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 FOR *AMICUS CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF APPELLEES

DONALD N. BERSOFF
(Counsel of Record)
JENNER & BLOCK
21 Dupont Circle, N.W.
Washington, D.C. 20036
(202) 223-4400
Attorney for Amicus Curiae
American Psychological Association

March 30, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. AVAILABLE SCIENTIFIC LITERATURE DOES NOT SUSTAIN APPELLANTS' ARGUMENT THAT *ROE v. WADE* SHOULD BE OVERRULED BECAUSE OF ABORTION'S ALLEGED ADVERSE PSYCHOLOGICAL EFFECTS	2
A. The Court Relied in 1981 on Tentative, Fragmentary, and Irrelevant Findings When it Concluded Abortion Produces Negative Psychological Effects in Women	5
B. Empirical Research on the Psychological Effects of Abortion Generally Lacks the Methodological Rigor Necessary to Justify Overruling *Roe*	7
1. Rigor of the research design	8
2. Abortion as an independent variable	10
3. Psychological effects as a dependent variable	13
4. Psychometric soundness of research measures	14
5. The characteristics of the groups studied	17
C. The Existing Evidence Does Not Support the View that there are Substantial Adverse Emotional and Psychological Consequences of the Decision to Have an Abortion	19

TABLE OF CONTENTS—Continued

Page

II. APPELLANTS' BAN ON THE USE OF PUBLIC FUNDS TO ENCOURAGE OR COUNSEL A WOMAN TO HAVE AN ABORTION IS ANTAGONISTIC TO THE STATE'S INTEREST IN PROMOTING INFORMED CONSENT AND PROTECTING THE HEALTH AND WELFARE OF ITS CITIZENS AND UNDULY INTERFERES WITH PROFESSIONAL DISCRETION 23

A. Appellant's Provision Undermines the Health of Its Citizens And May Be Antagonistic To Its Goal of Preventing Future Unwanted Pregnancies 24

B. Appellants' Provision Interferes With Professional Judgment and Requires Psychologists to Violate Basic Ethical Precepts 27

CONCLUSION 30

TABLE OF AUTHORITIES

CASES: Page

Bell v. Wolfish, 441 U.S. 520 (1979) 27
Blue Shield v. McCready, 457 U.S. 465 (982) 22
City of Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416 (1983) 1, 2, 3, 26, 27, 28
Colautti v. Franklin, 439 U.S. 379 (1979) 3, 27
Doe v. Bolton, 410 U.S. 179 (1973) 3, 27
Frye v. United States, 293 F 1013 (D.C. Cir. 1923) 4
H.L. v. Matheson, 450 U.S. 398 (1981) 5
Hartigan v. Zbaraz, 484 U.S. 171 (1987) 1
Lockhart v. McCree, 476 U.S. 162 (1986) 18
Parham v. J.R., 442 U.S. 584 (1979) 27
Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976) 3, 23, 26, 27
Reproductive Health Service v. Webster, 851 F.2d 1071 (8th Cir. 1988) 23
Roe v. Wade, 410 U.S. 113 (1973) ..... *passim*
Smith v. Allright, 321 U.S. 649 (1944) 2
Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) 1, 2, 3, 23
United States v. Vuitch, 402 U.S. 62 (1971) 3
Whalen v. Roe, 429 U.S. 589 (1977) 27, 29
Youngberg v. Romeo, 457 U.S. 307 (1982) 27

STATUTES:

Mo. Rev. Stat. § 337 22
Mo. Rev. Stat. § 188.205 22
Mo. Rev. Stat. § 188.210 22
Mo. Rev. Stat. § 188.215 22

MISCELLANEOUS:

Adler, *Abortion: A Social-Psychological Perspective*, 35 *J. Soc. Issues* 100 (1979) 21, 26
Adler, *Emotional Responses of Women Following Therapeutic Abortion*, 45 *Am. J. Orthopsychiatry* 446 (1975) 10, 19, 21
Adler, *Psychological Responses of Women Following Abortion* (1989) 19
Adler, *Sample Attrition in Studies of Psychological Sequelae of Abortion: How Great a Problem?*, 6 *J. Applied Soc. Psychology* 240 (1976) 17

TABLE OF AUTHORITIES—Continued

Page

Adler & Dolcini, *Psychological Issues in Abortions for Adolescents in Adolescent Abortion* (G. Melton ed. 1986) 19, 20, 21

AERA, APA, NCME, Standards for Educational and Psychological Testing (1985) 7

A. Anastasi, Psychological Testing (5th ed. 1982) .. 7, 15

APA, *Ethical Principles of Psychologists*, 36 *Am. Psychologist* 633 (1981) 29

APA, *General Guidelines for Providers of Psychological Services*, 42 *Am. Psychologist* 1 (1987) .. 29

APA, *Specialty Guidelines for the Delivery of Services by Counseling Psychologists*, 36 *Am. Psychologist* 652 (1981) 28

Ashton, *The Psychosocial Outcome of Induced Abortion*, 87 *Brit. J. Obstetrics & Gynecology* 1115 (1980) 13, 15, 21, 22

Athanasiou, Oppel, Michelson, Unger & Yager, *Psychiatric Sequelae to Term Birth and Induced Early and Late Abortions*, 5 *Fam. Plan. Persp.* 227 (1973) 9, 13, 16

Babikian & Goldman, *A Study of Teen-Age Pregnancy*, 128 *Am. J. Psychiatry* 755 (1971) 6

Belsey, Greer, Lal, Lewis & Beard, *Predictive Factors in Emotional Response to Abortion*, 11 *Soc. Sci. & Med.* 71 (1977) 8, 11, 15

Bersoff, *Psychologists and the Judicial System*, 10 *L. & Hum. Behav.* 151 (1986) 3

Bersoff, *Social Science Data and the Supreme Court*, 42 *Am. Psychologist* 52 (1987) 4

Blumberg & Golbus, *Psychological Sequelae of Elective Abortion*, 123 *Western J. Med.* 188 (1975) .. 16, 19, 21, 22

Blumberg, Golbus & Hanson, *The Psychological Sequelae of Abortion Performed for a Genetic Indication*, 122 *Am. J. Obstetrics & Gynecology* 799 (1975) 8, 10, 23

Bolter, *The Psychiatrist's Role in Therapeutic Abortion: The Unwitting Accomplice*, 119 *Am. J. Psychiatry* 312 (1962) 10

TABLE OF AUTHORITIES—Continued

Page

Bracken, *A Causal Model of Psychosomatic Reactions to Vacuum Aspiration Abortion*, 13 *Soc. Psychiatry* 135 (1978) 16, 21

Bracken, Hachamovitch & Grossman, *The Decision to Abort and Psychological Sequelae*, 158 *J. Nervous & Ment. Disorder* 154 (1974) 10, 13, 19

Bracken, Klerman & Bracken, *Abortion, Adoption or Motherhood: An Empirical Study of Decision-making During Pregnancy*, 130 *Am. J. Obstetrics & Gynecology* 251 (1978) 19

Bradley, *Abortion and Subsequent Pregnancy*, 29 *Can. J. Psychiatry* 494 (1984) 12

Brewer, *Induced Abortion After Feeling Fetal Movements: Its Causes and Emotional Consequences*, 10 *J. Biosoc. Sci.* 203 (1978) 8, 12, 15, 19

Brief for *Amicus Curiae* American Psychological Association in *Blue Shield v. McCready*, 457 U.S. 465 (1982) 22

Brief for Focus on the Family and Family Research Council of America 3, 6, 14

Brody, Meikle & Gerritse, *Therapeutic Abortion: A Prospective Study*, 109 *Am. J. Obstetrics & Gynecology* 347 (1971) 9

Cates, *Adolescent Abortions in the United States*, 1 *J. Adolescent Health Care* 18 (1980) 20, 21

Cavenar, Maltbie, Sullivan, *Aftermath of Abortion*, 42 *Bull. Menniger Clin.* 433 (1978) 14

Cohen & Roth, *Coping with Abortion*, 10 *J. Hum. Stress* 140 (1984) 16, 18, 19

Colquitt, *Judicial Use of Social Science Evidence at Trial*, 30 *Ariz. L. Rev.* 51 (1988) .....

Croghan, *Areas of Potential Psychological Vulnerability in the New Era of Liberalized Abortion*, 11 *Psychology* 35 (Aug. 1974) 7

Cvejic, Lipper, Kinch & Benjamin, *Follow-up of 50 Adolescent Girls 2 Years After Abortion*, 116 *Can. Med. Ass'n. J.* 44 (1977) 13, 15

Dauber, Zalar & Goldstein, *Abortion Counseling and Behavior Change*, 4 *Fam. Plan. Persp.* 23 (1972) 25

TABLE OF AUTHORITIES—Continued

Page

David, Rasmussen & Holst, *Postpartum and Post-abortion Psychotic Reactions*, 13 *Fam. Plan. Persp.* 88 (1981) 9, 12

Ewing & Rouse, *Therapeutic Abortion and a Prior Psychiatric History*, 130 *Am. J. Psychiatry* 37 (1973) 8, 10, 15

Ford, Castelnuovo-Tedesco & Long, *Abortion: Is it a Therapeutic Procedure in Psychiatry?* 218 *J. Am. Med. Ass'n.* 1173 (1971) 8, 13, 16

Freeman, *Influence of Personality Attributes on Abortion Experiences*, 47 *Am. J. Orthopsychiatry* 503 (1977) 15, 17, 20

Freeman, Rickels, Huggins, Garcia & Polin, *Emotional Distress Patterns Among Women Having First or Repeat Abortions*, 55 *Obstretics & Gynecology* 630 (1980) 12, 16, 17

Friedman, Greenspan & Mittleman, *The Decision-Making Process and the Outcome of Therapeutic Abortion*, 131 *Am. J. Psychiatry* 1332 (1974) .. 8, 10, 19, 21, 22

George, *An Empirical Study of Medical Termination of Pregnancy*, 25 *Psychological Studies* 118 (1980) 16

Giannelli, *The Admissibility of Novel Scientific Evidence: Frey v. United States, a Half-Century Later*, 80 *Colum. L. Rev.* 1197 (1980) 4

Handy, *Psychological and Social Aspects of Induced Abortion*, 21 *Brit. J. Clinical Psychology* 29 (1982) 10, 12, 24

Hittner, *Feelings of Well-Being Before and After an Abortion*, 9 *Am. Ment. Health Counselors Ass'n J.* 98 (1987) 13, 15

Illsley & Hall, *Psychosocial Aspects of Abortion: A Review of Issues and Needed Research*, 53 *Bull. World Health Organ.* 83 (1976) 6, 12, 18

S. Isaac & W. Michael, Handbook in Research and Evaluation (1971) 14

Jacques, *Abortion and Psychological Trauma*, 27 *Med. Arts & Sci.* 52 (1973) 19, 22, 24

TABLE OF AUTHORITIES—Continued

Page

Kaltreider, *Psychological Factors in Mid-Trimester Abortion*, 4 *Psychiatry in Med.* 129 (1973) 10, 25

Kaltreider, Goldsmith & Margolies, *The Impact of Midtrimester Abortion Techniques on Patients and Staff*, 135 *Am. J. Obstetrics & Gynecology* 235 (1979) 11, 17

C. Everett Koop to President Reagan, Letter, January 9, 1989 18

Kumar & Robson, *Previous Induced Abortion and Ante-natal Depression in Primaparae: Preliminary Report of a Survey of Mental Health in Pregnancy*, 8 *Psychological Med.* 711 (1978) 9, 15

Lazarus, *Psychiatric Sequelae of Legalized Elective First Trimester Abortion*, 4 *J. Psychosomatic Obstetrics and Gynecology* 141 (1985).... 12, 15, 19, 20, 21, 22, 24

Lidz, *Reflections of a Psychiatrist in* 22 *Therapeutic Abortions* 276 (H. Rosen ed. 1954) 14

E. Lind, J. Shepard & J. Cecil, Experimentation in the Law: Report of the Federal Judicial Center Advisory Committee on Experimentation in the Law (1981) 4

Lipper, Cvejic, Benjamin & Kinch, *Abortion and the Pregnant Teenager*, 109 *Can. Med. Ass'n. J.* 852 (1973) 11, 12, 15, 16

Lipper & Feigenbaum, *Obsessive-Compulsive Neurosis after Viewing the Fetus during Therapeutic Abortion*, 30 *Am. J. Psychotherapy* 666 (1976) 14

W. Loh, Social Research in the Judical Process (1984) 3, 4

Lyons, Larson, Huckeba, Rogers & Mueller, *Research on the Psychosocial Impact of Abortion: A Systematic Review of the Literature 1966 to 1985 in Values and Public Policy* 77 (G. Regier ed. 1988) 6

Major, Mueller & Hildebrandt, *Attributions, Expectations, and Coping with Abortion*, 47 *J. Personality & Soc. Psychology* 585 (1985) 13, 21

TABLE OF AUTHORITIES—Continued

Page

Marecek, *Consequences of Adolescent Childbearing and Abortion in Adolescent Abortion* 96 (G. Melton ed. 1986) 19, 20

Marder, *Psychiatric Experiences with a Liberalized Therapeutic Abortion Law*, 126 *Am. J. Psychiatry* 1230 (1970) 26

Melton, *Bringing Psychology to the Legal System*, 42 *Am. Psychologist* 488 (1987) 3

Melton & Pliner, *Adolescent Abortion: A Psycholegal Analysis in Adolescent Abortion: Psychological and Legal Issues* 11 (G. Melton ed. 1986) 6

Mester, *Induced Abortion and Psychotherapy*, 30 *Psychotherapy & Psychosomatics* 98 (1978) 15

Monahan & Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 *U. Pa. L. Rev.* 477 (1986) 4

J. Monahan & L. Walker, Social Science in Law (1985) 3, 4

Monahan & Walker, *Social Science in Law: A New Paradigm*, 43 *Am. Psychologist* 465 (1988) 4

Moseley, Follingstad & Harley, *Psychological Factors that Predict Reaction to Abortion*, 37 *J. Clin. Psychology* 276 (1981) 12, 13, 16, 20, 21

Mueller, *Causal Attributions, Perceived Self-Efficacy, and Copying with a Negative Life Event* (1986) 25

Mueller & Major, *Self-Blame, Self-Efficacy, and Adjustment to Abortion, J. Personality & Soc. Psychology* (in press) 25

National Academy of Sciences, Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing (1987) 20

National Academy of Sciences/Institute of Medicine, Legalized Abortion and the Public Health 9 (1975) 3, 5, 11, 20

Niswander, Singer & Singer, *Psychological Reaction to Therapeutic Abortion*, 114 *Am. J. Obstetrics & Gynecology* 29 (1972) 9, 10, 16

TABLE OF AUTHORITIES—Continued

Page

Notman & Nadelson, *Reproductive Crises in Women in Psychotherapy* (A. Brodsky & R. Hare-Mustin eds. 1980) 26

Oliver & Simmons, *Depression as Measured by the DSM-III and the Beck Depression Inventory in an Unselected Adult Population*, 52 *J. Consulting & Clin. Psychology* 892 (1984) 16

Olson, *Social and Psychological Correlates of Pregnancy Resolution Among Adolescent Women*, 50 *Am. J. Orthopsychiatry* 432 (1980) 19

Osofsky & Osofsky, *The Psychological Reaction of Patients to Legalized Abortion*, 42 *Am. J. Orthopsychiatry* 48 (1972) 19, 20, 21

Osofsky, Osofsky, Rajan & Spitz, *Psychosocial Aspects of Abortion in the United States*, 42 *Mt. Sinai J. Med.* 456 (1975) 11, 13, 19, 20

Patt, Rappaport & Barglow, *Follow-up of Therapeutic Abortion*, 20 *Arch. Gen. Psychiatry* 408 (1969) 9

Payne, Kravitz, Notman & Anderson, *Outcome Following Therapeutic Abortion*, 33 *Arch. Gen. Psychiatry* 725 (1976) 8, 13, 15, 16, 19, 21

Peck & Marcus, *Psychiatric Sequelae of Therapeutic Interruption of Pregnancy*, 143 *J. Nervous & Ment. Disease* 417 (1966) 10, 11, 20

Peres-Reyes & Falk, *Follow-Up After Therapeutic Abortion in Early Adolescence*, 28 *Arch. Gen. Psychiatry* 120 (1973) 13, 16, 21

Robbins, *Out-of-Wedlock Abortion and Delivery: The Importance of the Male Partner*, 21 *Soc. Probs.* 334 (1984) 16, 17, 18

Robbins & DeLamater, *Support from Significant Others and Loneliness Following Inducted Abortion*, 20 *Soc. Psychiatry* 92 (1978) 21

Rosen, *State Anxiety and Abortion*, 1 *Anxiety Research* 115 (1988) 11, 20

Schmidt & Priest, *The Effects of Termination of Pregnancy*, 54 *Brit. J. Med. Psychology* 267 (1981) 18

TABLE OF AUTHORITIES—Continued

Page

Scott, *Legal and Ethical Issues in Counseling Pregnant Adolescents in Adolescent Abortion* 24
Shusterman, *Predicting the Psychological Consequences of Abortion*, 13 *Soc. Sci. & Med.* 683 (1979) 10, 20, 21
Shusterman, *The Psychosocial Factors of the Abortion Experience: A Critical Review*, 1 *Psychology of Women Q.* 79 (1976) 11, 15, 19, 21
Simon & Senturia, *Psychiatric Sequelae of Abortion: Review of the Literature, 1935-1964*, 15 *Arch. Gen. Psychiatry* 378 (1966) 6
Simon, Senturia & Rothman, *Psychiatric Illness Following Therapeutic Abortion*, 124 *Am. J. Psychiatry* 59 (1967) 8, 10, 16, 17
Smith, *A Follow-Up Study of Women Who Request Abortion*, 43 *Am. J. Orthopsychiatry* 574 (1973) 13, 19, 21, 24
Spaulding & Cavenar, *Psychoses Following Therapeutic Abortion*, 135 *Am. J. Psychiatry* 364 (1978) 15
A. Speckard, The Psycho-Social Aspects of Stress Following Abortion (1987) 8, 15, 17
Tishler, *Adolescent Suicide Attempts Following Elective Abortion*, 68 *Pediatrics* 670 (1981) 13, 15
Wallerstein, Kurtz & Bar-Din, *Psychosocial Sequelae of Therapeutic Abortion in Young Unmarried Women*, 27 *Arch. Gen. Psychiatry* 828 (1972) 5, 17

BRIEF FOR *AMICUS CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF APPELLEES

INTEREST OF *AMICUS CURIAE*

The American Psychological Association (APA) is a nonprofit scientific and professional organization founded in 1892, with more than 70,000 members. APA believes that the expertise of its scientific and professional members can help inform the Court's decision in this singularly important case. APA intends to provide relevant information not offered by the parties or their supporting *amici*. APA has participated frequently as an *amicus* in this Court, including three cases involving the right to an abortion—*Hartigan v. Zbaraz*, 484 U.S. 171 (1987); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); and *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416 (1983).

The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This *amicus* brief will address only the issues raised by Question (7)—whether *Roe v. Wade*, 410 U.S. 113 (1973), should be overruled—and Question (4)—whether the Constitution prohibits appellants from declaring that public funds may not be used to encourage or counsel a woman to have an abortion not necessary to save her life.

Appellants' argument that this Court should overrule *Roe* rests in part on their claim that the *Roe* Court did not fully comprehend the alleged psychological threats to a woman's health brought about by seeking and obtaining an abortion. On this question, APA has relevant information. Many of APA's members have studied the psychological effects of abortion or have published comprehensive reviews of the substantial body of research literature on this topic. Their work reveals that appellants' claims cannot be supported. Point I.

A large number of APA members are licensed practitioners who provide mental health services to individual clients. Those services include counseling pregnant women who raise the question of abortion during ongoing treatment or during counseling specifically related to abortion. Research shows that such counseling promotes informed consent and protects the psychological health of women seeking abortions. Depriving women of such services in publicly-financed facilities is antagonistic to the very goals appellants say they seek to achieve and unduly interferes with professional discretion. Point II.

ARGUMENT

I. AVAILABLE SCIENTIFIC LITERATURE DOES NOT SUSTAIN APPELLANTS' ARGUMENT THAT *ROE v. WADE* SHOULD BE OVERRULED BECAUSE OF ABORTION'S ALLEGED ADVERSE PSYCHOLOGICAL EFFECTS.

"Since *Roe* was decided in [January] 1973, the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the personal choice whether or not to terminate her pregnancy." *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, at 420 n.1 (1983). "[T]he constitutional principles that led this Court to its decisions in 1973 still provide the compelling reason for recognizing the constitutional dimensions of a woman's right to decide whether to end her pregnancy." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 759 (1986).

Despite the continuing vitality of those decisions and their recent reaffirmation, appellants ask the Court to use the instant case as a vehicle for reconsidering and overruling *Roe*. So modern a precedent as *Roe* should not be overruled unless there is a compelling reason to do so.[1]

---

[1] The Court should overrule precedent only "when *convinced* of former error." *City of Akron*, 462 U.S. at 458 (O'Connor, J., dissenting) *quoting Smith v. Allwright*, 321 U.S. 649, 665 (1944) (emphasis added).

Justice White has asserted that it is permissible "to overrule decisions . . . where experience, scholarship, and reflection demonstrated that their fundamental premises were not to be found in the Constitution." *Id.* at 787 (White, J., dissenting). Unquestionably, methodologically rigorous scholarship should help inform legal decisionmaking, especially when the issue is fundamentally an empirical one.[2] Some of those who want the Court to overrule *Roe* claim there is now a substantial body of scientific evidence proving there are significant, negative, and often permanent psychological effects on women who obtain elective abortions. Thus, they say, in keeping with the government's interest in protecting maternal health, States should be permitted to enact laws that more closely regulate abortions than is presently the case, and such laws should no longer be subjected to strict scrutiny.[3]

Amicus agrees that health comprises more than physical health. "[P]hysical, emotional, psychological, [and] familial . . . factors [all] may relate to health." *Doe v. Bolton*, 410 U.S. 179, 192 (1973).[4] Thus, research on

---

[2] *See, e.g., W. Loh, Social Research in the Judicial Process* (1984) [hereinafter *Loh*]; *J. Monahan & L. Walker, Social Science in Law* (1985) [hereinafter *Monahan & Walker*]; Bersoff, *Psychologists and the Judicial System*, 10 *L. & Hum. Behav.* 151 (1986); Melton, *Bringing Psychology to the Legal System*, 42 *Am. Psychologist* 488 (1987).

[3] *See, e.g.*, Brief for Appellants at 12-18; Brief for the United States at 8-24; Brief for Focus on the Family and Family Research Council of America at 13-28.

[4] *See City of Akron*, 462 U.S. at 467 (O'Connor, J., dissenting) ("Health-related factors . . . go well beyond . . . the *physical* safety of a particular procedure"); *Colautti v. Franklin*, 439 U.S. 379, 394 (1979) ("Attendant circumstances" include "psychological and emotional as well as physical"); *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 70 (1976) (effects of abortion include those "that are both physical and mental"); *United States v. Vuitch*, 402 U.S. 62, 73 (1971) ("[T]his construction accords with the general usage and modern understanding of the word 'health,' which includes psychological as well as physical well-being"). *See generally National Academy of Sciences/Institute of Medicine, Legalized Abortion and the Public Health* 9 (1975) [hereinafter

the psychological effects of a woman's decision to abort is highly relevant to any decision by this Court on the continued validity of *Roe*.

The extent to which a body of social science evidence has gained general acceptance within the scientific community is critical to its acceptance by the judicial system.[5] There is no uniform standard by which general acceptance is determined but it can be ascertained by the application of several evaluative criteria.[6] The quality of empirical research is established by the use of valid methods, its support by a body of other research, scrutiny through critical peer review in the scientific community, and subsequent publication in respected journals.

The most important criterion is validity. Social scientists distinguish between two kinds of research validity—internal and external.[7] *Internal* validity "refers to the trustworthiness of a piece of research on its own terms. . . . To have high validity, a study must rule out, or control for, competing hypotheses that may account for an observed state of affairs." *Social Authority, supra* note 5, at 502 (1986). *External* validity refers to the

---

NAS/IOM] ("The health effects of abortion include physical, mental, emotional, and social outcomes of the procedure").

[5] *See Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 *Colum. L. Rev.* 1197 (1980); Monahan & Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 *U. Pa. L. Rev.* 477 (1986) [hereinafter *Social Authority*].

[6] These criteria have been proposed by legal scholars trained in social science methodology and familiar with the uses of social science research by the courts. *See, e.g., Loh, supra* note 2; *Monahan & Walker, supra* note 2; Bersoff, *Social Science Data and the Supreme Court*, 42 *Am. Psychologist* 52 (1987); Monahan & Walker, *Social Science in Law: A New Paradigm*, 43 *Am. Psychologist* 465 (1988).

[7] *See E. Lind, J. Shepard & J. Cecil, Experimentation in the Law: Report of the Federal Judicial Center Advisory Committee on Experimentation in the Law* (1981).

extent to which research can be generalized across different people, different settings, and over time.

In this context, *amicus* will evaluate the research on the psychological effects of abortion. APA will first show that the studies relied upon by the Court when it first asserted that abortion has negative psychological effects were too few and not germane to elective abortions. Second, APA will show that the studies relied on by appellants' supporting *amici* are lacking in basic requirements of scientific acceptability. Finally, APA will demonstrate that the scientifically acceptable studies that have been performed contradict any claim that elective abortion has substantial negative psychological effects.

A. The Court Relied in 1981 on Tentative, Fragmentary, and Irrelevant Findings When it Concluded Abortion Produces Negative Psychological Effects in Women.

The Court has stated that the "emotional[] and psychological consequences of an abortion are serious and can be lasting." *H. L. v. Matheson*, 450 U.S. 398, 411 (1981). This is not a judgment of law but an empirical claim. Its scientific credibility depends on the validity of the research that supports it. The studies on which the Court relied in 1981 fail to meet minimal scientific validity criteria and are irrelevant to the questions before the Court in this case.[8] Sound decisionmaking demands that the Court base its reconsideration of

[8] The Court cited two articles to support its conclusion, *see, id.*, at 411 n.20, published prior to the Court's decision in *Roe* when elective abortions were difficult to obtain and most abortions were either illegal or performed only for therapeutic reasons. The first article, Wallerstein, Kurtz, & Bar-Din, *Psychosocial Sequelae of Therapeutic Abortion in Young Unmarried Women*, 27 *Arch. Gen. Psychiatry* 828 (1972) [hereinafter Wallerstein et al.] limited its study to women receiving *therapeutic abortions*, *i.e.*, abortions where there is a substantial risk that continuation of pregnancy would gravely impair the health of the woman or that the child would be born with a grave physical or mental defect, or where the pregnancy resulted from felonious intercourse. *See NAS/IOM, supra* note 4, at 133. Wallerstein et al. candidly

Roe on valid research, insofar as its decision is grounded on empirically-based judgments.[9]

Even after *Roe*, researchers concluded that an objective review of findings:

> fully corroborates the already widespread opinion that past research in this field has been inadequate in scope, faulty in methodology, unsystematically organized, and in general motivated and directed towards problems posed by ideological rather than scientific considerations.[10]

---

admitted "that this study is sociologically skewed (since it draws in its entirety upon young unmarried women) as well as methodologically skewed because of the high follow-up refusal rate (which may have resulted in a heavier weighing toward those experiencing difficulties)." *Id.* at 831. The second article, Babikian & Goldman, *A Study of Teen-Age Pregnancy*, 128 *Am. J. Psychiatry* 755 (1971), "was in fact an account of rather unsystematic psychoanalytic impressions of a sample of adolescents who carried their pregnancies to term." Melton & Pliner, *Adolescent Abortion: A Psycholegal Analysis in Adolescent Abortion* 11 (G. Melton ed. 1986).

[9] Appellants' supporting *amici* do not fulfill the obligation to rely on valid research. The most egregious use of unacceptable "scholarship" is found in the Brief for Focus on the Family and Family Research Council of America. They purport to support the argument that abortions produce serious adverse psychological effects by numerous references to published reports. However, a "systematic review on the psychosocial sequelae of abortion" performed by the Family Research Council itself concludes that these very studies are "without sufficient methodological standards to assure the reader of the conclusions [they draw]." Lyons, Larson, Huckeba, Rogers & Mueller, *Research on the Psychosocial Impact of Abortion: A Systematic Review of the Literature 1966 to 1985 in Values and Public Policy* 77, 82 (G. Regier ed. 1988).

[10] Illsley & Hall, *Psychosocial Aspects of Abortion: A Review of Issues and Needed Research*, 53 *Bull. World Health Organ.* 83, 99 (1976) [hereinafter Illsley & Hall]. Similarly, in a review of thirty years of pre-*Roe* research, the authors noted that "[d]eeply held personal convictions frequently seem to outweigh the importance of data, especially when conclusions are drawn." Simon & Senturia, *Psychiatric Sequelae of Abortion: Review of the Literature, 1935-1964*, 15 *Arch. Gen. Psychiatry* 378, 387 (1966) [hereinafter Simon & Senturia]. "The literature on the psycho-

B. Empirical Research on the Psychological Effects of Abortion Generally Lacks the Methodological Rigor Necessary to Justify Overruling *Roe*.

The persuasiveness of any empirical research will depend on five major factors: (1) Rigor of its research design; (2) accurate definition of the independent variable, *i.e.*, the variable from which an outcome will be predicted—in this case the abortion itself; (3) accurate definition of the dependent variable, *i.e.*, the outcome one is studying—in this case the psychological effects of abortion; (4) reliability and validity of measures used to study the dependent variable;[11] and (5) representativeness of the sample of human participants used from which generalizations are drawn. The published studies upon which appellants' supporting *amici* most heavily rely are flawed in one or more of these respects.

1. *Rigor of the research design.*

Drawing valid inferences about the psychological effects of abortion on women depends on a sound research design. The best way to ascertain whether there are such effects on women who obtain abortions is to contrast these women to relevant comparison groups.[12] Yet, the

---

logical sequelae for women who have obtained an abortion is a classic illustration of the danger of biased and polemical reporting." Croghan, *Areas of Potential Psychological Vulnerability in the New Era of Liberalized Abortion*, 11 *Psychology*, Aug. 1974, at 35, 36.

[11] "*Reliability* refers to the degree to which test scores are free from errors in measurement." *AERA, APA, NCME, Standards for Educational and Psychological Testing* 19 (1985). The more reliable a measurement instrument is, the more consistent or repeatable its measurements will be. Validity "concerns *what* the test measures and how well it does so." *A. Anastasi, Psychological Testing* 27 (5th ed. 1982) [hereinafter *Anastasi*].

[12] Choosing a comparison group is partly a function of the question the researcher frames. If the question is whether abortion produces more psychological injury than other kinds of surgery on the genital tract, then this suggests one kind of comparison group. If the question is whether abortion produces more psychological injury than unwanted pregnancy, this suggests another kind of comparison group.

use of such groups in abortion research has been inconsistent and many studies use no comparison sample at all.[13]

When a single group of subjects is examined without comparison to a group that differs only on the independent variable nothing can be concluded about the dependent variable, *i.e.*, the effect of the procedure, because confounding variables could contribute to or be causing any observed effects.[14] These confounding variables can be accounted for only by studying comparison groups that share these variables. At a minimum, the groups being studied should be matched on significant variables to rule out alternative explanations for differences between abortion and comparison groups. But such matching is rarely done.[15]

---

[13] Studies not using a comparison group include *A. Speckhard, The Psycho-Social Aspects of Stress Following Abortion* (1987) [hereinafter Speckhard]; Belsey, Greer, Lal, Lewis & Beard, *Predictive Factors in Emotional Response to Abortion*, 11 *Soc. Sci. & Med.* 71 (1977) [hereinafter Belsey et al.]; Blumberg, Golbus & Hanson, *The Psychological Sequelae of Abortion Performed for a Genetic Indication*, 122 *Am. J. Obstetrics & Gynecology* 799 (1975) [hereinafter Blumberg et al.]; Brewer, *Induced Abortion After Feeling Fetal Movements: Its Causes and Emotional Consequences*, 10 *J. Biosoc. Sci.* 203 (1978) [hereinafter Brewer, *Induced Abortion*]; Ewing & Rouse, *Therapeutic Abortion and a Prior Psychiatric History*, 130 *Am. J. Psychiatry* 37 (1973) [hereinafter Ewing & Rouse]; Ford, Castelnuovo-Tedesco & Long, *Abortion: Is it a Therapeutic Procedure in Psychiatry?* 218 *J. Am. Med. Ass'n.* 1173 (1971) [hereinafter Ford et al.]; Friedman, Greenspan & Mittleman, *The Decision-Making Process and the Outcome of Therapeutic Abortion*, 131 *Am. J. Psychiatry* 1332 (1974) [hereinafter Friedman et al]; Payne, Kravitz, Notman & Anderson, *Outcome Following Therapeutic Abortion*, 33 *Arch. Gen. Psychiatry* 725 (1976) [hereinafter Payne et al.]; Simon, Senturia & Rothman, *Psychiatric Illness Following Therapeutic Abortion*, 124 *Am. J. Psychiatry* 59 (1967) [hereinafter Simon et al.].

[14] In abortion research these confounding variables include, *e.g.*, previous mental illness, relationship with the potential father, marital status, other stressful events in the woman's life.

[15] Even careful researchers who have matched comparison and experimental groups on relevant variables have neglected to consider fully other extraneous influences that may contaminate re-

Studies of the psychological effects of abortion should evaluate women prior to the abortion to establish a baseline for the existence of any psychological disturbance and then reevaluate them after the abortion. Many studies, relying on "post-test only" designs, fail to control for the possibility of preexisting differences within and between groups on the dependent variable of psychological effects, thus making it difficult to draw any useful inferences from them. In fact, many investigators use retrospective assessment as a substitute for pretesting; they ask women to recall after the abortion how they felt prior to the abortion.[16] Retrospective assessment is likely to distort the data and render the results unreliable.

2. *Abortion as an independent variable.*

The five decades of research studying the psychological effects of abortion on women do not examine the same

---

sults. *See, e.g.*, Athanasiou, Oppel, Michelson, Unger & Yager, *Psychiatric Sequelae to Term Birth and Induced Early and Late Abortions*, 5 *Fam. Plan. Persp.* 227 (1973) [hereinafter Athanasiou et al.]; David, Rasmussen & Holst, *Postpartum and Postabortion Psychotic Reactions*, 13 *Fam. Plan. Persp.* 88 (1981) [hereinafter David et al.]. Both researchers controlled for age, race, prior history of pregnancy, marital status, and socioeconomic level, but did not control for whether pregnancy had been desired. Niswander, Singer & Singer, *Psychological Reaction to Therapeutic Abortion*, 114 *Am. J. Obstetrics & Gynecology* 29 (1972) [hereinafter Niswander et al.], compared women who obtained abortions to those who carried to term but did not match the two samples on other relevant variables and did not test to see if the two samples were equivalent. Brody, Meikle & Gerritse, *Therapeutic Abortion: A Prospective Study*, 109 *Am. J. Obstetrics & Gynecology* 347 (1971) [hereinafter Brody et al.], also compared women choosing abortions to those carrying to term, but the sample of women who chose an abortion contained significantly more single women than those who gave birth.

[16] *See, e.g.*, Kumar & Robson, *Previous Induced Abortion and Ante-natal Depression in Primaparae: Preliminary Report of a Survey of Mental Health in Pregnancy*, 8 *Psychological Med.* 711 (1978) [hereinafter Kumar & Robson]; Patt, Rappaport & Barglow, *Follow-up of Therapeutic Abortion*, 20 *Arch. Gen. Psychiatry* 408 (1969).

event or medical procedure because of changing technology, legal circumstances, and social climate.[17] Research prior to 1960 primarily examined *illegal* abortion. Studies conducted between 1960 and 1973 primarily examined *therapeutic* abortion.[18] None of the pre-1973 studies are generalizable to individuals choosing to have abortions in the current sociocultural climate for several reasons: (1) the criteria used by physicians to justify therapeutic abortions varied widely across practitioners and the jurisdictions in which they practiced;[19] (2) illegal and therapeutic abortions were obtained in a generally socially disapproving environment, in contrast to the present era when a woman's right to choose an abortion is legally sanctioned and supported by a very large segment of the public;[20] (3) women granted therapeutic abortions for psychiatric rea-

---

[17] "[F]rom a research perspective, the influence of sociological factors on psychological aspects of abortion means that past literature, even when relatively recent, may not be applicable to current problems if the attitudes of women, their families and doctors have changed and/or if legal, economic or welfare provisions regarding pregnancy have changed." Handy, *Psychological and Social Aspects of Induced Abortion*, 21 *Brit. J. Clinical Psychology*, 29, 29 (1982) [hereinafter Handy].

[18] For representative studies *see, e.g.*, Adler, *Emotional Responses of Women Following Therapeutic Abortion*, 45 *Am. J. Orthopsychiatry* 446 (1975) [hereinafter Adler]; Blumberg et al., *supra* note 13; Brody et al., *supra* note 15; Ewing & Rouse, *supra* note 13; Friedman et al., *supra* note 13; Kaltreider, *Psychological Factors in Mid-Trimester Abortion*, 4 *Psychiatry in Med.* 129 (1973) [hereinafter Kaltreider]; Niswander et al., *supra* note 15; Peck & Marcus, *Psychiatric Sequelae of Therapeutic Interruption of Pregnancy*, 143 *J. Nervous & Ment. Disease* 417 (1966) [hereinafter Peck & Marcus]; Simon et al., *supra* note 13.

[19] *See, e.g.*, Bolter, *The Psychiatrist's Role in Therapeutic Abortion: The Unwitting Accomplice*, 119 *Am. J. Psychiatry* 312 (1962).

[20] *See, e.g.*, Bracken, Hachamovitch & Grossman, *The Decision to Abort and Psychological Sequelae*, 158 *J. Nervous & Ment. Disorders*, 154 (1974) [hereinafter Bracken et al.]; Shusterman, *Predicting the Psychological Consequences of Abortion*, 13 *Soc. Sci. & Med.* 683 (1979).

sons are more likely to have a history of emotional disturbance making it more likely that such women would experience post-abortion psychological problems, whether or not related to the abortion itself; and, (4) women granted therapeutic abortions for physical reasons frequently planned to carry to term and would, therefore, have been more likely than women who chose abortion voluntarily to mourn the loss of the fetus.[21]

But even studies of the outcomes of legal elective abortions do not invariably investigate the same medical procedure.[22] There are at least four medical procedures in current use [23] and each of these procedures may have a differential impact on the patient.[24]

Finally, some studies relied upon by appellants' supporting *amici* were conducted in foreign countries.[25] Because of differing cultural, religious, political, and legal

---

[21] *See, e.g.*, Peck & Marcus, *supra* note 18.

[22] "Investigations of the psychological sequelae must be examined separately for the therapeutic abortion population, the illegal abortion population, and the abortion on request population." Shusterman, *The Psychosocial Factors of the Abortion Experience: A Critical Review*, 1 *Psychology of Women* Q. 79, 90 (1976) [hereinafter Shusterman].

[23] These procedures include saline injection, dilation and curretage, vacuum aspiration, and prostaglandin instillation. *See NAS/IOM*, *supra* note 4, at 20-22.

[24] The procedure used may also depend on whether the abortion was performed in the first or second trimester, which may have an effect on the woman as well. *See, e.g.*, Kaltreider, Goldsmith & Margolies, *The Impact of Midtrimester Abortion Techniques on Patients and Staff*, 135 *Am. J. Obstetrics & Gynecology* 235 (1979); Osofsky, Osofsky, Rajan & Spitz, *Psychosocial Aspects of Abortion in the United States*, 42 *Mt. Sinai J. Med.* 456, 464 (1975) [hereinafter Osofsky et al.].

[25] *See, e.g.*, Belsey et al., *supra* note 13 (England); David et al., *supra* note 15 (Denmark); Lipper, Cvejic, Benjamin & Kinch, *Abortion and the Pregnant Teenager*, 109 *Can. Med. Ass'n. J.*, 852 (1973) [hereinafter Lipper et al.] (Canada); Rosen, *State Anxiety and Abortion*, 1 *Anxiety Research* 115 (1988) [hereinafter Rosen] (Sweden).

rules, abortion may have "a different meaning from country to country and from one period to another. Research studies that are all formally concerned with an event called abortion may, in fact, be measuring different phenomena." [26]

Consequently, to be useful, research on the psychological effects of abortion must describe the type of abortion procedure used and the sociocultural and political climate in which it was performed.[27]

3. *Psychological effects as a dependent variable.*

Another limitation on the abortion literature is disagreement concerning which psychological conditions to measure as dependent variables. Diverse conditions have been chosen, including doubt, embarrassment, fear of disapproval, regret, dissatisfaction, anxiety, guilt, anger, hostility, sense of loss, depression, neurosis, and psychosis.[28] Other investigators have sought to identify be-

---

[26] Illsley & Hall, *supra* note 10, at 84-85. "The results of studies performed in one country may not be comparable with the results of studies carried out in another country, and may possibly be contradictory as a direct result of the social and legal context in which they occur." Handy, *supra* note 17, at 29.

[27] In addition, the study should describe how long the procedure has been in use, how experienced the physician is in performing the procedure, the gestational stage of the pregnancy, and the reason for the abortion.

[28] *See, e.g.*, Bradley, *Abortion and Subsequent Pregnancy*, 29 *Can. J. Psychiatry* 494 (1984) (depression, social adjustment, self-esteem); Brewer, *Induced Abortion*, *supra* note 13 (depression); Brewer, *Incidence of Post-Abortion Psychosis*, 1 *Brit. Med. J.* 476 (1977); David et al., *supra* note 15 (admission to psychiatric hospital); Freeman, Rickels, Huggins, Garcia & Polin, *Emotional Distress Patterns Among Women Having First or Repeat Abortions*, 55 *Obstetrics & Gynecology* 630 (1980) [hereinafter Freeman et al.] (anxiety, depression, phobias, somatization, neurosis and psychosis); Lazarus, *Psychiatric Sequelae of Legalized Elective First Trimester Abortion*, 4 *J. Psychosomatic Obstetrics & Gynecology* 141 (1985) [hereinafter Lazarus]; guilt, sense of loss, depression, worry); Lipper et al., *supra* note 25 (emotional instability, regret); Moseley, Follingstad & Harley, *Psychological*

havioral manifestations such as suicide attempts or sexual dysfunction.[29]

This wide array of dependent variables reflects a lack of consensus regarding symptoms, severity, and duration of psychological effects of abortion. Reported outcomes such as regret or guilt are not necessarily indicative of personality problems or mental illness and may be regarded as rational or pathological depending on the predilections of the researcher.[30] Furthermore, researchers have used inconsistent and widely variable time periods to measure psychological effects. Effects have been measured while the patient is still in the recovery room [31] and others from three days to ten years post-abortion.[32]

Factors that Predict Reaction to Abortion, 37 *J. Clin. Psychology* 276 (1981) (depression) [hereinafter Moseley et al.]; Payne et al., *supra* note 13 (anxiety, anger, depression, guilt, shame).

[29] *See, e.g.*, Ashton, *The Psychosocial Outcome of Induced Abortion*, 87 *Brit. J. Obstetrics & Gynecology* 1115 (1980) (sexual dysfunction) [hereinafter Ashton]; Tishler, *Adolescent Suicide Attempts Following Elective Abortion*, 68 *Pediatrics* 670 (1981) (case study of two adolescents) [hereinafter Tishler].

[30] These symptoms may be more the result of unwanted pregnancy than abortion; abortion may, in fact, lessen these symptoms, not exacerbate them, in many people. *See* Part I(C), *infra*.

[31] *See, e.g.*, Bracken et al., *supra* note 20; Hittner, *Feelings of Well-Being Before and After an Abortion*, 9 *Am. Ment. Health Counselors Ass'n.* J. 98 (1987) [hereinafter Hittner]; Major, Mueller & Hildebrandt, *Attributions, Expectations, and Coping with Abortion*, 47 J. *Personality & Soc. Psychology* 585 (1985) [hereinafter Major et al.]; Moseley et al., *supra* note 28.

[32] *See, e.g.*, Athanasiou et al., *supra* note 15 (16 months); Cvejic, Lipper, Kinch & Benjamin, *Follow-up of 50 Adolescent Girls 2 Years After Abortion*, 116 *Can. Med. Ass'n.* J. 44 (1977) [hereinafter Cvejic et al.] (2 years); Ford et al., *supra* note 13 (6 months); Lipper et al., *supra* note 25 (over course of 1 year); Osofsky et al., *supra* note 24 (1 month, 6-12 months); Payne et al., *supra* note 13 (1 day, 6 weeks, 6 months); Perez-Reyes & Falk, *Follow-Up After Therapeutic Abortion in Early Adolescence*, 28 Arch. *Gen. Psychiatry* 120 (1973) [hereinafter Perez-Reyes & Falk] (6 months); Smith, *A Follow-Up Study of Women Who Request Abortion*, 43 Am. J. *Orthopsychiatry* 574 (1973) [hereinafter Smith] (1-2 years).

There is little agreement how soon any claimed negative effects of abortion may become manifest or how enduring they are.

Without adequate definition, it is difficult to make a clear distinction between any putative diagnostic rubric such as "post-abortion stress syndrome" [33] and a normal psychological process in response to a life stress that is limited in duration and intensity and does not require psychological intervention. In general, ambiguity in the definition of the dependent variable limits the usefulness of the data.

4. *Psychometric soundness of research measures.*

A variety of techniques have been used to study the psychological effects of abortion. These techniques include case studies, interviews, questionnaires, and tests.

Several published reports, including many in the post-*Roe* era, rely solely or heavily on case studies, *i.e.*, in-depth investigations of an individual. Such studies have very limited scientific utility not only because of the problems created by a totally inadequate research design, but because they preclude evaluation of the reliability and validity of the observer's judgment.[34]

---

[33] The existence of a "post-abortion stress syndrome" has been suggested in Brief for Focus on the Family and Family Research Council of America at 22-24. Neither the American Psychiatric Association in its Diagnostic and Statistical Manual nor *amicus* APA recognize such a syndrome.

[34] *See S. Isaac & W. Michael, Handbook of Research and Evaluation* 20 (1971) ("cases studies are limited in their representativeness [and] do not allow valid generalizaitons to the population from which their units came;" "[c]ase studies are particularly vulnerable to subjective biases . . . because [they] neatly fit[] the researchers' preconceptions."). For representative case studies *see, e.g.*, Cavenar, Maltbie & Sullivan, *Aftermath of Abortions*, 42 *Bull. Menninger Clin.* 433 (1978) (2 cases of therapeutic abortion); Lidz, *Reflections of a Psychiatrist in* 22 *Therapeutic Abortions* 276 (H. Rosen ed. 1954) (2 cases); Lipper & Feigenbaum, *Obsessive-Compulsive Neurosis after Viewing the Fetus during Therapeutic Abortion*, 30 *Am. J. Psychotherapy* 666

Many researchers have measured women's responses to abortion through questionnaires, sometimes in combination with interviews.[35] Those measures typically are neither standardized nor subjected to reliability and validity studies. Standardization refers to measuring responses under uniform conditions across large numbers of people so that an individual's response can be compared to average responses in a normative population. Nonstandardized measures, however, are common in abortion studies. None of the studies assess the reliability of measures, *i.e.*, whether two independent raters score the interviews or questionnaires in the same way. Neither have questionnaires been validated, *i.e.*, proven to actually measure the psychological outcome the researcher claims to measure. Without standardization and without studies of reliability and validity, it is difficult to assess whether the reported research findings are accurate or predictive of future behavior.[36]

Some studies have used tests to supplement information gained in interviews or questionnaires. For example, many researchers have used the Minnesota Multiphasic Personality Inventory, a standardized test used

---

(1976) (1 case); Mester, *Induced Abortion and Psychotherapy*, 30 *Psychotherapy & Psychosomatics* 98 (1978) (2 cases); Spaulding & Cavenar, *Psychoses Following Therapeutic Abortion*, 135 *Am. J. Psychiatry* 364 (1978) (2 cases); Tishler, *supra* note 29 (2 cases).

[35] *See, e.g.*, Speckhard, *supra* note 13; Ashton, *supra* note 29; Belsey et al. *supra* note 13; Bracken et al., *supra* note 20; Brewer, *Induced Abortion*, *supra* note 13; Cvejic et al., *supra* note 32; Ewing & Rouse, *supra* note 13; Freeman, *Influence of Personality Attributes on Abortion Experiences*, 47 *Am. J. Orthopsychiatry* 503 (1977) [hereinafter Freeman]; Hittner, *supra* note 31; Kumar & Robson, *supra* note 16; Lazarus, *supra* note 28; Lipper et al., *supra* note 25; Payne et al., *supra* note 13.

[36] *See Anastasi*, *supra* note 11. "The literature has included anecdotes, which are not solid scientific material; surveys, which often have lacked depth, particularity and precision; and interviews, which often have been uncontrolled and retrospective." Shusterman, *supra* note 22, at 102.

to construct personality profiles,[37] or checklists of possible psychological problems.[38] Although such instruments may have more psychometric integrity than subjective measures like interviews, they identify many emotional responses that are not pathological. There is considerable disagreement among investigators, for example, as to which cutoff scores are appropriate for distinguishing a true psychological disorder from a normal life stress.[39] Even a statistically significant increase in post-abortion scores might remain in the nonpathological range, but many authors report scores without specifying whether the scores are indicative of genuine psychological disorder.[40] These data analyses yield few, if any, legitimate conclusions about the real-world significance of the results and thus are of no assistance to the Court in resolving Question 7.[41]

5. *The characteristics of the groups studied.*

Most studies of the psychological effects of abortion fail to discern whether the samples of human participants

---

[37] *See, e.g.*, Athanasiou et al., *supra* note 15; Blumberg & Golbus, *Psychological Sequelae of Elective Abortion*, 123 *Western J. Med.* 188 (1975) [hereinafter Blumberg & Golbus]; Ford et al., *supra* note 13; Payne et al., *supra* note 13; Perez-Reyes & Falk, *supra* note 32; Robbins, *Out-of-Wedlock Abortion and Delivery: The Importance of the Male Partner*, 21 *Soc. Probs.* 334 (1984) [hereinafter Robbins]; Simon et al., *supra* note 13.

[38] Athanasiou et al., *supra* note 15; Cohen & Roth, *Coping with Abortion*, 10 J. Hum. Stress 140 (1984) [hereinafter Cohen & Roth]; Freeman et al., *supra* note 28; Moseley et al., *supra* note 28.

[39] *See, e.g.*, Oliver & Simmons, *Depression as Measured by the DSM-III and the Beck Depression Inventory in an Unselected Adult Population*, 52 *J. Consulting & Clin. Psychology* 892 (1984).

[40] *See, e.g.*, Bracken, *A Causal Model of Psychosomatic Reactions to Vacuum Aspiration Abortion*, 13 *Soc. Psychiatry* 135 (1978) [hereinafter Bracken]; George, *An Empirical Study of Medical Termination of Pregnancy*, 25 *Psychological Studies* 118 (1980); Niswander et al., *supra* note 15; Payne et al., *supra* note 13.

[41] Moreover, no standardized scales of positive functioning or well-being have been used in measuring the effects of abortion on women. Thus, the total picture remains incomplete.

studied are representative or typical of the population from which they are gleaned. Many other studies are comprised only, or predominantly of women of one race, single women, or women of one social class.[42] Furthermore, almost all research on psychological effects use volunteers who essentially select themselves as participants. It is highly likely that these "self-selecters" have characteristics that distinguish them from women who abort but who do not volunteer for such studies or from women who do not choose abortion but who do volunteer.[43] These methodological factors severely lessen generalizability of the results because they may give a false impression that emotional responses to abortion are higher for the population as a whole than the baseline for such difficulties in women experiencing other stressful events.

Many abortion studies are of limited value because they investigate small groups of participants making it difficult to control for the effect of extraneous variables or to generalize from the small sample to the larger population. A great number of researchers have been forced to use small samples because of the lack of volunteers or attrition in the volunteers with which they started. One survey of 17 studies of the psychological effects of abortion found that the range of initial sample lost to attrition was 13% to 86%,[44] and that those participants who complete such studies differ from those who do not complete them on important variables. *Id.*[45]

---

[42] *See, e.g.*, Freeman et al., *supra* note 28; Kaltreider, *supra* note 18; Robbins, *supra* note 37; Wallerstein et al., *supra* note 8 (using all or almost all women of the same race); Simon et al., *supra* note 13 (same for social class).

[43] *See, e.g.*, Speckhard, *supra* note 13, where the sample of women consisted of those answering an advertisement for patients who had serious problems after an abortion.

[44] Adler, *Sample Attrition in Studies of Psychological Sequelae of Abortion: How Great a Problem?* 6 *J. Applied Soc. Psychology* 240 (1976).

[45] *See* Freeman, *supra* note 35 (those who refused participation in the study were younger, more likely to be single, more

In sum, the abortion decision involves "a constant interaction between individual psychology, social pressures and constraints, and individual actions that precipitate societal responses, which, in turn, have an impact on the social and psychological state of the woman . . . . Research on abortion should always be formulated in full cognizance of this context." Illsley & Hall, *supra* note 10, at 86. Unfortunately, most research on the effects of abortion has not done so. A great deal more rigorous research in a variety of situations with a more diverse and clearly defined group of human participants is needed to describe and measure meaningfully the psychological effects of abortion. The most theoretically and methodologically sound research is yet to be done; indeed, the Surgeon-General has recently concluded that most extant studies of mental health effects of abortion are "flawed methodologically." [46] At this time, "convincing" scientific findings that abortion is psychologically harmful to women do not exist.[47]

C. The Existing Evidence Does Not Support the View that there are Substantial Adverse Emotional and Psychological Consequences of the Decision to Have an Abortion.

Given these methodological problems, any conclusions about the *cause* of psychological effects of abortion on women are, at best, tentative. However, competent studies exist that *describe* women's normative psychological response to abortions and the results of more recent and

---

ambivalent about abortion, and more likely to have been forced by others to obtain an abortion than volunteers completing the study). *See also* Cohen & Roth, *supra* note 38; Robbins, *supra* note 37; Schmidt & Priest, *The Effects of Termination of Pregnancy*, 54 *Brit. J. Med. Psychology* 267 (1981), all noting heavy attrition rates.

[46] Letter from C. Everett Koop to President Reagan at 2 (Jan. 9, 1989).

[47] "[F]ar-reaching" constitutional rules "should not be based on the results" of studies that suffer from serious methodological flaws. *Lockhart v. McCree*, 476 U.S. 162, 172-173 (1986).

more sophisticated studies reveal the risk factors that may evoke adverse response in the few women in which they occur.

With regard to competently designed and conducted descriptive studies, there are significant convergent findings. Five major reviews of the psychological and psychiatric literature published between 1975 and 1989 all confirm that for the overwhelming majority of women who undergo abortion, there are no long-term negative emotional effects.[48]

There is consensus among researchers that abortion—like any significant life event—has psychological implications.[49] When women experience regret, depression, or guilt, however, such feelings are mild and diminish rapidly without adversely affecting general functioning. Severe emotional responses are rare,[50] even in young

---

[48] Marecek, *Consequences of Adolescent Childbearing and Abortion in Adolescent Abortion* 96 (G. Melton ed. 1986) [hereinafter Marecek]; *NAS/IOM*, *supra* note 4; Adler, *Psychological Responses of Women Following Abortion* (1989) (testimony on behalf of APA to Subcommittee on Human Resources and Intergovernmental Relations of the House of Representatives Committee on Government Operation); Adler & Dolcini, *Psychological Issues in Abortions for Adolescents in Adolescent Abortion*, *supra*, at 74 [hereinafter Adler & Dolcini]; Shusterman, *supra* note 22.

[49] Adler & Dolcini, *supra* note 48; Cohen & Roth, *supra* note 38; Olson, *Social and Psychological Correlates of Pregnancy Resolution Among Adolescent Women*, 50 *Am. J. Orthopsychiatry* 432 (1980) [hereinafter Olson].

[50] *See, e.g.*, Adler, *supra* note 18; Adler & Dolcini, *supra* note 49; Blumberg & Golbus, *supra* note 37; Bracken, Klerman & Bracken, *Abortion, Adoption or Motherhood: An Empirical Study of Decision-making During Pregnancy*, 130 *Am. J. Obstetrics & Gynecology* 251 (1978); Bracken et al., *supra* note 20; Brewer, *Induced Abortion*, *supra* note 13 (1978); Friedman et al., *supra* note 13; Jacques, *Abortion and Psychological Trauma*, 27 *Med. Arts & Sci.* 52 (1973) [hereinafter Jacques]; Lazarus, *supra* note 28; Marecek, *supra* note 48; Olson, *supra* note 49; Osofsky & Osofsky, *The Psychological Reaction of Patients to Legalized Abortion*, 42 *Am. J. Orthopsychiatry* 48 (1972) [hereinafter Osofksy & Osofsky]; Osofsky et al., *supra* note 24; Payne et al., *supra* note 13; Shusterman, *supra* note 22; Smith, *supra* note 32.

women.[51] To the contrary, the great majority of women who have had an abortion express feelings of relief.[52]

Moreover, there is evidence that positive psychological changes occur as a result of abortions. Studies of the mental health status of pregnant women before and after abortion show significant reductions in the symptoms of stress, as measured by standardized psychological tests.[53] Other researchers have noted improved contraceptive use after abortions, with women reporting feelings of increased self-directedness, autonomy, and efficiency.[54]

The focus of current research is on the variables that predict diverse emotional responses to abortion. Abortion does not take place independently of a woman's intrapersonal and interpersonal context. Thus much research has moved away from testing causal hypotheses (does abortion cause adverse effects) to testing conditional hypotheses (under what conditions will abortions be related to adverse responses). These more finely-grained studies have proved illuminating.

For those few women who do experience negative psychological responses there appear to be four categories of women who are at risk. In the first category are women who desire to carry to term but cannot because of medical

---

[51] With respect to adolescents, abortion "is neither psychologically harmful nor in other ways damaging to the patient." Olson, *supra* note 49, at 440. "Very few teenagers have severe psychiatric complications after induced abortion." Cates, *Adolescent Abortions in the United States*, 1 *J. Adolescent Health Care* 18, 22 (1980) [hereinafter Cates]. *See generally National Academy of Sciences, Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing* (1987).

[52] *See, e.g.*, Adler & Dolcini, *supra* note 48; Cates, *supra* note 51; Lazarus, *supra* note 28; Marecek, *supra* note 48; Osofsky & Osofsky, *supra* note 50; Osofsky et al., *supra* note 24.

[53] *See* Moseley et al., *supra* note 28; Peck & Marcus, *supra* note 18; Rosen, *supra* note 25; Shusterman, *supra* note 22.

[54] *See* Freeman, *supra* note 35.

or genetic indications.[55] Conversely, those who elect abortion for other reasons are relatively free from adverse responses. In the second category are women who have difficulty deciding to abort, or are pressured into it. Conversely those women who are satisfied with their decision prior to an abortion have fewer, if any, negative responses.[56] In the third category are women who do not perceive that their decision to abort is supported by others influential in their lives. Conversely, those who perceive support from those they are close to appear to have positive outcomes after an abortion.[57] Finally,[58] those with a previous history of serious emotional problems

---

[55] *See, e.g.*, Ashton, *supra* note 29; Blumberg & Golbus, *supra* note 37; Freeman, *supra* note 35; Friedman et al., *supra* note 13; Lazarus, *supra* note 28; Major et al., *supra* note 31.

[56] *See, e.g.* Adler, *supra* note 18; Adler & Dolcini, *supra* note 48; Friedman et al., *supra* note 13; Payne et al., *supra* note 13; Perez-Reyes & Falk, *supra* note 32; Shusterman, *supra* note 22; Smith, *supra* note 32. Married women report their decision as being more difficult, Bracken, *supra* note 40, as do Catholic women and women who seek an abortion in the second trimester. Osofsky & Osofsky, *supra* note 50.

[57] *See, e.g.*, Adler & Dolcini, *supra* note 48; Cates, *supra* note 51; Moseley et al., *supra* note 28; Robbins & DeLamater, *Support from Significant Others and Loneliness Following Induced Abortion*, 20 *Soc. Psychiatry* 92 (1978) [hereinafter Robbins & DeLamater]; Shusterman, *Predicting the Psychological Consequences of Abortion*, 13 *Soc. Sci. & Med.* 683 (1979); Smith, *supra* note 32.

[58] Other factors that relate to the psychological outcome of abortions have been identified as well, *e.g.*, the woman's defensive and coping style, her age, religion, education, prior history of pregnancy, the type of abortion used, and pain during the procedure. *See* Adler, *supra* note 18; Adler, *Abortion: A Social-Psychological Perspective*, 35 *J. Soc. Issues* 100 (1979) [hereinafter *Social-Psychological Perspective*]; Adler & Dolcini, *supra* note 48; Bracken, *supra* note 40; Bracken et al., *supra* note 20; Cates, *supra* note 51; Friedman et al., *supra* note 13; Major et al., *supra* note 31; Moseley et al., *supra* note 28; Payne et al., *supra* note 13; Perez-Reyes & Falk, *supra* note 32; Robbins & DeLamater, *supra* note 57; Smith, *supra* note 32; *see generally* Shusterman, *supra* note 22.

appear to have the greatest chance of responding negatively after abortion.[59]

In sum, the most definitive research is yet to be done. Recent and better designed studies have begun the necessary process of examining a wide variety of variables associated with negative outcomes of abortion. Nevertheless, although more research is needed, recent and objective descriptive or normative studies suggest that abortion does not evoke or cause serious psychological disorders in the vast majority of women.

II. APPELLANTS' BAN ON THE USE OF PUBLIC FUNDS TO ENCOURAGE OR COUNSEL A WOMAN TO HAVE AN ABORTION IS ANTAGONISTIC TO THE STATE'S INTEREST IN PROMOTING INFORMED CONSENT AND PROTECTING THE HEALTH AND WELFARE OF ITS CITIZENS AND UNDULY INTERFERES WITH PROFESSIONAL DISCRETION.

Appellant makes it "unlawful for a doctor, nurse or other health care personnel,[60] a social worker, a counselor or person of similar occupation who is a public employee within the scope of his public employment to encourage or counsel a woman to have an abortion not necessary to save her life." Mo. Rev. Stat. § 188.210 (1986). The State also prohibits the use of public facilities, Mo. Rev. Stat. § 188.215 (1986), or public funds for such purposes. Mo. Rev. Stat. § 188.205 (1986). All three restrictions were declared unconstitutional by the courts below but only the public funds provision is currently at issue. Nevertheless, any ban on the use of public funds for abortion-related counseling would neces-

---

[59] *See, e.g.*, Ashton, *supra* note 29; Blumberg & Golbus, *supra* note 37; Friedman et al., *supra* note 13; Jacques, *supra* note 50; Lazarus, *supra* note 28; Payne et al., *supra* note 13.

[60] Psychologists are recognized as health care providers under federal and state law. *See Blue Shield v. McCready*, 457 U.S. 465 (1982) and Brief for *Amicus Curiae* American Psychological Association submitted in that case; Mo. Rev. Stat. § 337 *et seq.* (1981).

sarily preclude such counseling by public employees in public institutions, or in private programs or institutions supported by State funds.

The prohibition on the use of public funds for abortion-related counseling significantly undermines important interests that the State claims it wishes to advance. The prohibition essentially denies a significant proportion of women seeking abortions or coping with an unwanted or problem pregnancy the benefit of gathering and receiving crucial information uncensored by the State and unduly restricts health care providers' ability to communicate their professional judgment and requires them to violate ethical requirements to provide such information.[61]

A. Appellant's Provision Undermines the Health of its Citizens and May be Antagonistic to its Goal of Preventing Future Unwanted Pregnancies.

The Court has recognized that the "decision to abort . . . is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences." *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 67 (1976). "A requirement that the woman give what is truly a voluntary and informed consent, as a general proposition, is, of course, proper and is surely not unconstitutional." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 760 (1986).[62] *Amicus* strongly endorses pre-abortion counseling to en-

---

[61] Appellants seek to persuade the Court that the words "encourage" and "counsel" refer only to affirmative advocacy of abortions. Brief for Appellants at 42-44. The Eighth Circuit disagreed, holding that the scope of those phrases, particularly the word "counsel," was "much broader than the interpretation offered by the state." *Reproductive Health Service v. Webster*, 851 F.2d 1071, 1078 (8th Cir. 1988). *Amicus* will adopt the meaning of the terms used by the court of appeals.

[62] "An intelligent decision requires the input of all available data, and the ignorance of the psychological aspects of selective abortion precludes a fully informed decision." Blumberg et al., *supra* note 13, at 808.

sure that consent is informed and that a trained professional will be available to discuss any psychological or related problems the woman might have.[63]

Research demonstrates that pre-abortion counseling is beneficial.[64] One study, for example, of all women who contacted the Pregnancy Consultation Service in St. Louis during an entire year, found that "[e]ighty-six percent of the women felt that counseling was helpful to them. Most frequently mentioned were the emotional support provided by the counselor and the information given regarding the abortion procedure." [65] Whatever psychological difficulties a woman may experience as a result of abortion may be substantially ameliorated through pre-abortion counseling.[66]

---

[63] "The clinician, whether abortion counselor or therapist, typically has two roles. . . . The first is to assist [the woman] in examining all alternatives, thus increasing the likelihood that her ultimate decision is mature, independent, and carefully deliberated. The second role is to provide support through the decision-making process and through the abortion or pregnancy itself." Scott, *Legal and Ethical Issues in Counseling Pregnant Adolescents in Adolescent Abortion* 120-121 (citations omitted).

[64] "[F]ew would disagree that competent and compassionate treatment, a description of the procedure, and contraceptive advice are basic requisites. More than that, however, the clinician must be aware of those factors and special circumstances which may predispose women to undesirable sequelae. This information can best be used preventively and postoperatively to provide additional support or brief psychotherapy for those who really need it." Lazarus, *supra* note 28, at 148. "It seems there is a need for pre-abortion counselling concerning both medical and psychological aspects of abortion and that a combination of medical and non-medical counsellors may be beneficial. Abortion counseling may be an area in which psychologists and gynaecologists could usefully work together as a team, with the gynaecologists providing medical advice and the psychologist helping the woman clarify the various psychosocial problems surrounding her pregnancy." Handy, *supra* note 17, at 36.

[65] Smith, *supra* note 32, at 583. "Only seven percent of the women did not feel that counseling was helpful to them." *Id.*

[66] "[T]hrough adequate counseling and evaluation, psychological injury [associated with abortion] can be minimized. Jacques,

In one of the more recent, better controlled studies, 283 women who underwent first trimester vacuum aspiration abortions were randomly divided into experimental groups and a control group. The women in the experimental groups received one of two kinds of pre-abortion counseling designed either to minimize self-blame or to enhance self-efficacy. The control group received a presentation on a therapeutically-neutral subject. "Women exposed to the experimental treatments coped significantly better than women exposed to the no treatment control group . . . . They had significantly better moods and a tendency toward fewer physical complaints immediately post-abortion than women who were exposed to the no treatment control condition." [67]

Pre-abortion counseling may be especially important to women seeking abortions in the second trimester. "A pilot descriptive study . . . suggests that the women who presented in the second trimester were initially different psychologically and underwent a more stressful experience." Kaltreider, *supra* note 18, at 133. As a result, professionals "who deal with the mid-trimester abortion applicant" may be particularly helpful in approaching "the issue of ambivalence in the patient," permitting "the patient to recognize her emotional turmoil and then to make a reasoned decision." *Id.*[68]

---

supra note 50, at 58 (1973). The major role of the abortion counselor "is to provide the support which will, hopefully, bring the woman through this crisis in her life with a minimum of trauma and will help her gain an understanding of the circumstances which led to the unwanted conception and to action which will prevent the need for repeat abortion." Dauber, Zalar, & Goldstein, *Abortion Counseling and Behavior Change*, 4 *Fam. Plan. Persp.* 23, 23 (1972).

[67] Mueller, *Causal Attritions, Perceived Self-Efficacy, and Coping with a Negative Life Event* 99 (unpublished doctorial dissertation available from APA); *see* Mueller & Major, *Self-Blame, Self-Efficacy, and Adjustment to Abortion, J. Personality & Soc. Psychology* (in press).

[68] "The descriptive data suggests that mental health specialists are appropriate partners to the gynecologist for this potentially high-risk group." *Id.; see* note 64, *supra.*

Counseling may also be effective in encouraging women to return for post-abortion checkup: "94 of 99 women who received counseling returned to the hospital for a check-up while only 60 of 99 uncounseled women did so. Return for follow-up could . . . provide further information about and encouragement for contraceptive use." *Social-Psychological Perspective*, *supra* note 58, at 108-109. In contrast, communication of negative attitudes by hospital personnel can contribute directly to the incidence of post-abortion guilt, remorse, and depression.[69]

In sum, counseling can produce positive psychological results while serving important state interests. In the exercise of its governmental functions, the State should be protecting women from unnecessary mental health risks, promoting informed, intelligent, and self-determinative decisionmaking, and providing information that will help reduce the need for future abortions.[70] Forbidding the use of public funds for abortion counseling, and thereby forbidding the use of publicly-supported health care professionals and facilities for such counseling, undermines the very goals appellants assert in support of the statutory provision at issue in this case.

B. Appellant's Provision Interferes with Professional Judgment and Requires Psychologists to Violate Basic Ethical Precepts.

In many different settings, this Court has stressed the deference that should be shown to judgments made by

---

[69] *See* Marder, *Psychiatric Experiences with a Liberalized Therapeutic Abortion Law*, 126 *Am. J. Psychiatry* 1230 (1970); Notman & Nadelson, *Reproductive Crises in Women in Psychotherapy* (A. Brodsky & R. Hare-Mustin eds. 1980).

[70] The State has an interest in ensuring that a woman's decision is "informed and freely given and is not the result of coercion." *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 65 (1976). "The validity of an informed consent requirement thus rests on the State's interest in protecting the health of the pregnant woman." *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 443 (1983).

qualified professionals.[71] It is particularly important that professional judgment be exercised freely because in discussing reproductive options the woman necessarily relies on professional guidance in making, and coming to terms with, decisions she has a constitutional right to make. Since, in the abortion context, professional judgment is inextricably related to exercise of a constitutional right, legislation that burdens exercise of professional judgment burdens the exercise of that right. These principles require deference to the judgment of health care professionals involved in counseling women about reproductive options, and respect for women's constitutional right to exercise their choice unburdened by the State's attempt to inject its policy preferences into their decisionmaking process.

It is not surprising, therefore, that the Court has stressed the important role of professional judgment in the abortion decision.[72] Health care professionals, such as psychologists, exercise professional judgment

---

[71] *See Youngberg v. Romeo*, 457 U.S. 307 (1982); *Parham v. J.R.*, 442 U.S. 584 (1979); *Bell v. Wolfish*, 441 U.S. 520 (1979).

[72] In *Roe*, 410 U.S. at 165, the Court noted that its decision "vindicates the right of the physician to administer medical treatment according to his professional judgment." In *Doe v. Bolton*, 410 U.S. 179, 192 (1973), the Court again emphasized the importance of giving the physician the "room he needs" to exercise professional "judgment." In *Planned Parenthood of Missouri v. Danforth*, 428 U.S. at 80, the Court warned against "restrictions or regulations governing the medical judgment of the pregnant woman's attending physician with respect to the termination of her pregnancy." In *Whalen v. Roe*, 429 U.S. 589, 604 n.33 (1977), the Court cautioned against "placing obstacles in the path of the doctor upon whom she was entitled to rely for advice in connection with her decision." In *Colautti v. Franklin*, 439 U.S. 379, 387 (1979), the Court reiterated the "importance of affording the physician adequate discretion in the exercise of his medical judgment." Finally, in *City of Akron*, 462 U.S. at 427, the Court recognized that "the full vindication of the woman's fundamental right" to an abortion requires that the exercise of professional judgment encompass "both assisting the woman in the decisionmaking process and implementing her decision should she choose an abortion."

in the pregnancy counseling context. In refusing to sustain a local ordinance's requirement that only physicians could counsel patients seeking abortions, the Court noted that, "[t]he State's interest is in ensuring that the woman's consent is informed and unpressured; the critical factor is whether she obtains the necessary information and counseling from a qualified person, not the identity of the person from whom she obtains it." *City of Akron*, 462 U.S. at 448.

The Court has also recognized that a health care professional engaged in counseling pregnant women who seek an abortion cannot be confined to a simple "recital of pertinent medical facts. On the contrary, it is clear that the needs of patients for information and an opportunity to discuss the abortion decision will vary considerably." *Id.* at 448 n.38. It is the performance of these functions for which counseling services are directly relevant and for which psychologists are specially trained. Such services "are intended to help . . . persons develop a variety of problem-solving and decision-making capabilities." [73]

The Court has clearly stated that "individual counseling should be available for those persons who desire or need it." *City of Akron*, 462 U.S. at 448 n.38. But, appellants' provision effectively precludes the vast majority of those persons who depend on free or low cost public services from the opportunity to obtain appropriate counseling in reproductive decisionmaking. This kind of absolute bar runs afoul of the Court's admonition that

---

[73] APA, *Specialty Guidelines for the Delivery of Services by Counseling Psychologists*, 36 *Am. Psychologist* 652, 654 (1981). "Counseling psychological services refers to services . . . intended to help persons acquire or alter personal-social skills, improve adaptability to changing life demands, enhance environmental coping skills, and develop a variety of problem-solving and decision-making capabilities. Counseling psychological services are used by individuals, couples, and families of all age groups to cope with problems connected with sex, marriage, family, [and] other social relations.

the State may not place "obstacles in the path of the [professional] upon whom she was entitled to rely for advice in connection with her decision." *Whalen v. Roe*, 429 U.S. 589, 604 n.33 (1977).

Furthermore, appellants' statute forbids therapists from addressing abortion in any treatment context carried out by public employees in public facilities. Reproductive issues, including abortion, arise frequently in treatment in such public settings as community mental health clinics or public university counseling centers. A therapist in these situations will not know when therapy begins what topics the patient will eventually raise or will need to be raised. Once the therapeutic relationship is created and developed, it would damage the patient, place the therapist in an ethical dilemma, and unduly interfere with professional discretion, if the therapist were barred from discussing the full range of appropriate reproductive issues and alternatives.

The primary responsibility of professional psychologists is "to protect the welfare of those who seek their services," APA *Ethical Principles of Psychologists*, 36 *Am. Psychologist* 633, 633 (1981)[74] and they are urged to "facilitate[] optimal human functioning." *General Guidelines*, *supra* note 74, at 7 (Guidelines 2.4.1). A therapist's role is to interact with the patient to maximize her achievement of those objectives, and it is imperative that professional judgment, not state-imposed moral absolutes, guide the therapeutic process. Achievement of those goals is undermined by appellants' statute, which forces the therapist to refrain from discussing abortion even if the patient directly requests it and interferes with the clinician's duty to act in conformity with his/her best judgment as to the most appropriate treat-

---

[74] "The promotion of human welfare is the primary principle guiding the professional activities of all members of the psychological service unit." APA, *General Guidelines for Providers of Psychological Services*, 42 *American Psychologist* 1, 7 (1987) (Guideline 3.1) [hereinafter *General Guidelines*].

ment the patient requires. These restrictions are antagonistic to proper counseling, forces the therapist to abandon the patient and forego his/her professional responsibility, and places the patient between her therapist and the State.

In sum, appellants' prohibition is counter to the State's interest in ensuring that its most needy citizens receive objective, vital information and effective counseling to ameliorate the mental health and physical problems that may arise prior to, during, and after the decision to abort. The prohibition shows a degree of insensitivity and lack of concern toward some of its most vulnerable citizens inappropriate to a governmental entity.

CONCLUSION

For the foregoing reasons, the decision of the Eighth Circuit Court of Appeals should be affirmed and the decision in *Roe v. Wade* should be reaffirmed.

Respectfully submitted,

DONALD N. BERSOFF
(Counsel of Record)
JENNER & BLOCK
21 Dupont Circle, N.W.
Washington, D.C. 20036
(202) 223-4400
Attorney for Amicus Curiae
American Psychological Association

March 30, 1989