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Folder Title:
Abortion (Webster v. Reproductive Health Services) [2]

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6/21/89

Fossibilities:1. Roe overturned

Today's decision is a great step forward for assuring the protection of the unborn. It is also a sign of the Court's growing confidence in the American people's ability to make decisions themselves through their legislatures.

2. Webster upheld, leaves Roe

While I welcome today's Court decision, I continue to believe that Roe should be overturned.

3. Missouri statute not upheld; Roe left unshaken

I am disappointed that the Supreme Court has not accepted our contention that the people, not the courts, should resolve these issues. We will continue to make this point to the Court.

4. DelayOptional topics:

Adoption
Constitutional Amendment

THREE POSSIBLE WEBSTER DECISIONS WITH RESPONSES

(1) Supreme Court upholds State of Missouri statute and overrules Roe v. Wade.

The decision of the Court represents a landmark step forward toward protecting the lives of our nation's most vulnerable humanity--the unborn child. It recognizes that there are two sets of rights involved in the abortion decision, not just one, and that our society is founded on respect for all human life. It reminds us that each one of us has a responsibility to reach out in compassion to women in crisis due to unintended pregnancies, and to offer them love and support and compassionate alternatives to abortion.

Our attorneys are reviewing the decision to determine its implications for specific HHS programs and policies, so I cannot comment further until that review is completed.

(2) Supreme Court upholds State of Missouri statute but affirms or is silent with respect to Roe v. Wade.

I am very pleased that the Supreme Court has upheld the constitutionality of Missouri's abortion restrictions. I strongly support efforts by states such as Missouri to ensure that their citizens' tax dollars are in no way used to promote abortion or to assist women in obtaining them. Missouri has exerted outstanding leadership on this issue by taking the case all the way to the Supreme Court.

I regret, however, that the Court did not go further and roll back Roe v. Wade. I am a physician and not an attorney, but I cannot agree with those who say that the U.S. Constitution guarantees a woman's right to abortion, with no respect for the rights of the unborn child. The more than 21 million abortions that have resulted since abortion on demand was legalized by the Court in 1973 are a national tragedy, most especially for our medical profession whose very mission is to protect and heal innocent life.

Our attorneys are reviewing the decision to determine its implications for specific HHS programs and policies, so I cannot comment further until that review is completed.

(3) Supreme Court overturns Missouri statute and affirms or is silent on Roe v. Wade.

I am obviously very disappointed that the Court did not use this opportunity to overrule Roe v. Wade. Our attorneys are reviewing the decision so I cannot comment at this time.

COPIES 12/1985 12/81 MARK BUS CHD CTR
Alix - FIVE - D. Runkel

TO: AG

FROM: D. RUNKEL

RE: WEBSTER CASE DRAFT STATEMENTS, reflecting SG's changes

A--Roe V. Wade is upheld

"I'm disappointed that the Court has failed to accept our view in this case. While we accept the court's ruling as the law of the land, on a personal basis I will continue to strongly oppose abortion on demand and will work to encourage alternatives to abortion, including support for adoption services."

B--Roe v. Wade is overturned

"The court's decision today is a victory for those of us who believe that the issue of abortion is one which should be resolved, as an initial matter, by the legislative process, which has successfully dealt with balancing deeply felt moral and social perspectives on other public health and safety issues. Obviously, I'm pleased by today's decision."

C--Further restricts Roe V. Wade, but leaves framework of that law standing

"Today's decision is welcomed to the degree that it recognizes that state legislatures have a legitimate role to play in regulating abortion. Although the court has not taken the step which I support, that of returning primary responsibility for this issue to the legislative process, I believe we can take heart that a majority of the Justices have seen fit to give the states greater leeway in establishing some limitation on abortion on demand."

Webster

URGENT URGENT URGENT URGENT URGENT URGENT URGENT URGENT URGENT URGENT

To: Lee Liberman, Office of the White House Counsel

FAX 456-2461

Lee, here is some interesting stuff I thought you would like to see.

SUGGESTED PRESIDENTIAL RESPONSES TO SUPREME COURT ABORTION DECISION

June 21, 1989

The following responses would be appropriate if the Court explicitly overturns Roe v. Wade, or otherwise makes it clear that the state legislatures and Congress would regain essentially unrestricted power to restrict abortion.

1. I applaud today's Supreme Court ruling, which restores to the nation's elected representatives, the power to protect the right to life of unborn children.

Today's decision was not a "turning back the hands of the clock," but rather, a step forward towards a more humane society. The Supreme Court did not "retreat," but rather, corrected a tragic error. The 1973 Roe v. Wade decision resulted in an enormous cost of human life, as abortion has come to be used more and more as a method of birth control. Since Roe v. Wade, the number of abortions has at least tripled, with over 40% of the abortions performed each year now being repeat abortions.

2. I believe that most Americans oppose the use of abortion in all but the most extreme circumstances, and oppose legal abortion on demand. There have been a number of major national public opinion polls which clearly demonstrate that about 75% of the American people would favor making abortion illegal except in specific, extreme circumstances-- and only 2 to 7 percent of the abortions now performed involve those circumstances.

3. I continue to favor state and Federal legislation which would protect the right to life of unborn children. I have previously endorsed a Federal constitutional amendment to prohibit abortion, except in cases of life endangerment, rape, or incest, and I will consider other types of

SUGGESTED RESPONSES TO ABORTION DECISION, PAGE 2

Federal legislation as well. We will be studying what the appropriate Federal role should be. Certainly, at a minimum, we will seek to protect unborn children within the jurisdictions which the Constitution places under direct Federal authority, such as the District of Columbia, military bases, and the like.

4. Penalties: Specific penalties are largely a matter for the legislatures and Congress to determine. However, I agree with the National Right to Life Committee and with the pro-life leadership in Congress, that the penalties are not appropriately directed against the woman who has an unplanned pregnancy and who may seek abortion. The pro-life movement is interested in saving the lives of unborn children-- not in being punitive or retributive towards women. Women were not the targets of prosecution prior to Roe v. Wade.

5. I believe that pro-life laws are appropriately targeted at physicians and others who perform or facilitate illegal abortions. Some states already have criminal penalties on the books, which can now be enforced again. Other states may now enact such legislation. However, it very well may be that some legislatures, in addition to or instead of criminal laws, will authorize civil remedies-- that is, will permit injunctions to be issued by civil courts to put abortionists out of business. These sorts of civil remedies have been found to be effective in curbing certain forms of discrimination on the basis of race and sex, and they might well be utilized to protect the right to life of unborn children.

6. EXCEPTIONS: The best estimates are that assault rape or incest is involved in only a fraction of 1% of the abortions performed. I also favor a narrow exception for cases in which the woman's life is in genuine jeopardy. There are very few such cases under modern medical practice, but those rare cases are allowed for in legislation endorsed by the National Right to Life Committee.

But this "life" exception is a far cry from permitting an abortion whenever any physician believes that it would enhance the woman's "health." When the Federal Medicaid program covered so-called "health" abortions, prior to enactment of the Hyde Amendment in 1976, we paid for 300,000 abortions a

SUGGESTED RESPONSES TO ABORTION DECISION, PAGE 3

year. The Hyde Amendment permits only "life of the mother" abortions, and that usually amounts to around 100 a year.

SUGGESTED RESPONSES TO POSSIBLE QUESTIONS:

QUESTION: There have always been abortions. If state legislatures or Congress restrict abortions, won't that just drive women to back-alley butchers? How does that represent compassion?

RESPONSE: We have to remember that at least one human being dies in every abortion. When the Supreme Court legalized abortion on demand, it allowed the establishment of thousands of full-time abortion mills, so that we now have at least one million more abortions each year than we did before Roe v. Wade. One million individual human lives, each one unique and unrepeatable.

Thus, in reversing that tragic decision and allowing legal protection for unborn children, today's Supreme Court decision will save many lives.

As for illegal abortions, we would not expect to see high numbers of abortion-related deaths, even if every state prohibited most abortions. In 1972, the year before Roe v. Wade, the Centers for Disease Control reported 39 deaths nationwide related to illegal abortions. (There may have been some which were not reported, but probably not a great number by 1972. There was incentive to report such deaths in order to buttress the case for liberalized abortion laws.) The number of deaths was decreasing every year, due to constant improvements in treating infection and blood loss.

If abortion is again illegal, some illegal abortions will occur, and some complications will occur. We have laws against dangerous drugs, but some people violate them and are injured. That is tragic, but the answer is not to legalize dangerous drugs, which would result in even greater loss of life.

In 1976, it was predicted that if public funding of abortions was cut off, there would be an epidemic of complications and deaths resulting from illegal abortions. But that did not happen. The CDC later found no measurable increase in complications or deaths.

SUGGESTED RESPONSES TO ABORTION DECISION, PAGE 4

QUESTION: Don't you think there will be a political backlash by the 'pro-choice' majority-- especially from women who've had abortions? Won't this hurt the Republican Party?

RESPONSE: This involves a very fundamental right-- the right to life-- and so it's not the kind of issue where my position is shaped by the latest polls. But, plenty of polls are taken, and I don't see that so-called "pro-choice majority." I believe that the major public opinion polls clearly demonstrate that a solid majority of Americans believe that abortion should be legal only in circumstances which are quite rare, and which account for only a few percent of all the abortions.

As for women who've had abortions-- many of them have found it to be a very emotionally scarring experience, and now oppose abortion. For example, Sandra Cano [con-know], the woman who was the plaintiff in one of the two cases which legalized abortion in 1973 [Doe v. Bolton, decided the same day as Roe v. Wade] is now strongly anti-abortion.

QUESTION: Won't we now have a "patchwork" of conflicting state laws? Women who have money will be able to go to states in which abortion is legal. Isn't this unfair?

RESPONSE: It's not unfair for the hundreds of thousands of unborn children whose lives will be saved even under a "patchwork" situation. After all, we had a "patchwork" in 1972-- the year before Roe-- when 17 states had permissive laws. And the total number of legal abortions in those 17 states was about one-third of the 1.6 million abortions we have now. If a "patchwork" will save a million lives a year, that is very much worth doing.

QUESTION: This was a 5-to-4 decision by the Court to overturn Roe. How does this reversal, and by such a narrow margin, affect your decision in filling the next vacancy on the Court?

RESPONSE: I will proceed exactly as I would have if this decision had not come down at this time. I will nominate jurists who are well qualified,

SUGGESTED RESPONSES TO ABORTION DECISION, PAGE 5

and who recognize that the function of the courts is to interpret and enforce the laws enacted by the elected branches of government-- not to engage in social engineering from the bench.

QUESTION: During recent months, thousands of people have been arrested in anti-abortion protests at abortion clinics. These people say that they are trying to prevent babies from being murdered. Since you agree that abortion takes innocent human life, do you support these protests? Or do you regard them as extremists?

Response: I am for working through our institutions to change the law. Now, within our democratic system, there is a place for protests, for demonstrations. Within certain limits, these are an exercise of First Amendment rights to free speech.

Of course, violence and willful destruction of property must be condemned. But if your question pertains to those who have, as I understand it, adopted entirely non-violent methods-- sit-ins and that sort of thing. It is called "civil disobedience," and there is a lot of precedent for it in the anti-slavery movement, in the anti-segregation movement, in the anti-Vietnam War movement, and so forth.

Now, there are many compassionate and serious-minded people involved in these protests, including a number of Catholics bishops and other respected religious leaders-- believes that its non-violent protests will help to draw public attention to the tragic number of innocent human lives which are lost every day in these abortion mills, and thereby hasten the day when the Supreme Court decision will be overturned.

[ONLY IF PRESSED:] I don't condemn those who engage in non-violent civil disobedience, whether against segregation or against abortion or whatever, so long as they are willing to pay the price. People who engage in civil disobedience-- for any cause-- have to be ready to pay the price. The laws must be enforced, and as Chief Executive I will enforce them impartially.



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MEMORANDUM

TO: NRLC Affiliates

FROM: James Bopp, Jr., General Counsel
Burke J. Balch, State Legislative Coordinator

DATED: June 13, 1989

RE: THE SIX POSSIBLE WEBSTER SCENARIOS

I. Complete Reversal. The Court could effectively overturn Roe v. Wade, either by declaring there is no constitutionally protected "right to abortion," and saying that laws prohibiting or regulating abortion will be upheld as long as they are rational, or perhaps by saying that states have a "compelling state interest" in the unborn child from conception and indicating that this interest justifies prohibition of abortion except in narrowly defined circumstances.

(The Court is more likely to overturn laws if it decides they restrict a "fundamental right." Until now, abortion has been considered such a fundamental right, which means that only a "compelling state interest" allows legislatures to restrict it. According to Roe and other past Supreme Court decisions, the state's interest in fetal life becomes "compelling" only after "viability," but even then this interest is too weak to let a legislature prohibit abortions deemed necessary for a woman's "health." "Health" has been defined so broadly as to include the harm to mental health from having an unwanted child.

If the Court now decides abortion is not a "fundamental" right, that will mean only a "legitimate" state interest is needed to restrict it, and the Court has already said the government has a legitimate interest in fetal life throughout pregnancy. So this sort of ruling would probably mean that states could thereafter prohibit nearly any abortions--perhaps with the exception of those necessary to prevent the mother's death.

If the Court decides abortion remains a "fundamental" right, but holds that the state's interest in fetal life becomes "compelling" at conception (rather than "viability"), much will depend on how broad or narrow are the circumstances in which the abortion right still overcomes the state interest in fetal life. If the Court holds or suggests that these circumstances are limited (such as, for example, to instances in which the life of the mother would be threatened if the fetus were carried to term), this outcome, for all practical purposes, will be tantamount to a complete reversal.

If, on the other hand, the Court holds or suggests that despite a "compelling" interest in fetal life throughout pregnancy, the "fundamental" right will still supercede the interest in fetal life in a significantly broader range of circumstances, this outcome, in practice, will be equivalent to a modification but not a reversal of Roe and therefore will fall into scenario II or III.)

II. Mixed Majority with Effect of Substantially Modifying Roe.

A plurality of Justices (the largest number to join a single opinion on the winning side, but not enough to constitute a majority) could vote to overturn Roe, while one or more concurring Justices, who together with the plurality made up a majority, could vote to uphold the statute under a standard that substantially modifies but does not completely overturn Roe. For example, the concurring opinion could say that statutes will not be subjected to the "strict scrutiny" test (under which only a "compelling interest" will uphold a statute against constitutional attack), unless they "unduly burden" the right to abortion. Or the concurring opinion could hold that states have a compelling state interest in the unborn child from conception and indicating that this interest sometimes justifies prohibition of abortion but that abortion is still protected in broadly defined circumstances. The effect would be that for the present the Court had adopted an intermediate standard, but that with one or more new Justices a complete reversal would be likely.

III. Majority Substantially Modifies Roe. A majority of the Justices could vote to uphold the statute under a standard that substantially modifies but does not completely overturn Roe. This modification could take the forms discussed in II. This would have the same effect as II, except that there would be no explicit indication that some of the Justices were prepared to reverse Roe outright.

IV. Majority Avoids Roe But Upholds Statute. The Court majority could sidestep the Roe issue for the time being, by stating that it need not address the continued validity of Roe on the ground that the provisions of the Missouri statute at issue can be upheld even under the holdings of Roe and its progeny.

V. Majority Reaffirms Roe But Upholds Statute. The Court could specifically reaffirm the holdings of Roe and its progeny but uphold the provisions of the Missouri statute as constitutional under them.

VI. Majority Reaffirms Roe and Strikes Down Statute. The Court could reaffirm the holdings of Roe and its progeny, and conclude that they require the striking of all or part of the Missouri statute.

NOTE A: DEGREES OF VICTORY

Outcomes I through IV would be significant pro-life victories. Outcome V would represent progress but would be hard to call a clear victory. Outcome VI would be a defeat. Although V and VI are theoretical possibilities, and responses to them are included as a matter of contingency planning, they are regarded as quite unlikely.

If I occurs, no one will doubt that the pro-life movement has been victorious. As the advisory for that scenario details, we recommend that you avoid wasting precious access to press time on claiming or celebrating victory and instead stress our arguments for the task ahead: persuading state legislators and those who elect them that unborn children ought to be protected, now that they can be.

By contrast, if II, III, or IV occur, it will be important to emphasize that we have won a significant victory. The other side has raised expectations of a complete reversal to such an extent that there is a danger that if anything short of that occurs, they and the press will claim that the Court has listened to the April rally and the voice of the "silent prochoice majority" and backed off. But we have always said that a step by step chipping away at Roe is at least as likely as a complete reversal and that whatever contributes to that will represent a substantial prolife victory.

NOTE B: DISTINGUISHING BETWEEN RIGHT TO ABORTION ISSUES AND OTHER ISSUES IN THE COURT'S HOLDING

It is important to understand that the Court could give us a substantial prolife victory that cuts back on or even completely reverses Roe while still striking down some portions of the Missouri statute on grounds not directly related to abortion. For example, it has been claimed that the Missouri ban on public counseling for abortion infringes on First Amendment rights and is unconstitutionally vague. While we believe--and have argued to the Court--that these claims are wrong, we could lose on those issues without affecting the Court's ruling on the key underlying issues concerning the right to abortion. Similarly, with regard to the Missouri provision requiring tests necessary to determine fetal weight, gestational age, and lung maturity after 20 weeks, it has been argued that because no tests exist to measure lung maturity until significantly later in pregnancy, the provision is irrational. The Missouri Attorney General has argued that the law should be interpreted to require only "necessary" tests and that if a test is impossible, it is not "necessary;" therefore, the section is not irrational and should be upheld. Again, however, we could lose on that point without affecting the significance of a substantial victory on issues concerning the right to abortion.

The point is that if the Court's ruling strikes down some provisions of the statute, we should not assume--or permit the press to assume--that this necessarily means a significant prolife defeat. The important thing is to focus on what the Court says about the right to abortion and the countervailing

State interests in the unborn child.

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SCENARIO I: COMPLETE REVERSAL

Advisory. If the Court completely reverses, whether unborn children's lives are saved will depend on whether state legislatures act to protect them. If the reversal occurs, it will give an extraordinary but extremely brief opportunity for us to try to persuade the American people to press for protective laws. The great danger for us is the prospect that the press will devote our precious moments of comment to quotes that express celebratory jubilation, while our opponents are given the opportunity to argue effectively why laws making abortion illegal would be horrible things. However much they might express our feelings, celebratory comments accomplish nothing toward our goals; instead, in this scenario they would be counterproductive. Our expressions of pleasure do nothing to convince, they nurture complacency in our ranks, and, above all, they allow the press to avoid conveying our arguments while protesting that they are quoting us accurately.

To persuade, we must bring the focus to the unborn child who is the victim of abortion. We must briefly and convincingly demonstrate that the child is a human being and that abortion violently takes the child's life. The most effective way to do so, for a visual medium like TV, is to insist on bringing and showing photographs of living unborn children and of the dead baby who is the result of an abortion. Throughout the interviews in any medium, the facts of fetal development must continually be stressed.

Statement. "The effect of today's Supreme Court decision is to pose to the people and legislators of each state the momentous question of whether we will now act to protect those most vulnerable members of the human family, children not yet born. When someone is already pregnant, the only "choice" is how the baby will come out: alive or dead.

"Abortions kill children whose hearts are beating three weeks after fertilization, who are moving by seven weeks, and who have recorded brain waves at 40 days. Unless we act, abortion--the ultimate act of child abuse--will continue to be legal throughout the full nine months of pregnancy for any reason, including sex selection. Abortions are now widely used as just another form of birth control. Indeed, one half of those obtaining abortions admit neither they nor their partners made use of any method to prevent conception. Over 40% of all abortions are repeat abortions.

"Unless we act, young girls will continue to be sold abortions without their parents so much as knowing, while fathers will continue to be completely without any say about the life or death of their unborn children. Unless we act, women experiencing difficult pregnancies will continue to face terrible pressure to consent to the destruction of their children instead

of receiving social support for positive, nonviolent solutions.

"Today's decision removes barriers to protecting unborn children, but the long, hard struggle to achieve that protection has only just begun."

Arguments and Brief Answers.

1. Argument: "Women will always have abortions whether they are legal or illegal; the only question is whether they will die at the hands of back alley butchers or whether we will keep abortion safe and legal."

Answer: Pro-abortionist claims that thousands of mothers died from illegal abortions before Roe are demonstrably false: official statistics show a total of 39 maternal deaths from illegal abortions in 1972, the year before Roe was decided. In the same year, there were 24 maternal deaths from legal abortions. One must go back to the era before antibiotics to find maternal abortion deaths in the thousands; since the 1940's, maternal illegal abortion deaths steadily declined as medical treatments for abortion complications dramatically improved. Studies show that since the legalization of abortion began in 1967, the total number of abortions increased from between 100,000 to 200,000 a year before legalization to over 1.6 million a year today. The year before Roe v. Wade there were 586,760 legal abortions in the United States. They have nearly tripled since. While there undoubtedly will always be some abortions if they are forbidden, just as there are rapes and robberies even though they are outlawed, their number will be significantly decreased.

2. Argument: "The abortion choice affects a woman's own body, which she should be able to control."

Answer: The straightforward biological reality is that abortion destroys another body, the child's. The child's body is dependent on the mother's body, just as for a long period after birth the child will be completely dependent for food and survival on adults, but that dependency does not change the fact that the child is another human being rather than merely a part of the mother's body.

3. Argument: "Making abortion illegal will put the government into the bedroom. Big Brother will intrude into the most intimate and private details, investigating miscarriages and throwing women in jail."

Answer: If there is any legitimate role for government, surely it includes protection of the lives of the weak and vulnerable. The aim of the prolife movement is not vindictive retribution, but rather the effective protection of unborn children from the ultimate act of child abuse--abortion. That can best be achieved through laws directed at abortionists rather than women who have abortions. As was almost invariably the case before Roe v. Wade, investigations and enforcement will be

directed at suspected abortionists instead of those they abort. As far as women are concerned, our efforts will be concentrated on assuring the availability of counseling and support to assist them through difficult pregnancies.

SCENARIO II:
MIXED MAJORITY WITH EFFECT OF SUBSTANTIALLY MODIFYING ROE

Advisory. This scenario and scenario III pose the greatest difficulty for rapid reaction, since if the Court effectively adopts an intermediate position between completely reversing Roe and leaving it untouched, much will depend on precisely what line the Court draws or suggests. NRLC will attempt to analyze the implications of any such new standard as rapidly as accurately possible. State affiliates will be FAXed the results of that analysis in the second press release, which is expected to be available within three hours of the time the decision is handed down. While the analysis is being awaited, the focus of response to press inquiries should be to stress the importance of the victory, that this represents a step back from the unbelievably extreme position on abortion staked out by the Supreme Court from Roe up through Webster, the promise for the future implicit in the repudiation of Roe by the concurring members of the majority, and the important initiatives the pro-life movement will be taking in the immediate future to capitalize on the new standards established by Webster.

Statement. "Today's decision is a substantial victory for unborn children. The Supreme Court has granted significantly more latitude to legislatures to act to protect some of the 1.6 million unborn children abortion kills each year, children who have heartbeats at 18 days, who are moving within the womb at six to seven weeks, and who have recorded brain waves at 40 days. The decision will provide impetus to efforts to enact laws that will give the fathers of unborn children the opportunity to argue in court, on a case by case basis, that their children should not be killed. Those who will bear the responsibility of child support because of their joint role in the child's creation should be given at least some right to argue that their child should not be aborted. The decision will also spur efforts to ensure that young girls with a difficult pregnancy are not deprived of their parents' guidance and counsel before they are subjected to abortions.

"We are particularly encouraged by the concurring opinion of several Justices that directly supports a complete reversal of Roe v. Wade. In today's decision a majority of the Justices have repudiated the holdings of Roe in part, while a number of them have signalled they are prepared to go farther. A number of abortion-related cases are either now before the Supreme Court or soon to reach it, and we are today given reason to hope that one or more of them may soon further reduce the residual obstacles to the ability of state legislatures to act to protect the unborn. We have a very long, hard struggle ahead in our effort to restore the most fundamental rights to children not yet born, but the Webster decision is a major step forward on that journey."

SCENARIO III: MAJORITY SUBSTANTIALLY MODIFIES ROE

Advisory. This scenario poses difficulties for rapid reaction, since if the Court effectively adopts an intermediate position between completely reversing Roe and leaving it untouched, much will depend on precisely what line the Court draws or suggests. NRLC will attempt to analyze the implications of any such new standard as rapidly as accurately possible. State affiliates will be FAXed the results of that analysis in the second press release, which is expected to be available within three hours of the time the decision is handed down. While the analysis is being awaited, the focus of response to press inquiries should be to stress the importance of the victory, that this represents a step back from the unbelievably extreme position on abortion staked out by the Supreme Court from Roe up through Webster, and the important initiatives the pro-life movement will be taking in the immediate future to capitalize on the new standards established by Webster.

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SCENARIO IV: MAJORITY AVOIDS ROE BUT UPHOLDS STATUTE

Advisory. The most important thing to get across in this scenario is that it represents a significant pro-life victory. Because of all the hoopla about the possibility the Court would use Webster to reverse Roe, the press may be inclined to represent this as a partial defeat for the prolife movement. But it merely means that the Court did not yet feel itself called upon to address Roe, and it did uphold a prolife statute that had been struck down by two lower federal courts. Ironically, we may be aided in countering this perspective by our opponents, whose extremism and desire to avoid complacency in their ranks may well lead them to emphasize the danger to women' abortion rights inherent in the provisions upheld.

Statement. "Today's decision is a substantial victory for unborn children. By upholding the key provisions of the Missouri statute, the Supreme Court has broken a long chain of decisions in which court after court has leaned over backward to invalidate virtually any legislation touching on abortion.

"The decision will provide impetus to efforts to enact further protective legislation. For example, the prolife movement expects to pursue laws that will give the fathers of unborn children the opportunity to argue in court, on a case by case basis, that their children should not be killed. Those who will bear the responsibility of child support because of their joint role in the child's creation should be given at least some right to argue that their child should not be aborted. The decision will also spur efforts to ensure that young girls with a difficult pregnancy are not deprived of their parents' guidance and counsel before they are subjected to abortions.

"Because it was able to uphold the statutory provisions without reconsidering Roe, the Court saw no need to address its continuing validity in this case. A number of abortion-related cases are either now before the Supreme Court or soon to reach it. Eventually, the Court will have to confront Roe. When it finally does, we are confident that the decision will be reversed.

"We have a very long, hard struggle ahead in our effort to restore the most fundamental rights to children not yet born, but the Webster decision is an important step forward on that journey."

SCENARIO V: MAJORITY REAFFIRMS ROE BUT UPHOLDS STATUTE

Advisory. If the majority of the Court specifically reaffirms Roe, it will be hard to characterize the decision as a major victory, but it will still represent progress. After all, the Court will have upheld statutory provisions that were struck down by two lower courts as unconstitutionally restrictive of abortion. The impact of Roe's reaffirmation will vary depending on how many Justices join in it. If, for example, the decision is 5-4, with 4 Justices voting to strike the statute and reaffirm Roe, 4 Justices attacking Roe, and the swing Justice reaffirming Roe but upholding the statute, then it will simply mean that we must await another Court appointment. If a larger number of Justices reaffirm Roe, then the situation is, of course, worse for us.

In any case, it will be important to stress for the press that the upholding of the statute does represent important progress.

Statement. "The decision upholding key provisions of the Missouri statute represents significant progress in the continuing effort to secure protection for the lives of unborn children. The Court, while not repudiating Roe v. Wade, has nevertheless broken a long chain of decisions in which court after court has leaned over backward to invalidate virtually any legislation touching on abortion.

"The Court has reaffirmed Roe v. Wade before when it has been challenged, in the Akron and Thornburgh cases. But the issue has risen again and again, and it will continue to rise until, in good time, Roe is finally reversed. Today's decision will provide impetus, for example, to efforts to enact laws that will give the fathers of unborn children the opportunity to argue in court, on a case by case basis, that their children should not be killed. Those who will bear the responsibility of child support because of their joint role in the child's creation should be given at least some right to argue that their child should not be aborted. The decision will also spur efforts to ensure that young girls with a difficult pregnancy are not deprived of their parents' guidance and counsel before they are subjected to abortions.

"A number of abortion-related cases are either now before the Supreme Court or soon to reach it. For so long as it adheres to Roe, the Court will be unable to avoid confronting the abortion issue in virtually every term.

"We have a very long, hard struggle ahead in our effort to restore the most fundamental rights to children not yet born, but the Webster decision represents progress on that journey."

SCENARIO VI: MAJORITY REAFFIRMS ROE AND STRIKES DOWN STATUTE

Advisory. In this situation of a substantial defeat, the crucial message to the press must be that not even such a devastating blow will deter or deflect the movement, which will return again and again for however long it takes to restore protection to the unborn.

Statement. "The Court's decision today is a shocking one. It cuts back on even the limited opportunities which taxpayers had to assure that employees paid with their money and facilities constructed with their funds not provide or promote what they know to be the killing of millions of unborn children.

"The Court has reaffirmed Roe v. Wade before when it has been challenged, in the Akron and Thornburgh cases. But the issue has risen again and again, and it will continue to rise until, in good time, Roe is finally reversed. Even after Webster, there are issues the Court has yet to address. The question remains: are there any limits to abortion? May abortions take place under Roe purely for sex selection, even when near birth, after viability? We fully expect to pursue legislation that will test this. We also expect efforts to enact laws that will give the fathers of unborn children the opportunity to argue in court, on a case by case basis, that their children should not be killed. Those who will bear the responsibility of child support because of their joint role in the child's creation should be given at least some right to argue that their child should not be aborted.

"A number of abortion-related cases are either now before the Supreme Court or soon to reach it. For so long as it adheres to Roe, the Court will be unable to avoid confronting the abortion issue in virtually every term.

"This is an issue that will never go away until the day when effective protection is restored for unborn children throughout the United States."

Webster 252

THE WHITE HOUSE
WASHINGTON

June 23, 1989

MEMORANDUM FOR THE PRESIDENT

THROUGH: GOVERNOR JOHN H. SUNUNU
FROM: C. BOYDEN GRAY
COUNSEL TO THE PRESIDENT

"CBG Signed"

WILLIAM L. ROPER
DEPUTY ASSISTANT TO THE PRESIDENT FOR DOMESTIC
POLICY AND DIRECTOR, OFFICE OF POLICY
DEVELOPMENT

SUBJECT: White House Response to Supreme Court Decision in
Webster v. Reproductive Health Services

I. ACTION-FORCING EVENT

The Supreme Court has pending before it in the case of Webster v. Reproductive Health Services the question of the future constitutional status of abortion. It could decide this case as early as Monday, June 26, although it may also wait until Thursday, June 29 or Friday, June 30. This past Wednesday, our offices convened a meeting to discuss possible Administration responses. This memorandum grows out of that meeting.

II. BACKGROUND

The Supreme Court is expected to finish its term no later than Friday, June 30. That means that within the next week, it is likely to hand down its decision in Webster v. Reproductive Health Services. That is the case in which the Court has before it the question whether to overrule, substantially cut back on, or leave standing its 1973 decision in Roe v. Wade, in which it discovered that the Constitution protects the right to abortion.

Two days after the election, the Department of Justice filed a brief in the Webster case urging that Roe be overruled. It orally argued that position in Court this April. Regardless of how the Court rules, the Administration's response will be carefully watched.

Traditionally, the White House has not tried to respond immediately to Supreme Court decisions. There are sound reasons for this practice. There are sufficient variations in the way the Court can decide any case that it is almost impossible to prepare a response in advance that would anticipate all the possibilities, and an off the cuff response arrived at without careful study of the opinion in a case and its ramifications for future cases could be disastrous.

On the other hand, the Administration's position in this case has been extremely important to a significant part of your constituency. Because of that, enough people could read sinister motives into the lack of an immediate response to a decision in this case that an exception might be warranted. Were we to attempt to do so on the spot, however, these issues are sufficiently emotionally charged that any misstep could be disastrous. For all these reasons, we thought it might be useful to set out some fairly detailed options for you to consider in responding to various possible scenarios. If you feel comfortable making some of these decisions in advance, that might provide sufficient guidance to allow a response other than "We're studying the decision."

Accordingly, this memorandum sets out possible Court decisions and options for how to respond. One thing to remember while going through this memorandum is that the Court has a choice between overruling Roe directly or undermining it indirectly over a period of years.

III. Possible Court Decisions

The Missouri statute at issue places several different kinds of restrictions on the performance of abortions. Each of these restrictions is being challenged as a violation of the right protected by Roe v. Wade.

The Supreme Court can basically do one of four things.

- o First, it can overrule Roe and find that there is no constitutional right to abortion. If it takes that route, it would then uphold the Missouri statute (except possibly the provisions challenged on other grounds) as within the State's power to enact, since the Constitution would no longer be read as an obstacle. This would leave the States and arguably the Congress a great deal of latitude to pass restrictions on abortions in the future.

- o Second, it can decline to address the continuing validity of Roe on the ground that even if Roe places limitations on the States' power to regulate abortions, this statute is well within those limitations. That would also result in upholding the Missouri statute. It would also

leave the States and arguably the Congress much freer to restrict abortions than they are at present, although less so than under the first scenario.

o Third, it can address the continuing validity of Roe, find that it remains valid, but find that some of the Missouri statute's provisions are nevertheless constitutional. That could result in upholding the Missouri statute in whole or in part. As a practical matter, this outcome might well be very similar to the second scenario. Nevertheless, anti-abortion groups might not see it as providing as much additional leeway, thus requiring the Administration to address whether it will continue to attack Roe frontally (which might be the better political course) or chip away at it (which might be the better litigation strategy).

o Finally, the Court can reaffirm Roe and invalidate all of the provisions of the Missouri statute as in conflict with the constitutional right to abortion. This would basically leave present law intact.

We should add that although we state that "the Court" can do each of these things, it is also possible that there will not be five votes to do any of these things. The most likely scenario of that sort is some combination of Rehnquist, White, Scalia and Kennedy voting to overrule Roe, O'Connor voting to leave it standing but uphold some or all of the Missouri statute, and Brennan, Marshall, Blackmun and Stevens voting to strike down the statute.

Any of the first three options is likely to be viewed as a victory by the anti-abortion groups. Conversely, the pro-abortion groups will view anything short of option four as a defeat, although they may not say so publicly about some forms of option three.

IV. POSSIBLE ADMINISTRATION RESPONSES

The Administration should be ready with an internal decision regarding how to respond for each of the four scenarios described above. That decision should encompass both the contents of the response and the method of giving it.

A. Court Overrules Roe

Option 1: No immediate response ("We're studying the decision")

Pros:

- The traditional White House and Department of Justice immediate reaction to Supreme Court decisions.
- Avoids placing the Administration at the center of the firestorm that will inevitably ensue.

Cons:

- Would be viewed as an abandonment of the President's campaign commitment to oppose Roe.
- Would be viewed as backsliding from the Administration's litigation position.

Option 2: Express delight at the decision, no opinion on what future policy on abortion should be

"Today's decision is a great step forward for assuring the protection of the unborn. It is also a welcome sign of the Court's confidence in the American people's ability to make decisions themselves through their legislatures."

Pros:

- Consistent with the President's campaign position and litigation position.
- Chooses a side on this emotional issue and therefore helps gain the strong support of an important combination of constituencies (anti-abortion groups, evangelicals) in the Republican Party.

Cons:

- Places the Administration closer to the center of what will surely be an emotional and divisive debate.
- The anti-abortion position may become a great deal more unpopular once it has a chance of being realized through legislation, rather than simply being an abstraction. (This is obviously a hard proposition to test).

Option 3: Same as above, but add brief expression of policy view on abortion.

Add at the end of Option 2 answer: "This offers the American people an opportunity to move away from abortion on demand. It does not, in and of itself, place any restrictions on abortions, but leaves the States free to place those that they see fit."

Pros:

- Same advantages as Option 2.
- Takes a substantive position on the underlying issue (what kinds of abortions should be illegal) consistent with the President's prior statements and with the views of a majority of the American people.
- Reassures proponents of abortion that there is a political battle yet to be fought.

Cons:

- Same disadvantages as Option 2.
- Involves the Administration immediately in the merits of the abortion debate.

DECISION: _____ Option 1
 _____ Option 2
 _____ Option 3
 _____ Other

B. Court Does Not Reach Roe, but Upholds Missouri Statute

(Same answer can be used if less than a majority of the Court reaches Roe and would overrule it, e.g. four to overrule, one not to reach Roe, and four to keep it in place, with additional phrase in brackets at the end.)

Option 1: No response for several days. "We're studying the opinion"

Pros:

- There are a lot of different ways the Court could reach this result. Therefore it is hard to prepare an immediate response in advance that will definitely work.

Cons:

- This would lose an opportunity for the President to claim credit for this outcome.
- A lot of people will be very interested in whether the President remains committed to seeking the reversal of Roe. It would be best to give an answer to that question as soon as possible.

Option 2: A response sometime during the day the opinion is handed down.

"My Administration will be studying the precise implications of this decision. I can tell you that we are very pleased that the Court has seen fit to restore to the people considerable latitude to legislate in this area, and believe this decision is an appropriate intermediate step. We will continue to seek the overruling Roe v. Wade [and are delighted that ___ Justices indicated a willingness to do so]."

Pros:

- Would be consistent with the President's campaign commitments and the Administration's litigation position.

Cons:

- Pledge to return to the Roe question might seem divisive.

DECISION: _____ Option 1
 _____ Option 2
 _____ Other

C. Roe Reaffirmed But Statute Upheld

Option 1: No comment for several days ("We're studying the decision")

Pros:

- Because of the different forms opinions reaching this outcome could take, this may be the only approach actually available.
- The answer to the question people will be interested in, whether the President will continue to oppose Roe in litigation, will have to depend in part on how the opinion reads.

Cons:

- Even if this would ordinarily be true about litigation decisions, this is such an important political issue that it is worth taking significant litigation risks over.

Option 2: A response sometime during the day the decision is handed down, stating that we are partly pleased and partly disappointed.

"My Administration is studying the decision. I can tell you that I am very pleased that the Court upheld the Missouri statute, and is prepared to interpret Roe to allow state restrictions on abortion. I am disappointed that it declined to reconsider that decision.

Pros:

- Highlights the part of the decision that is a victory while expressing the disappointment that opponents of abortion would feel at such an outcome. That may be as much as people should reasonably expect in the immediate aftermath of the decision.
- Does not present much of a litigation risk, since it does not commit the Administration to a future litigation course.
- A decision of the sort described above would suggest that the approach most likely to lead to results in the short term would be to chip away at Roe, which this option would leave open as a

possibility. The Justices might be offended by a pledge of a frontal assault and be less responsive in the future.

Cons:

- Does not address one issue on which even people without an agenda may expect the Administration to have a position in advance, what we will do next on Roe itself.
- Politically, the Administration might be expected to commit itself on that issue immediately.

Option 3: Add to 2 an expression of the intention to press the point in the future.

Same as 2, but add at the end "and hope that it will see fit to do so in the future, as my Administration will continue to urge."

Pros:

- Avoids the political difficulties presented by failing to include a statement on this point.

Cons:

- Would lead to claims that the Administration lacks respect for the rule of law.
- Might antagonize some of the Justices.

DECISION: _____ Option 1
 _____ Option 2
 _____ Option 3
 _____ Other

D. Roe Reaffirmed, Statute Struck Down

Option 1: No immediate response ("We're studying the decision")

Pros:

- Even a decision of this sort could be more or less bad depending on how it is written.
- Appropriate response would also depend in part on the margin of loss. A 5-4 decision might call for a very different response from a 9-0 one.

Cons:

- It would be surprising for the Administration not to express disappointment at a loss of this magnitude in an ordinary case, let alone this one.
- Disappointed opponents of abortion would be very puzzled about why the President did not share their feelings.

Option 2: Express disappointment at the decision, but do not describe Administration's future plans

"We're studying the decision. I can say that I am very disappointed that the Court did not accept our contention that the people have the constitutional power to accord some protection to the unborn."

Pros:

- Shows that the President cares.
- Not outside the bounds of decorum in dealing with Supreme Court decisions to be disappointed that you lost.

Cons:

- Any criticism of the Court can lead to charges that the Administration lacks respect for the rule of law.
- Any criticism of the Court could be taken personally by the Justices voting in the majority and held against the Administration in the future.
- Does not address the Administration's plans with respect to Roe in the future, which could leave

some opponents of abortion feeling that the Administration has not gone far enough.

Option 3: Express disappointment at the decision, and state an intention to continue to challenge Roe

Add to the previous answer: "We will continue to make this argument to the courts."

Pros:

- Is the most that anyone could expect the Administration to do.
- Failure to go this far might leave opponents of abortion uncertain that we are serious and accordingly unhappy.
- Could be a useful signal of our seriousness to Justices voting with us.

Cons:

- Would certainly lead to loud accusations of lawlessness on the part of the Administration.
- Might jeopardize the Administration's credibility with the Court in other cases.

DECISION: _____ Option 1
_____ Option 2
_____ Option 3
_____ Other

V. OTHER ISSUES CONNECTED WITH THE RESPONSE

In addition to the question of what to say, there is the question of who should say it and in what context. The options appear to be a live Presidential statement, a statement by Marlin Fitzwater, the release of a prepared statement, a statement by the Attorney General, or some combination of these. Depending on what decision the Court reaches, a different option for who should give the response might also be appropriate.

VI. OTHER ISSUES LIKELY TO ARISE IMMEDIATELY

(This portion of the memorandum is informational only.)

Unless the Court both reaffirms Roe and strikes down the statute, other issues resulting from the decision are sure to arise requiring your prompt attention. The most significant of these is that various legislators will undoubtedly introduce new federal legislation and will want your support. For example, Congressman Smith plans to introduce legislation forbidding abortions in federal enclaves except to save the life of the mother. There may be other legislative proposals that will go even further. We recommend that you assign somebody the task of developing a position on these questions.