IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 70-18

JANE ROE, JOHN DOE, AND MARY DOE, *Appellants,*

JAMES HUBERT HALLFORD, M.D., *Appellant-Intervenor,*

v.

HENRY WADE, *Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

No. 70-40

MARY DOE, *et al., Appellants,*

v.

ARTHUR K. BOLTON, *et al., Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

SUPPLEMENTAL BRIEF FOR AMICI CURIAE PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., and AMERICAN ASSOCIATION OF PLANNED PARENTHOOD PHYSICIANS

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SUPPLEMENTAL BRIEF FOR *AMICI CURIAE* PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. AND AMERICAN ASSOCIATION OF PLANNED PARENTHOOD PHYSICIANS

Summary of Argument

Amici, Planned Parenthood Federation of America, Inc. and American Association of Planned Parenthood Physicians, submitted a brief *amicus curiae* to this Court in August of 1971. This supplemental brief is submitted for the purpose of bringing the prior brief up to date as of September 15, 1972 with reference to factual information to which the judicial notice of this Court is respectfully invited, with reference to developments in the applicable law in the past year, and with reference to the arguments as to the rights of the fetus advanced by appellees and various *amici* in their support subsequent to the filing of our brief.

The facts set forth in Point I relate to the experience under the recent statutes which permit abortion on request in the early stages of pregnancy. These facts support the conclusion reached in the majority of relevant cases decided in the past year (Point II), that no compelling state interest justifies statutes, like those of Texas and Georgia, which infringe the rights of women and doctors in relation to the obtaining and furnishing of abortion services. Indeed, it appears from these facts that compelling state interests require that such restrictions on the performance of abortion be removed.

The argument advanced by the appellees, that restrictive abortion statutes are justified by a compelling state interest in protecting the claimed constitutional rights of the fetus, is without merit (Point III). It is clear from the decisions that the fetus is not a person for the purposes of the Fourteenth Amendment. State cases dealing with the

legal rights of the unborn do not support a contrary conclusion. The law has never considered the unborn fetus as having a separate juridical existence. Nor can the basic human rights of women be subordinated to any claimed rights of the fetus.

POINT I

The facts of record during the past year suggest that "compelling state interests" in public health and welfare require the removal of such restrictive abortion laws as those herein challenged.

The attention of the Court is respectfully invited to the following material which was not available at the time we filed our prior brief and which is submitted to supplement Point I of that brief.

A. Background facts

Significant statistics have begun to become available as to the experience under statutes which permit abortion on request in the early stages of pregnancy (such as are in effect in Alaska, Hawaii, New York and Washington). The latest official statistics available to us on the number of legal abortions performed in the United States are those contained in the United States Department of Health, Education and Welfare's Center for Disease Control's *Abortion Surveillance Report,* Jan.-Mar. 1971 (Mar. 1972). This publication reported a total of 99,721 legal abortions in the United States in the first quarter of 1971, excluding abortions reported by the Department of Defense. The overall abortion ratio for the United States was 110 reported abor-

tions per 1,000 live births (*Op. cit.*). Every state which reported abortions for both 1970 and the first quarter of 1971 had a higher abortion ratio in 1971.

The fifteen states which reported legal abortions for the first quarter of 1971 reported an overall ratio of 292 abortions per 1,000 live births. This compares with a ratio for reporting states in the previous year of 178 abortions per 1,000 live births. Of particular significance to this case is the fact that of the states reporting, Georgia had the lowest ratio of abortions to live births in both periods. *Ibid.*

The following table gives a breakdown by states for the first quarter of 1971 (*Id.* at 2):

TABLE 1: REPORTED LEGAL ABORTION RATIOS BY STATE OF OCCURRENCE, SELECTED STATES,* JANUARY-MARCH 1971

State	*Abortions*	*Live Births*[1]	*Abortions/1,000 Live Births*
Alaska	237	1,926	123
Arkansas	130	9,212	14
California	23,880	92,911	257
Colorado	678	10,223	66
Delaware	252[2]	2,658	95
Georgia	320	25,307	13
Hawaii	938	3,978	236
Kansas	2,772	8,881	312
Maryland	1,880	14,716	128
New York	57,737	73,888	781
(Upstate)	(12,004)	(39,062)	(307)
(City)	(45,733[3])	(34,826)	(1,313)
North Carolina	561	24,305	23
Oregon	1,809	8,723	207
South Carolina	192	13,814	14
Virginia	875	20,597	42
Washington	2,158	12,132	178
TOTAL	94,419	323,271	292

The foregoing figures for New York include abortions performed on non-residents. New York State's official figures for the full calendar year 1971 for both residents and non-residents are available, however. They show a

1. Live birth data for all states except Hawaii taken from *Monthly Vital Statistics Reports Provisional Statistics,* Vol. 20, No. 3, May 26, 1971, published by the National Center for Health Statistics. Hawaii live birth data from Hawaii State Department of Health.
2. Abortions performed in three hospitals that reported more than 95 percent of state abortions in 1970.
3. Estimate from City of New York Department of Health.

* All states with data available.

total 262,807 recorded induced abortions for the year 1971, of which 206,673 were performed in New York City. 159,969 of the 262,807 were performed on non-residents. The ratio of legal abortions to live births among residents of New York City was 517 out of per 1,000 live births and for up-state New York residents 226 per 1,000 live births. *Report on Induced Abortions Recorded in New York State January-December, 1971,* New York State Department of Health (August, 1972) at 1-2.

No meaningful figures are available as to the number of illegal abortions. Estimates of the number of illegal abortions performed annually in the United States have in the past ranged from 200,000 to 1,200,000. *Report of the Commission on Population Growth and the American Future* (1972) at 102.

The most detailed recent statistics emanate from New York State where more than half of all legal abortions reported in the United States from July 1, 1970 through March 31, 1971 were performed. The New York experience is summarized below together with such information from other states as is available to us.

B. Legal abortions are safer than childbirth.

The overall maternal death rate from legal abortions in New York State dropped to 3.7 per 100,000 abortions in the last half of 1971. This is less than half of the death rate associated with live delivery. *The New York Abortion Story,* Planned Parenthood Federation of America, Inc., (1972), at 22. *See also New York City Health Services Administration Abortion Report,* Feb. 20, 1972, at 2. This record,

when combined with the decrease in illegal abortions (the major source of maternal mortality) caused the maternal mortality rate in New York City to drop by two-thirds to a record low in 1971, the first full year during which abortions were available on request in New York. Maternal deaths due to criminal abortions in New York City in the 1960's ranged from a high of 130 in 1961 to a low of 66 in 1968. This represented 33 maternal deaths due to criminal abortions per 100,000 live births in 1961 and 15 in 1968. In the first 6 months of 1971 only one maternal death due to criminal abortion was reported. Pakter & Nelson, *Abortion in New York City: The First Nine Months,* Family Planning Perspectives (July 1971) at 10.

The California experience was comparable. *Report of the Commission on Population Growth and the American Future,* at 102.

There were no maternal deaths as a result of any of the 3,643 legal abortions performed in Hawaii in the first year after the permissive statute became effective on March 13, 1970. The University of Hawaii, *Report to the Legislature: Abortion in Hawaii: The First Year,* at 7.

C. Availability of abortion reduces the infant mortality rate.

The 1971 New York State infant mortality rate of 18.7 per 1,000 live births is the lowest rate ever recorded in that state. *Report on Induced Abortions Recorded in New York State, supra,* p. 2. The New York City rate dropped from 24.4 in 1969, the last full year before the new abortion statute, to 20.7 in 1971. *New York City Health Services Administration Abortion Report, supra* at 2.

"Neo-natal" mortality (deaths occurring in the first 28 days of life) in New York City dropped from 18.1 percent per 1,000 live births in 1969 to 16.2 percent in 1970 to 14.9 percent in 1971. *Report of the Commission on Population Growth and the American Future,* at 102.

D. Discrimination against the poor and the non-white is substantially eliminated.

In New York City in 1960/1961 the ratio of therapeutic abortions per 1,000 deliveries was 2.6 for white women, .5 for Negro women, and .1 for Puerto Rican women. *Memorandum of Assemblywoman Constance Cook,* New York Legislative Annual, 1970, at 241.

During the first nine months under the present New York law (July 1, 1970-March 31, 1971) abortions were performed on New York City residents at the rate of almost 3 for every 10 live births among the City's Puerto Rican community, 4 for every 10 live births among whites and 6 for every 10 live births of black residents. Pakter and Nelson, *Abortion in New York City: The First Nine Months,* Family Planning Perspectives (July 1971) at 8.

The Hawaiian experience shows that "the family income distribution of abortion patients varies slightly from that of the state. * * * A higher proportion of abortion patients is found in the over $15,000 income bracket than is true for the state as a whole with a corresponding slight underrepresentation in the lower income brackets." University of Hawaii, *Report to the Legislature: Abortion in Hawaii: The First Year,* at 16-17.

The all-inclusive cost of a first trimester abortion in a free-standing clinic in New York City has dropped to a

range of $145 to $175, complete with contraceptive counselling and a post-operative examination. New York City hospitals charge approximately $200 for an ambulatory procedure. Late pregnancy terminations are performed in hospitals and at an average cost of $325 to $500. *The New York Abortion Story, supra* at 27. The usual cost of an abortion in Hawaii in the first year under the new statute was about $350. *Report to the Legislature, supra* at 12. The cost of criminal abortions is widely understood to have been much higher.

E. No increased risk is associated with the performance of abortions on an out-patient basis whether in a hospital or in a free-standing clinic.

An interim report based on 42,598 records submitted on or before June 15, 1971 to the Joint Program for the Study of Abortion (JPSA) derived from 64 participating institutions in 12 states and the District of Columbia in connection with abortions performed after June 30, 1970 contained the finding that

> "Among JPSA patients, there appears to be no increased risk associated with abortions performed on an outpatient basis, whether in a hospital or in a freestanding clinic. Indeed, JPSA patients whose pregnancies were terminated by suction on an outpatient basis had fewer major complications than those whose abortions were performed on an inpatient basis."

Tietze & Lewit, *Legal Abortions: Early Medical Complications,* Family Planning Perspectives (October 1971) at 6, 13. Almost one half of all abortions performed in New York in the last half of 1971 were performed in clinics. *New York City Health Services Administration Abortion Report, supra* at 1.

F. A substantial number of legal abortions replace criminal abortions.

It is reliably estimated that only 25 percent of legal abortions replace live births. Most of the others probably replace illegal abortions. Tietze, The Potential Impact of Legal Abortion on Population Growth in the United States, an unpublished report prepared for the Commission on Population Growth in the United States (1971).

G. Professional and public support of abortion availability

The National Conference of Commissioners on Uniform State Law has adopted a Uniform Abortion Act which permits abortion on request up to a specified time and which thereafter permits abortion if the physician believes that there is a substantial risk of impairing the physical and mental health of the mother or that the child would have a grave physical or mental defect or if the pregnancy resulted from rape or incest. The American Bar Association's 307 member House of Delegates approved the Uniform Act with only 30 dissenting votes on February 7, 1972. *New York Times,* Feb. 8, 1972, at 39.

The American Medical Association previously in June of 1970 had dropped the limitations on the grounds of abortion contained in its prior policy statement (substantially the same limitations as appear in the Georgia statute herein) and stated with reference to abortion that: "The standards of sound clinical judgment, * * * together with informed patient consent should be determinative according to the merits of each individual case"; also that abor-

tions should be performed "only by a duly licensed physician and surgeon" under procedural limitations not relevant here.

The American College of Obstetricians' and Gynecologists' policy on abortion sanctions abortions on request. The National Council of Obstetrics-Gynecology is among many other important medical associations which support the repeal of restrictive abortion laws.

An opinion survey conducted in 1971 for the Commission on Population Growth and the American Future indicated that half of all Americans believed that abortion should be a matter decided solely between the individuals and their physicians. An additional 40 percent would have permitted abortion under certain circumstances and only 6 percent flatly opposed abortion under any circumstances. *Report of the Commission on Population Growth and the American Future,* at 103. In a national Gallup poll in January, 1972, 57 percent of those questioned agreed that the "decision to have an abortion should be made solely by a woman and her physician." Thirty-seven percent disagreed and 6 percent had no opinion. For the first time in such national polls a majority of the Roman Catholics interviewed, 54 percent, expressed support of general abortion reform. *The New York Abortion Story,* Planned Parenthood Federation of America, Inc. (1972). The latest Gallup poll conducted in June, 1972, the results of which were published by the *New York Times* on August 25, 1972, show that 64% of the public (including a majority of Roman Catholics) now believe that the decision to have an abortion should be left solely to the woman and her doctor.

The extent of support for the liberal New York abortion statute among voluntary health, welfare, and civic agencies is indicated by the fact that when the first attack on the constitutionality of the statute was launched in December, 1971 (*Byrn* v. *New York City Health and Hospitals Corporation,* 21 N.Y.2d 194 [1972]), the following agencies filed a joint brief *amici curiae* in support of the statute:

Association of the Bar of the City of New York
Citizens Committee for Children of New York, Inc.
Citizens Union of the City of New York
Clergy and Lay Advocates for Hospital Abortion Performance (formerly Clergy Consultation Service)
Committee on Public Affairs of the Community Service Society of New York
Federation of Jewish Philanthropies of New York
Federation of Protestant Welfare Agencies, Inc.
New York Academy of Medicine
New York Chapter of the National Organization for Women
New York State Council of Churches
New York Urban Coalition, Inc.
Planned Parenthood Federation of America, Inc.
Planned Parenthood of New York City, Inc.
State Communities Aid Association (formerly State Charities Aid Association)
Women's City Club of New York

H. Summary

Although the collection of data with regard to the relatively recent experience under the permissive abortion statutes in Alaska, Hawaii, New York and Washington is far from complete, the emerging patterns and trends are clear:

(1) Restrictive abortion statutes cannot be justified on health grounds, whether we are speaking of the woman's health or the health of a total population.

(2) Restrictive abortion statutes and practices discriminate heavily against poor people and non-whites in denying them access to safe medical treatment and in severely limiting their right to choose whether or not to bear an unwanted child.

(3) Assuming *arguendo* that restrictive abortion statutes could be constitutionally sustained on the ground of a compelling state interest in safeguarding the alleged right of a fetus to be born, the evidence shows that such statutes are not even an effective means to that questionable end. As has been estimated, restrictive abortion statutes are widely ignored primarily by resort to illegal abortionists and more recently by travel to jurisdictions where abortions are freely available.

(4) Thus the effect of the new permissive state statutes on public health and welfare has been salutary and the substantive position they reflect is supported by the general public as well as by national spokesmen for the medical profession, the legal profession and many other professional and lay groups throughout the country.

POINT II

The decisions of this Court, the lower federal courts and the state courts during the past year make clear the unconstitutionality of the laws herein challenged.

A. The decision of this Court in *Eisenstadt* v. *Baird*

This Court has now on several occasions indicated its view that a woman has a fundamental constitutional right to decide whether or not to have a child. Most recently, in *Eisenstadt* v. *Baird,* —— U.S. ——, 92 S. Ct. 1029 (1972), the Court, through Justice Brennan, said:

> "If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. See *Stanley* v. *Georgia,* 394 U.S. 557, 22 L. Ed. 2d 542, 89 S. Ct. 1243 (1969). See also *Skinner* v. *Oklahoma,* 316 U.S. 535, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942); *Jacobson* v. *Massachusetts,* 197 U.S. 11, 29, 49 L. Ed. 643, 651, 25 S. Ct. 358 (1905)." —— U.S. at ——, 92 S. Ct. at 1038 (footnote omitted) (emphasis in original).

The *Baird* decision followed logically from the decision of this Court in *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), discussed in our prior brief. These decisions build a citadel of privacy around the most intimate aspects of a person's life which state action may not invade. The decisions of the lower courts, discussed below, invalidating state legislation which drastically restricts the right to abortion, are consistent with and indeed follow inevitably from the philosophy of the *Griswold* and *Baird* cases.

B. The decisions of the lower federal courts in the past year

There were at least five decisions in the past year by three-judge federal courts holding that a woman has a fundamental right to choose not to bear a child. They are *Klein* v. *Nassau County Medical Center,* —— F. Supp. —— (No. 72-C-386) (E.D. N.Y., filed August 24, 1972); *Abele* v. *Markle,* —— F. Supp. —— (Civil Action No. B-521) (D. Conn., June 13, 1972); *Abele* v. *Markle,* 342 F. Supp. 800 (D. Conn., April 18, 1972); *Poe* v. *Menghini,* 339 F. Supp. 986 (D. Kan., March 13, 1972); and *Young Women's Christian Association* v. *Kugler,* 342 F. Supp. 1048 (D. N.J., March 1, 1972). See also *Vuitch* v. *Hardy,* —— F. Supp. —— (Civil No. 71-1129-Y) (D. Md., June 22, 1972).

In the April *Abele* v. *Markle* decision, *supra,* Judge J. Edward Lumbard held that the Connecticut abortion statute "trespasse[d] unjustifiably" on women's "personal privacy and liberty" in violation of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment. Judge Lumbard characterized the determination of whether or not to bear a child as "of fundamental importance to a woman," and went on to find that the interests asserted by the state and specifically its asserted interest in the fetus were "insufficient to warrant removing from the woman all decision-making power over whether to terminate a pregnancy."

He also stated:

"* * * The essential requirement of due process is that the woman be given the power to determine within an

appropriate period after conception whether or not she wishes to bear a child."

In *Young Women's Christian Association* v. *Kugler, supra,* Circuit Judge Forman wrote, "Hence, we hold that a woman has a constitutional right of privacy cognizable under the Ninth and Fourteenth Amendments to determine for herself whether to bear a child or terminate a pregnancy in its early stages, free from unreasonable interference by the State." 342 F. Supp. at 1072.

In *Klein* v. *Nassau County Medical Center, supra,* the court said "* * * It may well be that a still more fundamental right is infringed whenever an attempt is made by statute or rule to deny, or, as here, substantially to interfere with, the pregnant woman's interest in freely determining whether or not to bear a child." Slip opinion at 11. Holding invalid an administrative directive which denied Medicaid to indigent women seeking abortions, the court held that these women could not be "subjected to State coercion to bear children which they do not wish to bear. * * *". *Ibid.*

In the June *Abele* v. *Markle* decision, *supra,* the court entered a temporary restraining order preventing the state from enforcing the new Connecticut abortion statute as to a particular applicant for abortion, citing *Eisenstadt* v. *Baird, supra,* for the proposition that women have a fundamental right to decide whether to bear or beget children.

In *Poe* v. *Menghini, supra,* a three-judge court invalidated two provisions of the Kansas abortion law; one required that abortions be performed only in state licensed

hospitals accredited by the Joint Commission on Accreditation of Hospitals and the other prohibited abortion "until the opinions of three (3) duly licensed physicians attesting to the necessity of such termination have been recorded in writing in the permanent records of the hospital," (*Id.* at 995), both provisions being similar to provisions in the Georgia statute herein attached. The court held that there is "a fundamental right to individual and marital privacy which includes within its scope the right to procure an abortion[.]" *Id.* at 993. It found that "[t]he JCAH-accreditation provision * * * places an unwarranted limitation upon the exercise of a fundamental right and is, therefore unconstitutional," (*Id.* at 994), and that "requiring the certification by three physicians in writing of the circumstances necessitating the abortion, violates the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 996. The decision of the three-judge court with reference to the Kansas statute is equally applicable to the Georgia statute.

To similar effect is *Vuitch* v. *Hardy, supra,* a decision on habeas corpus of the United States District Court for the District of Maryland which also indicates the unconstitutionality of the conditions for abortion set forth in the Georgia statute. In the words of the court, "this Court is convinced that a woman does have a constitutionally protected 'fundamental personal right' to such an abortion [citing *Griswold* and *Baird supra*] * * *" The court held that the requirement that all abortions take place in a hospital accredited by the Joint Commission for Accreditation of Hospitals and licensed by the State Board of Health and Mental Hygiene was unconstitutional since it "* * *

placed an unnecessary burden on the exercise of [a constitutional] right * * *." Slip opinion at 12. Clearly, the Georgia statute here involved is subject to the same constitutional infirmity.

C. The decisions of the state courts in the past year

In addition to the state cases cited in our earlier brief, we respectfully refer the Court to the following which had not been decided or were not available to us at the time we filed our prior brief.

People v. *Gwynne,* No. 173309 (Mun. Ct. Orange County, Calif., June 16, 1970); *People* v. *Robb,* Nos. 149005, 159061 (Mun. Ct. Orange County, Calif., Jan. 9, 1970); *Florida* v. *Sachs* (Alachua County Court of Record, Dec. 10, 1971); *People* v. *Anast,* No. 69-3429 (Ill. Cir. Ct., Cook County, July 29, 1970); *State* v. *Ketchum* (Mich. Dist. Ct., March 30, 1970); *Rogers* v. *Danforth,* No. 315512 (Mo. Cir. Ct., St. Louis, June 7, 1971); *Commonwealth* v. *Page* (Dkt. No. 1968-353) (Pa. Ct. Comm. Pl., Centre County, July 23, 1970); *State* v. *Munson* (S. Dak. 7th Cir. Ct., Pennington County, April 6, 1970). *See also State* v. *Barquet,* —— Fla. ——, 262 So. 2d 431 (Feb. 14, 1972); *State* v. *Nixon,* No. 9579 (Ct. App., Mich., August 23, 1972); *Beecham* v. *Leahy,* —— Vt. ——, 287 A. 2d 836 (1972).

POINT III

There is no constitutional right or compelling state interest in the fetus which can render constitutional the violations of women's and physicians' rights entailed by the Georgia and Texas statutes herein challenged.

Since we filed our prior brief, we have seen the briefs filed by appellees and various *amici* which are based in large part on the claimed constitutional rights of the fetus. Since in our prior brief we did not discuss the state's alleged interest in the fetus in any detail (pp. 43-44), we now address ourselves to the reasons why the contention that the fetus has constitutional rights or any interest here relevant is without merit.

A. It is clear from the decisions of this Court, the lower federal courts, and the state courts that the fetus is not a person for the purposes of the Fifth and Fourteenth Amendments.

In *United States* v. *Vuitch,* 402 U.S. 62 (1971), this Court upheld the District of Columbia abortion statute against a claim that it was unconstitutionally vague. In so doing, the Court, by necessary implication, rejected the argument that the fetus is a person for purposes of the United States Constitution. Thus, in holding that the statute, which permitted abortion where "necessary for the preservation of the mother's life or health" was sufficiently precise under constitutional standards, the Court relied on lower court decisions construing the law as permitting abortions "for mental health reasons, whether or not the patient had a

previous history of mental defects." 402 U.S. at 71-72.* It was with this specific construction before it that the Court sustained the statute. Obviously in upholding such a law, the Court had to reject any rights of constitutional or other dimension in the fetus. Indeed, the Court recognized the danger that jurors who believe that all abortions are evil might for that reason vote to convict doctors for performing any abortion but pointed out that there are well-established methods to protect "against any such jury prejudices", *e.g.*, challenges to prospective jurors. *Id.* at 72, n.7.**

Thus at least seven members of this Court—the five Justices who upheld the *Vuitch* health statute against a claim of vagueness plus the two Justices who dissented on the merits—would permit abortions in cases in which fetuses would be denied constitutional rights if they had any such rights. These seven Justices reached this conclusion de-

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* Justices Burger, Black, Harlan, White and Blackmun joined in this aspect of the decision. Justices Douglas and Stewart dissented from the majority's holding that the statute was not void for vagueness. Justices Marshall and Brennan did not reach the merits of the vagueness issue, but instead restricted their views to the jurisdictional question.

** Justice Douglas, dissenting on the merits in *Vuitch,* found the District of Columbia abortion statute to be unconstitutionally vague. He indicated that problems of vagueness are magnified "where the regulation touches a protected constitutional right * * *. Abortion touches intimate affairs of the family, of marriage, of sex, which in Griswold v. Conn., 381 U.S. 479, we held to involve rights associated with several express constitutional rights and which are summed up in 'the right of privacy.'" *Id.* at 77-78 (dissenting opinion).

Justice Stewart also dissented on the merits in *Vuitch.* In his view the statute could be construed to uphold its constitutionality only "by extending the reasoning of the Court's opinion to its logical conclusion" and conclusively presuming "that when a physician has exercised his judgment in favor of performing an abortion, he has, by hypothesis, not violated the statute." *Id.* at 96, 97 (dissenting opinion).

spite the fact that the Court had before it in *Vuitch amici curiae* briefs in which it was argued that the fetus is a person for constitutional purposes. As a federal district court recently observed in discussing the *Vuitch* case, "Nowhere in the majority opinion, the dissenting opinion or the three concurring opinions was there any inference that fetal life was entitled to constitutional protection." *McGarvey* v. *Magee-Womens Hospital,* 340 F. Supp. 751 (W.D. Pa., March 17, 1972).

In *McGarvey* v. *Magee-Womens Hospital,* the plaintiff, as guardian *ad litem* for a class of conceived but unborn children, sought to enjoin the defendant-hospital from permitting the use of its facilities for the performance of abortions. Plaintiff claimed that the abortions performed by defendant violated the rights of the fetus under the Fourteenth Amendment and the Civil Rights Act (42 U.S.C.A. 1981 *et seq.*), and argued that judicial action must be taken to protect the unborn. The court held that the embryo or fetus is not a person or citizen within the meaning of the Fourteenth Amendment or the Civil Rights Act and granted defendant's motion for judgment on the pleadings on the basis of the constitutional rights of the woman. In the words of the court, "nor have we been cited authority that the framers of the Constitution contemplated fetal life or thought of unborn children as persons for purposes of constitutional protection or that Congress had fetal life in mind when it drafted the Civil Rights Act." The *McGarvey* court also, as indicated above, relied in part on this Court's decision in *United States* v. *Vuitch, supra,* and pointed out that "the statute and opinion * * * show that Congress and

the Supreme Court have had opportunity to comment on fetal life in constitutional terms." Accordingly, an injunction for the protection of the fetus was denied.

A leading state court case holding that the fetus has no constitutional rights is *Byrn* v. *New York City Health and Hospitals Corporation,* 21 N.Y.2d 194 (1972). In that case the plaintiff as guardian *ad litem* for a class of unborn fetuses alleged that the present New York law which permits abortion by a physician on the request of the woman until the 24th week of pregnancy unconstitutionally infringed the rights of fetuses. The Appellate Division of the New York Supreme Court had rejected this contention and held that the fetus had no such constitutional rights. This decision was affirmed by the New York Court of Appeals which stated "The issue, a novel one in the courts of law, is whether children in embryo are and must be recognized as legal persons or entities entitled under the state and federal constitutions to a right to life." The Court held that the answer to this question was in the negative.

The *McGarvey* and *Byrn* courts, explicitly, and all of the federal and state courts which have declared restrictive abortion statutes unconstitutional, implicitly, have rejected the argument that the fetus is constitutionally protected. These courts have, indeed, denied that the fetus has rights sufficient to constitute that compelling state interest required to justify the abridgment of women's fundamental constitutional rights by statutes such as the two here under review.

B. There is no basis in constitutional history for declaring the fetus a person.

In a century of Fourteenth Amendment litigation *amici* could find only one instance other than the very recent abortion cases in which the contention has been made that a fetus is a person under the Fourteenth Amendment. See *Montana* v. *Rogers,* 278 F. 2d 68 (7th Cir. 1960), *aff'd. sub nom. Montana* v. *Kennedy,* 366 U.S. 308 (1961). In that case, plaintiff claimed he was a citizen of the United States because he was conceived in the United States, was the son of a United States citizen mother, was outside of the United States for six months only (during which time he was born outside the United States because the American Consul refused his mother's request to return on the grounds of her pregnancy) and lived in the United States for the next 50 years. Upholding his deportation as an alien, the Court said that his being conceived in and being *in utero* in the United States was insufficient to confer to him Fourteenth Amendment citizen rights despite his ties to the United States. Until birth no rights existed. The argument for the right of the fetus was apparently not even pressed in this Court which upheld the decision below.

Other courts have responded similarly to the same argument. *See, e.g., McGarvey* v. *Magee-Womens Hospital,* quoted *supra*; *Commonwealth* v. *Page* (Dkt. No. 1968-353) (Pa. Ct. Comm. Pl., Centre County, July 23, 1970).

There is evidence elsewhere in the Constitution that "person" applies only to a live born person. The clause requiring a decennial census says "the whole Number of * * * Persons" in each state must be counted. U.S. Const.,

Art. 1, §2, Cl. 3. From the first census in 1790 to the present, census takers have counted only those born. Means, *The Phoenix of Abortional Freedom,* 17 N.Y.L. Forum 335, 402-403 (1971).

The constitutional status of the fetus was considered by the Governor's Commission appointed to review New York State's Abortion Law (the Froessel Commission). Responding to a lengthy minority report, the majority said:

> "The minority of this Commission virtually base their entire position on the premise that, by modern secular standards, the fetus is at all times a human being, possessed of corresponding legal rights. The premise is clearly fallacious. Let it first be noted that we are in the State of New York, governed by its laws. The differences in views among the early and modern theologians and their followers are of little assistance to us here." *Report of the Governor's Commission Appointed to Review New York State's Abortion Law* (March 1968) at 13.

C. State law cases dealing with the legal rights of the unborn do not support the contention that the fetus is a person for purposes of the Fourteenth Amendment.

Scattered state law authorities have recognized some legal rights in the fetus for some—here irrelevant—purposes. But no reliance can be placed on these tort, blood transfusion, and other cases, decided in other and different contexts, to support the statutes challenged in the instant case, for two reasons: first, the cases establish at most that the state can choose in some circumstances to protect the

fetus where the constitutional rights of others are not thereby impaired; and second, they fail to establish that the courts have treated the fetus as a person. The plaintiffs in the *Byrn* and *McGarvey* cases, *supra,* attempted to establish that the fetus was a person for constitutional purposes by citing proof of situations in which the law has recognized fetal life. The courts in both cases found these authorities unpersuasive in resolving the question of whether the fetus must be afforded constitutional protection at all and certainly not constitutional protection which overcomes the rights of the woman.

The state law cases fall into these categories:

1. *The transfusion cases:*

One New Jersey court ordered blood transfusions to save the life of a nonconsenting Jehovah's Witness *and* her unborn child. The case did not hold that fetuses have constitutional rights, however, but only that the state, as *parens patriae,* had power to protect fetuses where the conflicting right in the mother was to practice her religion at the probable expense of her own life. *Raleigh Fitkin-Paul Morgan Memorial Hospital* v. *Anderson,* 42 N.J. 421 (1964), *cert. denied,* 377 U.S. 985 (1964).

The same court has recently noted the established distinction between religious beliefs (which are absolutely protected) and religious conduct or practices, which must yield to government restraint where compelling state interests such as life and health are involved, citing among other cases those authorizing the vaccination of children and banning the use of snakes in religious ritual. *John F. Kennedy Memorial Hospital* v. *Heston,* 58 N.J. 576, 580-1

(1971). The court also pointed out in *Heston* that the adult Jehovah's Witness involved there (as, no doubt in every case where the patient has sought hospitalization) wanted to live, not die. *Id.* at 582. Therefore, the court was in effect acting as *parens patriae* in respect to a woman by helping her to choose between two inconsistent values. Judge J. Skelly Wright in *Application of the President and Directors of Georgetown College, Inc.*, 331 F. 2d 1000, *rehearing denied*, 331 F.2d 1010 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 978 (1964), discussed another common thread in these cases; the fact that the woman and family may welcome a court order as both saving the patient's life and excusing the patient and family of any sin by assuming the onus of authorizing the blood transfusions.

The blood transfusion cases provide no basis of support for the proposition that alleged constitutional rights of the fetus can outweigh, not a religious practice threatening the life of woman and fetus, but the fundamental positive constitutional rights of privacy and liberty of the woman. The fact that these courts have ordered blood transfusions in cases involving pregnant women in aid of their life and health as well as the life of the fetus, does not support the argument that the state must or may protect the fetus as a constitutional matter, as against the constitutional rights of the woman.

2. *The tort cases:*

Nor do wrongful death and other tort cases support the contention that the fetus is a legal person. In *Endresz* v. *Friedberg*, 24 N.Y. 2d 478 (1969), for example, the New York Court of Appeals held that there was no right of recovery under the New York wrongful death statute by

personal representatives of a stillborn fetus which died as a result of injuries received while *en ventra sa mere.*

The court in *Endresz* pointed out that the cause of action was given the born child only to recognize

> "the legal right of every human being to *begin life* unimpaired by physical or mental defects resulting from the negligence of another. The considerations of justice which mandate the recovery of damages by an infant, injured in his mother's womb and born deformed through the wrong of a third party, are absent where the fetus, deprived of life while yet unborn, is never faced with the prospect of impaired mental or physical health." *Id.* at 483 (emphasis added).

This passage, written in 1969, makes clear that legally the fetus "begins life" at birth. *Ibid.* Any event which occurs before birth, and which later results in a legal right for the child, creates only a conditional right, which "*attaches only* upon fulfillment of the condition that the child be born alive." *Id.* at 486 (citing *Keyes* v. *Construction Serv.,* 340 Mass. 633, 636) (emphasis added).

As the court said in *Endresz,*

> "In other words, even if, as science and theology teach, the child begins a separate 'life' from the moment of conception, it is clear that, 'except insofar as is necessary to protect the child's own rights'* (*Matter of Roberts,* 158 Misc. 698, 699, *supra*), the law has never considered the unborn fetus as having a separate 'juridical existence' (*Drabbels* v. *Skelly Oil Co.,* 155 Neb. 17, 22) or a legal personality or identity 'until it sees the light of day.' (*Matter of Peabody,* 5 N.Y. 2d 541, 547, *supra*)." 24 N.Y. 2d at 485.

* Meaning a child subsequently born alive.

3. *The criminal cases:*

State law restrictions on abortions do not support the view that the fetus must be deemed a person or may be given legal rights which negate the constitutional rights of the woman. An examination of state criminal statutes and cases thereunder makes clear that no state considers the fetus a person for purposes of the Fourteenth Amendment. *Amici* are aware of no abortion statute which provides that the destruction of the fetus constitutes murder. State cases dealing with the destruction of a fetus show that the courts do not consider the embryo or fetus a person for purposes of legal definition (*e.g., Foster* v. *State,* 182 Wis. 298 [1923] [citing, *inter alia, Evans* v. *People,* 49 N.Y. 86 (1872)]; *Summerlin* v. *State,* 150 Ga. 173 [1920]; *Abrams* v. *Foshee & Wife,* 3 Clark 274 [Sup. Ct. Iowa 1856]), irrespective of whether or not in a biological sense there is life in an embryo. *E.g., Foster* v. *State, supra.* Furthermore, the penalties for abortion provided for by statute are considerably less severe than those for murder. Thus, the criminal statutes on abortion and the cases construing them, coupled with the cases which have expressly held that the fetus is not a person under statutes defining murder or vehicular homicide are unconsistent with the thesis that abortion is murder and that the fetus is a person for constitutional purposes.

It is also relevant to note that a number of cases have held that in the absence of a special provision, the woman who commits an abortion on herself is not guilty of any criminal offense. *See, e.g., Snyder Appeal,* 398 Pa. 237, 246 (1960); *Moore* v. *State,* 37 Tex. Cr. Rep. 552, 560 (1897); *State* v. *Parm and Viney,* 5 Pennewill's Del. R. (21 Del.)

556, 558 (1905); *State* v. *Montifoire,* 95 Vt. 508, 512 (1922); *Payne* v. *Louisiana Industrial Ins. Co.,* 33 So. 2d 444 (Ct. App. La. 1948); *Abele* v. *Markle,* 342 F. Supp. 800 (D. Conn., April 18, 1972). Indeed, some states have made the exemption for women from prosecution for abortion explicit in their statute. *See, e.g.,* 12 Vt. Stat. Ann., §101 (1959), and *Beecham* v. *Leahy,* —— Vt. ——, 287 A. 2d 836 (1972).

If in fact the fetus were a person entitled to constitutional protection, neither the courts nor the legislatures would have exempted the woman from prosecution. And even in states where under the law the woman may be prosecuted, she almost never is. For example, there appears to be no New York case in which a woman was convicted for having an abortion or being a party to her abortion. *People* v. *Lovell,* 40 Misc. 2d 458, 242 N.Y.S. 2d 958 (1963); *People* v. *Vedder,* 98 N.Y. 630, at 632 (1885); *People* v. *McGonegal,* 136 N.Y. 62, at 76 (1892).

D. The fetus: science and metaphysics

Some of the briefs filed herein are devoted in considerable part to descriptions of scientific evidence with respect to whether or not a fetus is a living "person." Whatever the findings of science and embryology, whether a fetus is a person is, in the words of a prestigious association of physicians, "not a matter of fact"; the answer derives from matters of "religious philosophy and religious principle." VII The Right to Abortion: A Psychiatric View, pp. 218-219 (Group for the Advancement of Psychiatry, 1969). Thus, "whether the fetus is or is not a human being is a matter of definition, not fact; and we can define it

any way we wish." Hardin, Abortion or Compulsory Pregnancy? 30 J. Marriage & Family No. 2 (May, 1968). That our society has chosen to define human life as beginning at birth is sufficiently indicated by our method of calculating age. As the New York Court of Appeals said in *Endresz* v. *Friedberg, supra,* in commenting on the relation of scientific and theological teaching to law in this area: "The law has never considered the unborn fetus as having a separate juridical existence."

Conclusion

Stripped of all legalisms and argumentation, what the Georgia and Texas statutes do is compel a woman to bear a child she does not wish to have. Her whole life, not to mention the lives of all those connected with her, is affected by such compulsory child-bearing. Except possibly for military service, imprisonment and capital punishment, as to which there are elaborate safeguards, it is difficult to imagine a more drastic restriction on privacy or on the fundamental freedom to control one's body and one's life. The facts we have referred to in our original brief and herein make clear that when abortion is available on the joint decision of the woman and her physician in the early stages of pregnancy, the effect on public health and welfare is not adverse but enormously beneficial according to all measurable indices. *Amici* once again request that this Court affirm the judgments of the three-judge courts below insofar as they held unconstitutional the limitations in the Georgia and Texas statutes on the grounds for the performance of abortions, reverse the judgment of the Texas three-judge court insofar as it denied injunctive relief, and re-

verse the judgment of the Georgia three-judge court insofar as it denied injunctive relief and upheld the constitutionality of the residency, consultation, committee approval and joint accreditation requirements of the Georgia law.

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Respectfully submitted,

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