



U.S. Department of Justice
Office of the Solicitor General

SHG file

Washington, D.C. 20530

June 10, 1985

MEMORANDUM

TO: William B. Reynolds

FROM: Charles Fried *CF*

Enclosed please find my original draft introduction to our brief (if we file one) in next Term's abortion cases, as well as Sam Alito's memorandum, and a copy of our brief in the Akron case.

Messrs. Galebach, Cooper, Willard, Kuhl, Alito, Spears and I have had a preliminary discussion of this matter. The options we considered are: 1) not participating at all; 2) participating only on the narrow issues in the two cases; 3) participating on the narrow issues, but also indicating our disagreement with Roe and our willingness to argue that it should be overruled if invited (this is the position stated in my draft introduction); 4) arguing both that Roe should be overruled and arguing the narrow issues in the cases; and 5) arguing only that Roe should be overruled. Not entering the cases at all (1) seems an abdication, which I do not recommend. Arguing only the narrow issue (2) would repeat our Akron performance and display to the Court and the world a kind of disingenuousness, given our known position. I do not recommend this position either. I would object to only arguing that Roe should be overruled (5). Since we would not be addressing any of the issues which this Court has specifically brought before it in these cases, such a posture would appear disrespectful and unlawyerly.

So it comes down to options 3 and 4, in my mind. Most of the people at the meeting favored option 4. So long as the tone of the "overruling" argument is respectful and restrained, and so long as the balance of the length of the brief focuses on the many detailed issues in the cases themselves, I see no objective to adopting alternative 4. The difference between 3 -- as I originally drafted it -- and 4 is not great, and I would like to have your counsel on this.

cc: Messrs. S. Alito
C. Cooper
K. Cribb
S. Galebach ✓
C. Kuhl
J. Spears
R. Willard