one's intellect, interests, tastes, and personality.*" 410 U.S. at 211 (1973) (emphasis in original). This right, the Justice said, is "absolute, permitting of no exceptions." *Id.* No other rights encompassed by his notion of liberty, including the right of privacy, were denominated autonomous, and no other Justice spoke of autonomy in relation to personal liberty or privacy in those first abortion cases. 410 U.S. 113-223. Yet by the time the Court reached its decision in *Thornburgh v. American College of Obstetricians and Gynecologists*, this Court had come to employ the concept of autonomy in direct relation to a woman's decision to abort her child. 476 U.S. 747, 772 (1986). By so doing, the Court has truly caused the pregnant woman to be "isolated in her privacy" from all other legitimate interests of society, of her community, of her family, and of her unborn child—a result that *Roe v. Wade* disavowed. 410 U.S. at 159.

The problem lies not in *Thornburgh*, but in *Roe v. Wade*. To explain its extension of the constitutional right of privacy to abortion, the Court had to engage in speculation as to how certain perceived medical, social, or psychological "detriments" to a pregnant woman might be alleviated by abortion. *Id.* at 153. This nation's experience shows that those predictions were unfounded. Widespread abortion has not solved problems; illegal abortion, maternal and infant mortality, family instability, teenage pregnancy, and similar difficulties continue unabated. In addition, abortion has created its own list of unexpected and undesirable detriments to our society.

The only rational solution for this Court is not to entrench its decisional law further, but to reconsider its rationale for including abortion within the right of privacy. This the Court can and should do because sub-

ject matter jurisdiction over this case is dependent upon abortion remaining a constitutional right. In order for the Court to examine its own jurisdiction, as it is bound to do in this and every case,[1] *Roe v. Wade* must be reconsidered.

ARGUMENT

I. BEFORE ADDRESSING THE MERITS OF THIS CASE, THE COURT SHOULD RECONSIDER ITS DECISION IN *ROE v. WADE*.

Since January 9, 1989, when this Court noted probable jurisdiction in this case, there has been rampant speculation across this nation as to whether *Roe v. Wade* would, could or should be reconsidered. For the most part, however, the prognosticators have ignored the fundamental fact that subject matter jurisdiction is always open to review, and that jurisdiction over this case depends on the Court's decision in *Roe v. Wade*.

Without discussion, the district court below concluded that it had jurisdiction over this case "under 42 U.S.C. § 1983 (1982) and 28 U.S.C. § 1331 and § 1343(3) (1982)." *Reproductive Health Services v. Webster*, 655 F. Supp. 1300, 1303 (W.D. Mo. 1987). The court of appeals opinion, on review here, does not even mention jurisdiction. *Reproductive Health Services v. Webster*, 851 F.2d 1071 (8th Cir. 1988), *prob. juris. noted*, 109 S.Ct. 780 (1989) (No. 88-605). Yet this Court has stated that:

> [E]very federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it.

Bender v. Williamsport Area School District, 475 U.S. 534, 541 (1986) (quoting *Mitchell v. Maurer*, 293 U.S.

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[1] *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986).

237, 244 (1934) (citation omitted)). Every federal court is therefore obliged to examine its subject matter jurisdiction, whether the issue is raised by a party, a witness, an intervenor, an *amicus curiae*, or by the court itself. The question of jurisdiction is so "fundamental" that "the Court is bound to ask and answer [it] for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." *Bender*, 475 U.S. at 547 (quoting *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)).

The abortion cases filed in federal courts since the Court's decision in *Roe v. Wade* have principally relied, as this case does, on 28 U.S.C. §§ 1331 and 1343 for federal jurisdiction. Those statutory provisions require, of course, a "deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States" or a claim "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. §§ 1343(3) and 1331. Because of this Court's pivotal holding in *Roe v. Wade* that the constitutional "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," federal courts apparently assume that the jurisdictional requirement of a constitutional deprivation or claim is always extant where abortion is involved.[2] In fact, many parties do not even raise the issue, concentrating instead on other jurisdictional issues such as plaintiffs' standing, as the parties in this case did below. *Webster*, 851 F.2d at 1075; *see, e.g., Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. at 754-55.

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[2] This is not an unreasonable assumption since, under *Roe v. Wade*, plaintiffs can generally allege a substantial constitutional claim. *Hagans v. Lavine*, 415 U.S. 528, 538 (1974). Nevertheless, the issue remains open to review at each level of the federal judiciary. *Bender*, 475 U.S. at 541.

Yet prior to *Roe v. Wade*'s elevation of abortion to a constitutional position, federal jurisdiction over abortion cases was not at all clear; lower courts cited one another for assurance that they ought even to entertain these complaints. *See, e.g., Doe v. Bolton*, 319 F. Supp. 1048, 1052 (N.D. Ga. 1970) and *Doe v. Scott*, 310 F. Supp. 688, 689 (N.D. Ill. 1970). This Court has itself assumed jurisdiction in several abortion cases, beginning with *Doe v Bolton*, 410 U.S. 179 (1973), without ever mentioning that subject matter jurisdiction is wholly dependent on the continued efficacy of *Roe v. Wade*'s central holding.[3] Such silence by this Court, however, is decidedly not a binding jurisdictional decision. As this Court noted in another action brought under 28 U.S.C. § 1343:

> Moreover, when questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us. We therefore approach the question of the District Court's jurisdiction to entertain this suit as an open one calling for a canvass of the relevant jurisdictional considerations.

Hagans v. Lavine, 415 U.S. 528, 533 n.5 (1974) (citations omitted). Similarly, this Court is now faced with a consideration of federal jurisdiction under 28 U.S.C. §§ 1331 and 1343; indeed, the obligation to address the issue "is inflexible and without exception," applying "in all cases" and "[o]n every writ of error or appeal." *Bender*, 475 U.S. at 547 (quoting *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. at 382). In proceeding then to "canvass all relevant jurisdictional considerations," the Court must begin with studied consideration of its decision in *Roe v. Wade*. For it is that decision upon which federal jurisdiction rests.

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[3] In both *Thornburgh v. American College*, 476 U.S. at 759 and *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 420 n.1 (1983), this Court reaffirmed *Roe v. Wade* without commenting upon the jurisdictional ramification of that holding.

II. THE COURT'S APPLICATION OF PRIVACY PRINCIPLES TO ABORTION IN *ROE v. WADE* WAS FUNDAMENTALLY FLAWED.

One of the more enduring and intractable debates throughout the constitutional history of the United States has been how best to protect individual personal liberties against the arbitrary exercise of governmental power. Certainly for the last century or more in constitutional adjudication, deeply personal actions, interests, and choices, some not particularly threatening to public order, have been subjects of state regulation. This Court has struggled to demarcate those personal actions deserving of constitutional protection, on the one hand, from the interest of the government, the competing interests of other persons, and the common good, on the other. Some interests have had to be subrogated to other values, or the common good, in order for our basic institutions to thrive or even survive. Others have been protected under a body of case law developed on a theme of personal liberty and privacy. It has been a continuing search for fundamental constitutional values.

Historically, it was always understood that liberty to engage in certain personal actions was not license. In *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905), Justice Harlan explained:

> [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good . . . . Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.

Although the ability to make certain choices was often given constitutional foundation, such as in the due proc-

ess clause of the fourteenth amendment, the Court has always required that some balance be struck between legitimate competing interests, rationally related to the choice. *E.g., Allgeyer v. Louisiana*, 165 U.S. 578 (1897).[4] In the early cases the Court struggled without a script, but still decided that protection of basic constitutional values must be the dominant adjudicative principle.[5]

The early debate on what became the privacy doctrine in this century occurred during the process of incorporation of "federal" rights to the states through the fourteenth amendment. In a seminal decision, *Palko v. Connecticut*, 302 U.S. 319 (1937), the Court articulated the necessary standard to sort those rights "incorporated" from those "unincorporated." The "incorporated" rights were not necessarily enumerated in the Constitution but were those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Id.* at 326.[6] Only those liberties

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[4] In *Allgeyer*, the Court found that there was certainly a basic right to engage in business contracts as an element of personal liberty that deserved to be protected. But for purposes of this discussion, it should be noted that the Court did "not intend to hold that in no such case can the State exercise its police power." Indeed the Court found that this fundamental right "may be regulated, and sometimes prohibited, when the contract for business conflicts with the policy of the State as contained in its statutes . . . ." *Allgeyer*, 165 U.S. at 582.

[5] Throughout its cases the Court has engaged in an effort to apply faithfully those values. Justice Harlan in *Jacobson v. Massachusetts*, 197 U.S. at 22, cites approvingly Chief Justice John Marshall in *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202 (1819) for the idea that the spirit of the Constitution "is to be collected chiefly from its words."

[6] The *Palko* Court employed "freedom of thought" as its primary example: "Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom." 302 U.S. at 327. In his concurring opinion in *Roe v. Wade*, Justice Douglas states that such internal matters as thought or belief are integral to one's autonomy and not subject to *any* infringe-

"found to be implicit in the concept of ordered liberty" were incorporated. *Id.* at 325. In his famous dissent in *Poe v. Ullman*, 367 U.S. 497, 542 (1961), Justice Harlan recited that the search for these fundamental constitutional values was intended to be a "rational process" that must reflect the "traditions of the country, not judges." Thus, he found that personal liberty was somewhat of a "continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . ." *Id.* at 543. In that language, endorsed by the Court in *Moore v. City of East Cleveland*, 431 U.S. 494, 501-502 (1977) (plurality opinion), Justice Harlan acknowledged that protection of personal liberty often required a balance of different interests. By preserving liberty against only "substantial arbitrary" and "purposeless" restrictions, the Court invited consideration of countervailing interests.

When an individual exercises a private choice, which is personal as to him or her and does not affect the interests of others, the equation is only the individual versus the State. In many instances, individuals have made such choices, opposed to those of the State, whether they were over religious preferences,[7] the education of children,[8] the person to marry,[9] or similar interests. It makes sense that the State should have a strict standard of proof to engage in restriction of such choices where there are no third-party interests at stake. This is especially true when the exercise of individual choice falls within the context of a protected relationship, like a

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ment by the State. 410 U.S. at 211. Other interests, like an interest in one's life, health, or well-being, are subject to appropriate regulation. *Id.* at 211-14.

[7] *West Virginia State Board v. Barnette*, 319 U.S. 624 (1943).

[8] *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[9] *Loving v. Virginia*, 388 U.S. 1 (1967).

marriage or family.[10] Yet even in these relationships the State has regulatory authority, severely circumscribed, but sufficient to insure individual choices be worked out in a balance respectful of all members of the protected relationship.[11]

When one considers abortion decisions, however, the calculation is never simply one of individual interests competing with interests of the State. The choices made in an abortion decision are complex and certainly affect the life interests of others: the unborn child, the father, other members of the family, and society itself. S. Jordan, *Decision Making for Incompetent Persons* 19 (1985). The decision implicates the procreative interests of both partners, can affect the sanctity of a marriage relationship, ends a life, and has other impacts on family relations, alienating children from their parents and separating those parents from their unborn grandchildren. It subjugates liberties that in other contexts are found to be fundamental, but in this context are found to be less worthy of protection. J. Noonan, *A Private Choice: Abortion in America in the Seventies* 90-95, 190 (1979).

In perhaps its most candid observation about the nature of the "right" being established in *Roe v. Wade*, the majority specifically recognized that the decision-making process they were about to protect was, in its basic character, different from the character of the decisions protected in the line of cases from *Meyer* to *Griswold* (*see* notes 8-10). *Roe v. Wade*, 410 U.S. at 159. However, even while stating that a woman could not be "isolated in her privacy," the Court nonetheless framed the discussion in language that would enable subsequent majorities to link *Roe v. Wade* to the same line of cases

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[10] *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

[11] *Prince*, 321 U.S. at 166-67.

which it admittedly distinguished in that original opinion. *E.g., Thornburgh v. American College*, 476 U.S. at 722. By describing abortion as a confrontation only between a State and a woman, the Court has precluded full and fair consideration of the true nature and other impacts of the decision. S. Jordan, *Decision Making, supra*, at 20. Rather than carefully balance the way in which the various and plainly fundamental interests in life, procreation, marriage, family, or indeed the common good, might be affected by the abortion decision, the majority has treated these admittedly different interests as somehow subrogated to a state's interest, which it has already arbitrarily diminished beyond recognition. J. Noonan, *A Private Choice, supra*, at 90-95.

Over the last sixteen years, a majority of this Court has characterized itself as protecting a "promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." *Thornburgh*, 476 U.S. at 772 (citing without discussion the string of decisions noted above). The Court originally offered a number of rationales, legal, medical and social, for so doing. Although these rationales when first offered in 1973 were debatable, on further consideration and through actual experience, they have been largely unrealized. In actuality, although it claims to the contrary, the Court *has* isolated the pregnant woman in her privacy from all other interests. To be true to its constitutional roots and history, this Court should courageously label excess for what it is and promise to begin a thoughtful reconsideration of abortion jurisprudence.

In this kind of critical self-evaluation, it must be remembered that the privacy doctrine was intended to protect only certain kinds of choices, those "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. at 325. Its fidelity was to be measured by the "tradi-

tion of the country, not judges." *Poe v. Ullman*, 367 U.S. at 542. Limitations on choice were to be invalid only when they were "purposeless" or "substantial[ly] arbitrary." *Id.* As the majorities in the abortion case have erected a series of "substantial arbitrary impositions and purposeless restraints" on virtually every competing interest, the Court has separated legitimate privacy doctrine from its roots.[12] In stretching the privacy doctrine until it was broad enough to cover abortion, the Court introduced a flaw into its jurisprudence that has become a threat to the very constitutional values and legitimate societal interests the doctrine was meant to protect.

This Court should now rationally evaluate the abortion decision within its true decisional matrix.[13] If the Court seriously seeks support for abortion decisions in the historical line of privacy cases, it must reflect accurately that one person's "liberty" is not "license" to control even one's own body where another's interest could suffer or the common good be diminished. *Jacobson*

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[12] For example, it is widely recognized that parents have a general right to protect their children from potential adverse consequences of medical decisions. *Parham v. J.R.*, 442 U.S. 584, 604 (1979) (analyzing and rejecting *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976)). Yet, in the abortion area, parents do not have the ability to exercise the same fundamental freedom. Thus has Justice O'Connor observed that, in the area of abortion, different rules come into play and nothing is safe from "ad hoc nullification" at the hands of a majority. *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting). Even traditional principles of informed consent have been abrogated in the abortion context. *See id.* at 798-804 (White, J., dissenting).

[13] This *amicus* would note Justice O'Connor's efforts to rectify the standard by which these various concerns are reviewed. *Thornburgh*, 476 U.S. at 828-29 (O'Connor, J., dissenting). A rational balancing of legitimate interests throughout pregnancy is precisely the kind of calculus originally intended in privacy doctrine. *See id.* at 828.

v. Massachusetts, 197 U.S. at 26-27. And it must re-examine the rationales first proffered for bringing abortion under the Constitution.

III. A REASONED RECONSIDERATION OF *ROE v. WADE* IN LIGHT OF CURRENT KNOWLEDGE IS NECESSARY.

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.

Roe v. Wade, 410 U.S. at 153. These "detriments" are the precise underpinnings for the announced holding that the constitutional right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* When this Court thus speculated on the potential problems caused by denying women the discretion to abort their unborn children, however, it necessarily did so without any knowledge of how abortion might or might not alleviate the enumerated problems.

Today our country has sixteen years' experience with the effects of abortion's ever-increasing availability. The experience has been a painful one, but the knowledge gained must now be considered. This Court should do what it suggested in *Doe v. Bolton*: "readjust its views and emphases in light of the advanced knowledge and

techniques of the day." [14] 410 U.S. at 191. When considered, two things become increasingly apparent—abortion has not eliminated the problems it was supposed to solve and it has created additional problems unanticipated by the Court in *Roe v. Wade*.

A. The Problems Associated with Illegal Abortion Are Not Solved by Constitutional Abortion.

Abortion advocates argue strenuously that reconsideration of *Roe v. Wade* might lead to a narrowing of the choice of abortion that would cause "misery and deaths of thousands of women from illegal operations and reverse startling improvements which the legalization of abortion has made in both maternal and infant mortality and morbidity." [15] The assertion proceeds from a false premise. Even before *Roe v. Wade*, abortion was legal under certain circumstances throughout the United States. 410 U.S. at 118, 182. In fact, prior to 1973, the circumstances permitting abortion were expanding.[16] Therefore, even if this Court were to remove abortion from constitutional protection, it would not result in instantaneous illegality. The only abortion policy dependent upon constitutional protection for its survival is abortion-on-demand—something few states are likely to

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[14] There are other holdings, findings, and statements in the opinion that also should be reconsidered, including the discussion of Roman Catholic tradition and the decision that an unborn child is not a person. 410 U.S. at 134, 158, 162; J. Connery, *Abortion: The Development of the Roman Catholic Perspective* (1977); J. Noonan, *The Experience of Pain by the Unborn*, in New Perspectives on Human Abortion 205-16 (Hilgers, Horan, Mall, eds. 1981) (hereinafter "New Perspectives"); *see* Wardle, "Rethinking Roe v. Wade," 1985 *B.Y.U.L. Rev.* 231.

[15] *See* Appellees' Motion to Affirm at 17.

[16] Compare the Texas statute struck down in *Roe v. Wade* with the more "modern" Georgia statute in *Doe v. Bolton*. 410 U.S. at 117, 183. *See also* Will, "Splitting Differences," *Newsweek* 86 (February 13, 1989). To observe this trend is not to endorse it.

enact, and this Court insists it has not endorsed. *Thornburgh*, 476 U.S. at 772 ("within the limits specified in *Roe*"); *but see* 476 U.S. at 383-84 ("We have apparently already passed the point at which abortion is available merely on demand.") (Burger, C.J., dissenting).

However close to abortion-on-demand this country is, abortion has not reduced maternal deaths, or eliminated illegal abortions. The "problems" that *Roe v. Wade* was intended to solve continue; they are related to abortion itself, whether "legal" or not. In addition, new problems have been created, while reasonable legislative efforts, such as the Missouri statute on review here, are themselves deemed "illegal."

1. *Illegal Abortion.*

Prior to *Roe v. Wade*, abortion advocates inflated the estimates of illegal abortions and maternal deaths in order to influence judges and legislators.[17] Researchers have more recently determined that legal abortion does not replace illegal abortion; rather, total abortions have increased six- to eleven-fold.[18] Even the small effect that legal abortion does have on the incidence of illegal abortion decreases as the total number of abortions rises. Syska, Hilgers, O'Hare, *An Objective Model for Estimating Criminal Abortions and Its Implications for Public*

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[17] Estimates of illegal abortions prior to *Roe v. Wade* are notoriously unreliable. *Abortion in the United States* 180 (D. Calderone ed. 1958); Tietze, *Induced Abortion as a Method of Fertility Control*, in Fertility And Family Planning: A World View 311 (S.J. Berman, *et al.* eds. 1969). Widely used figures on maternal deaths were later admitted to be "totally false." B. Nathanson, *Aborting America* 193 (1979).

[18] Earlier estimates that legal abortions simply replace illegal ones assumed that unintended pregnancies remain constant despite easier access to abortions—an assumption now proven false. *See* K. Luker, *Taking Chances: Abortion and the Decision not to Contracept* (1975).

Policy, in New Perspectives, *supra* note 14, at 164-81. These findings not only undercut the argument that to restrict the availability or scope of legal abortion would increase illegal abortion, but also the argument that even more abortions are the solution to continued illegal abortions. The researchers conclude: "What was previously thought to be a single solution to criminal abortion [legalization], is *clearly a nonsolution.*" *Id.* at 180 (emphasis supplied).

2. *Maternal Deaths.*

Not only do deaths from illegal abortions continue to occur,[19] but constitutional abortion has added its own casualties to the maternal mortality statistics—in some cases simply bringing "back-alley" practitioners to the clinics. Indeed exhaustive study has shown that maternal deaths resulting from legal abortions are replacing those due to illegal abortions. Hilgers and O'Hare, *Abortion Related Maternal Mortality*, *supra* note 19, at 90. The trend toward a decrease in maternal deaths due to abortion began before *Roe v. Wade* and is attributable to improvements in health care and obstetrical medicine, not constitutional litigation. J. Legge, *Abortion Policy: An Evaluation of the Consequences for Maternal and Infant Health* 154-55 (1985).[20] Recent evidence suggests "in

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[19] Hilgers and O'Hare, *Abortion Related Maternal Mortality: An In-Depth Analysis*, in New Perspectives 69-91. Supporters of abortion now admit that "a substantial proportion of illegal abortions in the 1960s were performed by physicians, including some highly experienced practitioners, while in the late 1970s, most illegal abortions were self-induced or performed by medically unqualified practioners. It is entirely possible that the death-to-case ratio following illegal abortion in the United States is now higher, not lower than it was 15-20 years ago." Tietze and Henshaw, *Induced Abortion: A World Review 1986* 132 (Alan Guttmacher Institute 1986).

[20] Maternal mortality from all causes has declined sharply since the 1940s due to antibiotics and other medical advances. In 1965,

competition with other factors, [*Roe v. Wade*] and its implementation did not have a strong impact on health indicators." *Id.* at 150. After 1973 the decline in abortion-related deaths stopped and reversed itself in 1977, 1979, and 1982. U.S. Centers for Disease Control, 35 *CDC Surveillance Summaries* 955 (1986).

This country's experience after the adoption of the "Hyde Amendment" by Congress in 1976 is particularly instructive on this point.[21] Before the Hyde amendment became effective, abortion advocates predicted increases in illegal abortions and maternal deaths.[22] When the federal funding cut occurred, there was no discernible evidence of resort to illegal abortions or of increased abortion-

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abortion-related deaths decreased faster than other maternal deaths, in part because "illegal abortions may have shifted from the non-medical to the medical sector and become safer." Cates, U.S. Centers for Disease Control, Statement submitted to the U.S. Senate Judiciary Subcommittee on the Constitution, in 2 *Constitutional Amendments Relating to Abortion* 439 (U.S. GPO Serial No. J-97-62) (1983). An international comparison by abortion supporters recently concluded that "reported rates of abortion mortality are more closely associated with the availability of modern methods of contraception (including surgical sterilization), with the general level of health services and with the adequacy of the registration system than with the legal status of abortion or the presumed incidence of illegal abortions performed by untrained operators." Tietze and Henshaw, *Induced Abortion: A World Review 1986, supra* note 19, at 127.

[21] The Hyde Amendment, named for its principal sponsor, prohibits the use of any federal Medicaid funds to pay for abortion except under certain specified circumstances. *See Harris v. McRae*, 448 U.S. 297, 302 (1980).

[22] *E.g., Berger*, "Abortion in America: The Effects of Restrictive Funding," 298 *New England Journal of Medicine* 1474-77, 1475 (June 29, 1978); *see Pettiti* and Cates, "Restricting Medicaid funds for abortions: projections of excess mortality for women of childbearing age," 67 *Am. J. of Public Health* 860-62 (1977).

related mortality.[23] More intensive investigation did not find the predicted maternal deaths and complications. Over an eighteen-month period, only one death of a Medicaid-eligible woman in Texas occurred due to an illegal abortion; two others were not directly related to the funding cut. Even this "finding" was rebutted upon further investigation.[24]

Claims that childbirth is statistically more risky than abortion have also been exaggerated.[25] In a recent survey by abortion advocates, only 7% of the women obtaining an abortion reported any reason relating to a "health problem" as part of their motivation.[26] As each "indica-

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[23] "Original projections by the CDC that the cutoff of Medicaid funding for abortions would result in 5-90 excess abortion-related deaths annually have not proved true." "No Excess Deaths Follow Medicaid Cutoff of Abortion," *Ob. Gyn. News* (statement of Dr. Willard Cates) (April 1, 1979); *see also* U.S. Centers for Disease Control, 29 *Morbidity and Mortality Weekly Reports* 254 (June 6, 1980); Trussel, *et al.*, "The Impact of Restricting Medicaid Financing for Abortion," 12 *Family Planning Perspectives* 120-30, 127, 128 (May/June 1980).

[24] Gold and Cates, "Restriction of Federal Funds for Abortion: 18 Months Later," 69 *Am. J. of Public Health* 929 (Sept. 1979). Reporters discovered that the Texas woman "portrayed as a martyr to the Hyde Amendment" had died for reasons not related to the funding cutoff. Grand and Murray, "Facts Don't Back Link of Abortion Death in Texas to Fund Cutoff," *Ob. Gyn. News* 1, 26 (Dec. 1, 1977).

[25] Hilgers and O'Hare, *Abortion-Related Maternal Mortality, supra* note 19, at 84-90. Even advocates of constitutional abortion now admit that U.S. Centers for Disease Control figures suggest an abortion at 16-20 weeks is more dangerous than carrying to term. Tietze and Henshaw, *Induced Abortion, supra* note 19, at 110. As Dr. Kenneth Ryan stated as early as 1965, "with the advances in medical technology, there are now almost no absolute contraindications to pregnancy." Ryan, "Humane Abortion Laws and the Health Needs of Society," 17 *Case W. Res. L. Rev.* 424-34, 430 (1965).

[26] *See* Torres and Forrest, "Why Do Women Have Abortions?" 20 *Family Planning Perspectives* 169-76, 170 (1988). Among the

tion" for abortion—*e.g.*, diabetes, hypertension—finds its own appropriate treatment in modern medicine, it disappears from the proposed lists of "indications" for abortion. This progress in preventing maternal mortality has refocused attention on medicine's ability to treat both mother and unborn child as separate patients. *Williams Obstetrics* vii (J. Pritchard & P. MacDonald, 16th ed. 1980).[27]

3. *Infant Mortality.*

Abortion advocates argue that increased abortions have produced "startling improvements" in infant mortality. They even point approvingly to the increasing numbers of women, especially teenagers, whose babies are aborted each year.[28] Of course babies that are aborted never appear in infant mortality statistics, they appear in the abortion statistics. The distinction is without a legitimate difference.[29] The millions of children aborted during the last sixteen years are very real infant mortality statistics. Infant mortality improves in relation to better prenatal and postnatal care, not to abortion.[30] In cities where abortion rates far exceed national averages, infant

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seven percent who cited a health problem, only half said a doctor informed them that their condition might be made worse by remaining pregnant. *Id.* at 172.

[27] *See* Callahan, "How Technology is Reframing the Abortion Debate," 16 *Hastings Center Report* 33-42, 37-38 (1986); Harrison, *et al.* "Fetal Treatment 1983," 307 *New England Journal of Medicine* 1651-52 (1982).

[28] *See* Appellees' Motion to Affirm, at 18.

[29] *See, e.g.*, Forsythe, "Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms," 21 *Val. U. L. Rev.* 563, 607-11 (1987).

[30] "Social Support Programs Held Key to Reducing Infant Mortality," *Ob. Gyn. News* 1, 18 (Mar. 15-31, 1988).

mortality rates are a scandal.[31] At the same time, other forms of infant mortality increase in proportion to abortion.

Among the most tragic features of widespread abortion is the fact that a prior abortion may endanger subsequent children who otherwise could have been wanted and loved by their own mothers. This endangerment sometimes occurs in the form of a physical inability to carry a subsequent pregnancy to term. Although some studies suggest this as a possible effect of even one abortion, a woman who has had two or more abortions is at significantly increased risk of being unable to carry later children to term.[32] This is a substantial public health problem in light of the fact that over 35% of all abortions in the United States are performed on women who have had previous abortions, and that the figure is even higher in major cities. U.S. Centers for Disease Control, *Abortion Surveillance 1979-80* 6 (May 1983).

B. Personal, Social and Family Problems are Aggravated, Not Alleviated, by Abortion.

One of the most disturbing aspects of the majority opinion in *Roe v. Wade* was its failure to balance the predicted (but now unrealized) "benefits" of abortion

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[31] *Compare* "Abortion in the U.S. 1978-79," 13 *Family Planning Perspectives*, 6-10, 10-11 (Jan.-Feb. 1981) *with* "Washington Focuses on its High Perinatal Mortality," *Ob. Gyn. News* 6 (Nov. 15-30, 1982).

[32] Levin, Schoenbaum, Monson, Stubblefield, and Ryan, "Association of Induced Abortion with Subsequent Pregnancy Loss," 243 *Journal of the American Medical Association* 2495-99 (1980); "Repeated Abortions Increase Risk of Miscarriage, Premature Births and Low-Birth-Weight Babies," 11 *Family Planning Perspectives* 39-40 (1979) (reporting on World Health Organization, *Special Programme of Research, Development and Research Training in Human Reproduction: Seventh Annual Report* (Geneva, Nov. 1978)); *see also* Harlap, Shiono, Ramcharan, Berendes, and Pellegrin, "A Prospective Study of Spontaneous Fetal Losses After Induced Abortion," 301 *New England Journal of Medicine* 677 (1979).

against the probable (and now manifest) harm expanding abortion would cause. A growing body of evidence demonstrates that abortions, especially multiple abortions, have damaging effects on maternal and infant health, future pregnancies, mental well-being, adoption alternatives and other aspects of "marriage," "procreation," "contraception," "family relationships," and "child rearing." *Roe v. Wade*, 410 U.S. at 152-53. These effects are dramatically illustrated by the mounting evidence that abortion does not reduce child abuse and neglect, makes adoption increasingly difficult, and creates serious psychological ramifications.

1. *The "Unwanted" Child.*

Among the concerns cited in *Roe v. Wade* as justification for finding an abortion right in the Constitution was "the distress, for all concerned, associated with the unwanted child, and . . . the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it." 410 U.S. at 153. Implicit here was an assumption that the existence of "unwanted" children was due in part to lack of access to abortion, and that recognition of an abortion right would alleviate this problem. That this projected "benefit" has not materialized is clear from current statistics on child abuse and out-of-wedlock childbearing.[33] The correlation between the

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[33] Between 1970 and 1985, births to unmarried women rose from 399 thousand to 828 thousand annually. Between 1973 and 1982 estimated "unwanted births" to never-married women remained roughly the same: in 1973, 86% of the births were "wanted at conception," 26% were "mistimed," and 14% were "unwanted at conception"; in 1982, 90% were "unwanted at conception," 28% were "mistimed," and 10% were "unwanted at conception." Between 1978 (when reasonably accurate national reporting of child abuse is said to have begun) and 1985, reported cases of child abuse and neglect rose from 607 thousand to 1.3 million annually. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1988* Nos. 87, 101, 276 (108th ed. 1987).

increasing numbers of abortions and the increasing incidence of child abuse and neglect is such that one may well wonder whether the former is somehow contributing to the latter.[34]

Even at the time of the Court's 1973 decision, there was much literature indicating that children who were intensely desired during pregnancy may be at higher, not lower, risk of being abused and neglected after birth. Dr. Vincent Fontana, a professor of clinical pediatrics and a Chairman of the Mayor's Task Force on Child Abuse and Neglect of the City of New York, stated that abortion is a "sweeping and simplistic" solution that fails because "the assumption that every battered child is an unwanted child, or that most or even a large proportion of abused children are unwanted children is totally false." [35] Another professor of pediatrics, Dr. Edward Lenoski, discovered in 1975 that 91% of the abused children in his survey had been wanted by their parents: "Significantly high among these parents," Lenoski observes, "was the desire for the pregnancy." [36]

Considered together these studies demonstrate that abortion has not eliminated or reduced child abuse or other manifestations of dysfunctional families, and it never will. Other researchers go further, finding that abortion hinders normal maternal-infant bonding with later children and may increase the likelihood of later

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[34] Wardle, "Rethinking Roe v. Wade," *supra* note 14, at 232-43 (describing and collecting research).

[35] V. Fontana, *Somewhere a Child is Crying: Maltreatment-Causes and Prevention* 215-17 (3rd ed. 1983).

[36] E. Lenoski, *The Plight of the Children* (1981). *See also* R. Helfer, *Child Abuse and Neglect: The Diagnostic Process and Treatment Programs* 28 (1977) (DHEW Pub. No. 77-30069); Pohlman, "Unwanted Conceptions: Research On Undesirable Consequences," 14 *Eugenics Quarterly* 143 (1967).

child abuse.[37] Unless this nation becomes an Orwellian society where psychological tests are mandated to determine eligibility for parenthood, the solutions to child abuse must address the causes, not the victims, of the problem. Using abortions to eliminate "unwanted" children is not relieving distress or other psychological problems, it is simply eliminating children.

2. *Effect on Adoption.*

Prior to *Roe v. Wade*, two options were recommended to prospective unwed mothers: single motherhood and adoption. Rather than being a third alternative, abortion has disproportionately tended to replace adoption, eliminating children who would have been wanted and raised by adoptive parents. The National Committee for Adoption cites "the legalization of abortion" as a factor that "reduces the potential number of adoptive children," recounting data such as the following: In 1972, there were 403,200 out-of-wedlock births and 65,335 unrelated adoptions; but in 1982 there were 715,227 out-of-wedlock births but only 50,720 unrelated adoptions.[38] In 1981 Congress noted that "at present, only 4 per centum of unmarried pregnant adolescents who carry their babies to term enter into an adoption plan or arrange for their babies to be cared for by relatives or friends." 42 U.S.C. § 300z (a)(6)(B). In practice the prospective unwed mother's three choices have been reduced to two. If she is unalterably attached to her child she is assisted in

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[37] Ney, *Infant Abortion and Child Abuse: Cause and Effect* in The Psychological Aspects Of Abortion 25-38 (Mall and Watts eds. 1979); Kumar and Robson, "Previous Induced Abortion and Antenatal Depression in Primiparae," 8 *Psychological Medicine* 711-14 (1978); Calef, "The Hostility of Parents to Children: Some Notes on Infertility, Child Abuse and Abortions," 1 *International Journal of Psychoanalytic Psychotherapy* 79-66 (1972).

[38] National Committee for Adoption, *Adoption Factbook: United States Data, Issues, Regulations and Resources* 18 (Nov. 1985).

preparing for single parenthood, but otherwise abortion is proposed as her best alternative.

Meanwhile the pool of prospective adoptive parents has grown, due in part to delayed childbearing and unwanted infertility.[39] In 1984 alone, over two million couples were seeking to adopt children, while only some 58,000 children were available.[40] So while demand for adoptable children rises, supply declines. Bachrach, "Adoption As A Means of Family Formation: Data From the National Survey of Family Growth," 45 *J. Marr. & Fam.* 859 (1983). Infertile couples, frustrated at the short supply of adoptable children, have increasingly resorted to unusual and even experimental reproductive technologies, which themselves create new tensions for the institutions of marriage and family.[41] In short, the adverse effects of constitutional abortion are spreading to such unexpected areas as adoption, creating problems never anticipated when *Roe v. Wade* was first decided.

3. *Psychological Ramifications.*

Several of the concerns that prompted this Court to conclude that abortion ought to become a constitutionally protected privacy right dealt with the psychological stress

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[39] Based on 1982 figures, infertility affects an estimated 2.4 million couples in the United States. The decreased supply of children available for adoption has increased demands for infertility treatment from these couples. U.S. Congress, Office of Technology Assessment, *Infertility: Medical and Social Choices* 3, 14 (1988) (U.S. GPO Serial No. OTA-BA-358).

[40] Wilson and Hitchings, "Adoption: It's Not Impossible," 112 *Business Week* (July 8, 1985); *see also* Congressional Quarterly, *Independent Adoptions*, 2 Editorial Research Reports 647 (Dec. 11, 1987).

[41] They have also presented the judiciary with unique and challenging legal battles. *E.g., In re Baby M.*, 109 N.J. 396, 439, 537 A.2d 1227, 1249 (1988).

that pregnancy and child care may place upon the mother and her family.[42] 410 U.S. at 153. The underlying assumption was that abortion would relieve the psychological burden and, presumably, not replace it with something worse. Experience proves otherwise.

Only five years after *Roe v. Wade*, the psychological evidence against abortion had accumulated to the point that experts could conclude that "[a]bortion puts women at greater risk mentally" than does childbirth. *The Psychological Aspects of Abortion* x (Mall and Watts eds. 1979). "Out of the sea of conjecture surrounding the psychological aspects of abortion emerges the somewhat heretical idea that social policy may have moved in the wrong direction." *Id.* at xi. It is now even more clear that abortion policy did take a wrong turn and that women and their families are suffering psychologically as a result. "Not only is the woman who has a genuine psychiatric handicap more likely to suffer than benefit from an abortion, but across the board the prognosis of a post-abortive psychosis is worse than that of a post-partum one." Sim, *Abortion and Psychiatry*, in New Perspectives 151-63, 162.

Coincident with this Court's noting probable jurisdiction in this case, the Surgeon General of the Public Health Service recommended a new controlled study on the mental health effects of abortion.[43] His reason for the

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[42] It is not easy to understand how concern about the family translates into a policy treating abortion as an autonomous decision affecting only the mother and her physician. *E.g.*, *Thornburgh*, 476 U.S. at 772.

[43] Letter from C. Everett Koop, M.D., Sc.D., Surgeon General, U.S.P.H.S., to Ronald Reagan, The President of the United States (Jan. 9, 1989). The Surgeon General stated that there was no "conclusive data about the health effects of abortion on women." In so stating, his letter offers no explanation into either the "data" or the degree to which they must be "conclusive" for him to accept them. He most certainly does not state his disagreement with

recommendation was his conclusion "that, at this time, the available scientific evidence about the psychological sequelae of abortion simply cannot support either the preconceived beliefs of those pro-life or of those pro-choice." While noting the conflicting scientific evidence in the field, the Surgeon General does confirm two critical points that undermine the very assumptions upon which constitutional abortion relies. First, he confirms that even after sixteen years and twenty million abortions, there is still no confirmation that the possible benefits projected for *Roe v. Wade* exist. Second, he states that "when pregnancy, whether wanted or unwanted comes to full term and delivery, there is a well documented, low incidence of adverse mental health effects." [44] In other words, when a child, whether initially wanted or not, is born instead of aborted, adverse psychological consequences are rare.[45]

It is beyond question, however, that post-abortion trauma *does exist*, and can be lethal, especially for the woman most frequently cited as a beneficiary of legalized

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points made below that post-abortion trauma and other effects exist. The fact that studies may conflict does not mean they should or may be discarded wholesale.

[44] *Id.* at 2.

[45] "A review of published reports on women who had been denied abortion and were followed up shows that 70.6% of the 6298 women completed their pregnancies and only 13.2% had an abortion elsewhere." These women, denied abortion by review committees in various European countries, could reasonably be expected to have the most negative emotional attitudes toward giving birth. Yet "the literature shows a generally comparable outcome of pregnancy, delivery and puerperium between women who were denied abortion and controls," "no evidence that a continued unwanted pregnancy will endanger the mother's mental health," and "good acceptance of the infant by the mother, especially if she has the father's support." Del Campo, "Abortion Denied—Outcome of Mothers and Babies," 130 *Journal of the Canadian Medical Association* 361, 362 (1984).

abortion—the pregnant teenager. The American Psychological Association states:

> Although they are rare, cases have been reported of women's experiencing psychotic breaks following abortion despite the absence of preexisting psychological problems (Spaulding & Cavenar, 1978). In light of statistics showing that suicide is the third leading cause of death among adolescents, one needs to be alert to this risk . . .. Compared with adults, adolescents appear to have somewhat more negative responses on average following abortion.

Report of the Interdivisional Committee on Adolescent Abortion, American Psychological Association, *Adolescent Abortion: Psychological and Legal Issues* 84 (1986).

The increasing use of amniocentesis and other prenatal diagnostic techniques for detecting fetal abnormalities has also exacerbated the psychological problems of abortion by eroding the willingness of parents to accept the children they have voluntarily conceived. This practice at least delays, and may disrupt, the vital development of maternal-infant bonding. B.K. Rothman, *The Tentative Pregnancy* 100-102 (1986). The problem is likely to increase as more women resort to prenatal diagnosis and abortion for reasons of convenience, such as to select a child of the desired sex.[46]

The damaging psychic impact of abortion is not limited to the mother. Liebman and Zimmer, *The Psychological Sequelae Of Abortion: Fact And Fallacy* in The Psychological Aspects of Abortion 127-38 (1979). In particular, abortion is contributing to dysfunctional families and causing adverse psychological harm to the father as well. Rue, "Abortion in Relationship Context," *Interna-*

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[46] Since amniocentesis can now be used to determine an unborn's gender with certainty, abortions of children not of the desired sex are increasing. Jancin, "Prenatal Gender Selection Appears to be Gaining Acceptance," 23 *Ob. Gyn. News* 1, 30-31 (March 1-14, 1988). *See* Kolata, *Fetal Sex Test Used as Step to Abortion,* N.Y. Times, Dec. 25, 1988, at 1 and 38.

tional Review of Natural Family Planning 95-121 (Summer 1985).

C. There Is No Basis For *Roe v. Wade*'s Inclusion Of Abortion Within The Right Of Privacy.

This Court placed a freedom to choose abortion within its privacy doctrine because it thought that by constitutionalizing abortion, the health and welfare of both women and society would improve. *Roe v. Wade*, 410 U.S. at 153. As indicated by the above discussion, abortion has failed to solve the medical, familial and societal problems it was supposed to cure. To the contrary, it has inflicted its own evils upon women, the family, our communities and the nation. Solutions to the list of problems that existed before *Roe v. Wade*, or to the additional problems added since that decision, are not easy.[47] We now know there is no one simple answer like the one abortion was to provide. In protecting unlimited abortion against every other consideration, the Court has fortified itself against the critiques of physicians, lawyers, scholars, and basic community values.

This Court set us on our present path, and this Court can initiate a process to correct the course of its jurisprudence. The first step is to reconsider federal jurisdiction over abortion by reviewing the decision that first brought abortion within the constitution—*Roe v. Wade*. In undertaking that reconsideration, this Court should look to that line of privacy cases predating this country's turn toward abortion. In those precedents are found the proper balancing of individual and societal interests—a

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[47] "Respect for human life leads individuals and groups to reach out to those with special needs. With the support of the Catholic community, Catholic organizations and agencies will continue to provide services and care to pregnant women, especially to those who would otherwise find it difficult or impossible to obtain high-quality care." National Conference of Catholic Bishops, *Pastoral Plan for Pro-Life Activities: A Reaffirmation* 10 (Nov. 14, 1985).

balancing that allows for personal liberty within a framework that respects familial relationships, preserves and promotes the common good, and protects our free society.

CONCLUSION

The judgment of the court of appeals should be reversed after this Court has reconsidered its essential constitutional and jurisdictional holdings in the area of abortion jurisprudence.

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