ORIGINAL

In the

Supreme Court of the United States

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,

APPELLANT,

V.

CORA McRAE, ET AL.,

APPELLEES.

No. 79-1268

Washington, D. C.
April 21, 1980

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IN THE SUPREME COURT OF THE UNITED STATES

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, Appellant, v. CORA McRAE, ET AL., Appellees.	No. 79-1268

Washington, D. C.,

Monday, April 21, 1980.

The above-entitled matter came on for oral argument at 10:05 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the Supreme Court
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LWEIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

WADE H. McCREE, JR., ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C. 20530; on behalf of the Appellant

RHONDA COPELON, ESQ., Center for Constitutional Rights, 853 Broadway, New York, New York 10003; on behalf of the Appellees

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C O N T E N T S

ORAL ARGUMENT OF	PAGE
WADE H. McCREE, JR., ESQ., on behalf of the Appellant	3
RHONDA COPELON, ESQ., on behalf of the Appellees	22
WADE H. McCREE, JR., ESQ., on behalf of the Appellant -- Rebuttal	47

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: The Court will hear arguments first this morning in 79-1268, Harris v. McRae.

Mr. Solicitor General, you may proceed whenever you are ready.

ORAL ARGUMENT OF WADE H. McCREE, JR.,

ON BEHALF OF THE APPELLANT

MR. McCREE: Mr. Chief Justice, and may it please the Court:

At the outset it might be helpful to state what this appeal concerns and what it does not concern. At page 291 of its opinion, the District Court said the inquiry here is not what is wise policy but whether the Congress has or has not adopted a policy which, wise or unwise, the law forbids.

We submit that this is the proper approach to the case and that the voluminous evidence in the preceding 290 pages of the opinion would be useful in forming and informing a legislative judge but not especially helpful when we address the constitutionality of the Hyde amendment.

We regard the issues as two: First, whether the Hyde amendment violates the equal protection component of the due process clause by authorizing federal funds for medically necessary services generally and for abortions

only when the life of the mother would be endangered if the fetus were carried to term but not for other medically necessary abortions; and, second, whether by restricting the availability of federal funds for medicall necessary abortions the Hyde amendment deprives pregnant women of the liberty protected by the due process clause of the Fifth Amendment or the religious freedom protected by the free exercise clause of the First Amendment.

Title 19 of the Social Security Act, commonly called the Medicaid Act, is a cooperative program under which the federal government provides financial assistance to the states that choose to reimburse the categorically need and optionally the medically needy for the costs of medical services in at least five categories. These categories are in-patient hospital services, out-patient hospital services, other laboratory and x-ray services, skilled nursing services, periodic screening and diagnostic services, children and family planning and physician services.

The act does not expressly require participating states to pay for abortions or for any other specified medical procedures. The Hyde amendment comes into the picture in this fashion: In December 1977, in a joint resolution providing appropriations for the Department of Health, Education, and Welfare for the last ten months of

fiscal year 1978, Congress modified an earlier version of the Hyde amendment to include these exceptions to the general prohibition against abortions: necessary medical procedure for victims of incest and rape -- excuse me, I have misstated myself. I would like leave to say that initially, in September 1976, Congress, by the so-called Hyde amendment, limited the availability of funds to reimburse the costs of medically indicated or therapeutic abortions by providing that none of the funds contained in the act should be used to perform abortions except when the life of the mother would be endangered by carrying the fetus to term.

This original Hyde amendment has been subsequently amended. It has been amended to add a second exception to the one where the mother's life would be endangered by carrying the fetus to term, where necessary medical procedures for victims of incest and rape promptly reported are included, and where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term as so determined by two physicians.

These revised versions have appeared in subsequent appropriations and the current form of the Hyde amendment now consists of just the first two, where the life of the mother would be endangered if the fetus were carried to term or in the case of victims of incest or

rape when promptly reported.

The plaintiffs in these cases filed a complaint in 1976, the day on which the initial version of the Hyde amendment was adopted. Cora McRae, the named plaintiff, a medicaid recipient, was in the first trimester of her pregnancy, wished to have an abortion. She did not allege that the procedure was medically necessary or that continuation of her pregnancy would endanger her life.

The court entered a preliminary injunction, requiring the Secretary to fund all abortions, but then this Court decided the case of Maher v. Roe which provided in essence that the equal protection component clause of the Fourteenth Amendment in that case was not violated by excluding non-therapeutic or elective abortions from federal funding. This case then was sent back to the District Court to consider in the light of the Court's opinion in Maher v. Roe and the court took testimony over a period of 13 months and finally in January of this year decided that the discrimination between medically necessary abortions and other medically necessary procedures violated the equal protection component of the due process clause of the Fifth Amendment and that it further violated the protection accorded pregnant women by the liberty implicit in the Fifth Amendment, in the due process clause of the Fifth Amendment and in the free

exercise clause of the First Amendment.

It also said in a passage which is not exactly clear to us that it violated the rights of juveniles because they were the persons who had the greatest occasion to request abortions to terminate their pregnancy.

QUESTION: That passage in the District Court's opinion was an aspect of its holding with respect to the equal protection component of the Firth Amendment, was it not?

MR. McCREE: This is my understanding, Mr. Justice Stewart. This class was viewed as the ss pect class and --

QUESTION: Right, because of another federal statute.

MR. McCREE: Because they are under the Adolescent Health Services and Pregnancy Prevention and Care Act and he found that their equal protection rights were offended by the statute.

Our argument is essentially as follows: We contend that the Hyde amendment is rationally related to the legitimate governmental interests in preserving potential human life and encouraging child birth. We submit that the first approach is to determine the proper test to apply.

We suggest that in Maher this Court made it clear that the proper test was the rational relationship test.

In that case, which of course involved non-therapeutic or elective abortions, the Court held that it was sufficient if the Congress had a legitimate objective and if the measure was rationally related to it, and in that case it found that its interests in preserving potential human life and encouraging child birth was an appropriate relationship and it upheld the challenge under the Fourteenth Amendment.

We suggest here, where the classification is between medically necessary procedures generally and medically necessary abortions except those specified, that the same test should be applied and that the same governmental interests in preserving potential human life and encouraging child birth is a legitimate governmental goal rationally related to the refusal to fund generally medically necessary abortions.

QUESTION: Mr. Solicitor General, there is another interest involved though on the woman's side, isn't there, that wasn't in Maher?

MR. McCREE: There is another, yes, if the Court please, there is another interest. There is the medical necessity --

QUESTION: The life and health interest of the mother.

MR. McCREE: A life and health interest but not

of the degree specified in the Hyde amendment.

QUESTION: Right, exactly, but different from Maher?

MR. McCREE: Different from Maher in that respect, but we suggest that not different in the sense that it should require a different analysis. We still think that in this area of conferring a benefit, not a prohibition, not the imposition of a penalty, that the rational relationship standard should apply.

QUESTION: Did the District Court agree with you?

MR. McCREE: The District Court agrees with us. We are certain of that in every respect except possibly the respect relating to the teenagers, and in that respect it may not. But the --

QUESTION: That is where Maher basically differed from Roe, wasn't it, is that Roe v. Wade was not discussing the funding by federal or state of abortions but simply the right of the woman to consult with her physician and make the decision as to whether to have the abortion without restricted state prohibitions on the physician's right to give advice or the mother's right to heed the advice; where Maher was dealing with funding.

MR. McCREE: That is exactly my understanding of the difference. Roe was concerned with the state's

prohibition of the woman's right in consultation with her physician to have an abortion.

QUESTION: More specifically, it was concerned with state law that made it a serious criminal offense.

MR. McCREE: A serious criminal offense, and we say that the difference in Maher is, looking at a benefit conferred in the nature of public funding, the Court found that a different analysis was appropriate and reached a different result.

QUESTION: Mr. Solicitor General, would you make the same rational basis argument if the Hyde amendment did not contain the exception for endangering the life of the mother, if it was her death rather than adverse impact on her health that was involved?

MR. McCREE: I think I would. I think I would say that you would make the rational relation -- you would still apply the same formula because you are talking about bestowing a benefit. It doesn't prevent this woman from obtaining an abortion, it just denies her federal funding for that purpose and the --

QUESTION: Don't we have to assume for purpoes of analysis at least that some women will be denied abortions if they don't receive federal funding? I thought that was the thrust of the District Court's finding.

MR. McCREE: Oh, I think we have to. I don't

think there is any question about that.

QUESTION: And then we therefore must also assume that some of those women will suffer serious medical harm.

MR. McCREE: I think that is a judgment that is -- we must assume that and I think that is a judgment that the Congress must make. The Congress in the first instance did not have to appropriate money to reimburse any medical services whatsoever. And just because Roe said that the state could not punish a person under its criminal laws for obtaining an abortion in the first trimester and the other refinements, that still did not obligate the state or the federal government to reimburse her for the services. And we think this is the kind of discretion that is vested in the Congress, to decide what to do in this -- we are speaking about a unique phenomenon. This is the only -- a pregnant woman is the only person seeking reimbursement for medical services in a situation where potential human life is involved. It is unique and we say that the Congress has the right to make that determination.

QUESTION: But it must have a reason, I take it.

MR. McCREE: It must have a reason and we think that --

QUESTION: But if it has a reason, any rational

basis, that ends the role of the Court.

MR. McCREE: I think if the Court finds that -- well, let's say a legitimate reason --

QUESTION: Regardless of what the interests on the other side are, under the rational relationship test, I take it you argue that there is no balance involved at all, it is just if there is a rational basis, that is the end of it.

MR. McCREE: That's the approach in Maher and that is the way we read Maher. The --

QUESTION: Mr. Solicitor General, the Hyde amendment does not prevent a state choosing itself to fund abortions, does it?

MR. McCREE: It does not at all, nor does the medicaid act generally. The medicaid act provides funding for certain kinds of services but it does not restrict the state from using its judgment to extend the funding to other areas -- its funding to other areas where there will be no federal reimbursement.

QUESTION: Do you know how many states do in fact fund abortions?

MR. McCREE: I can tell you with reference to the --

QUESTION: Independent of medicare.

MR. McCREE: -- I could tell you with reference

to the briefs. I know . New York, for example, funds abortions and that is a state, of course, from which this plaintiff, Cora McRae, comes.

QUESTION: I think I read somewhere --

MR. McCREE: Michigan does, several do.

QUESTION: I think I read somewhere that there are ten or twelve that do.

MR. McCREE: That's my recollection, but --

QUESTION: Any may choose to do so?

MR. McCREE: Any may choose to do so, and New York has never ceased to fund abortions, according to my information. In the appellees' brief, there are two or three references to the states that do, and I could find it without too much difficulty, I am certain.

QUESTION: Judge McCree, one senses without being able to perhaps point to the exact language that the equal protection clause deprives the federal government of the right to or the authority to effect in any way the woman's decision whether to have a medically necessary or medically recommended abortion or whether to carry her pregnancy to term. If my recollection serves me, Canada at one time -- I don't know whether it still does or not -- simply paid $1,000 to every family to which a child was born. If I am right in thinking that the District Court rested its analysis on what I think

it did, does that mean the government couldn't give $1,000 to every mother who brought a new life into the world unless the government also paid $1,000 to every woman who had a medically necessary abortion?

MR. McCREE: I would find no offense to the equal protection clause of such a program. Indeed, it costs more to bring a -- to afford a pregnant woman pre-natal, obstetrical and postpartum care than it does to perform an abortion, so in a sense --

QUESTION: So the government concedes this?

MR. McCREE: The government concedes this, and this is set forth in appellees' brief and I think we concede it in our brief, too, and I don't think there is any question --

QUESTION: This hasn't always been conceded, you know, and I wanted to be sure.

MR. McCREE: I make a frank concession about that. According to the evidence in this case, it costs more to give a pregnant woman pre-natal, obstetrical, postpartum services than it does to abort, certainly in the first trimester if there are no complications.

QUESTION: And that was the finding in the companion case, too, I take it?

MR. McCREE: In the companion case, this is my understanding. But --

QUESTION: And the rationale of Maher was in effect that the government can prefer the producing of new lives to the financing of abortions as a legitimate interest without regard to cost?

MR. McCREE: Yes, it can and this is, of course, what we asserted as the essence of our argument on the equal protection --

QUESTION: General, in the Maher case, the Connecticut Attorney General, as I remember the argument, acknowledged that the case would be different if they did not fund medically necessary abortions. So this is a different issue than that case, wouldn't you agree with that much?

MR. McCREE: I think it acknowledges that it might be different.

QUESTION: It might be, I guess that is what he said. And they did in fact fund medically necessary abortions, didn't they?

MR. McCREE: And there is a difference. We submit that --

QUESTION: You say the analysis should be the same?

MR. McCREE: The analysis should be the same. As I suggested, we begin with the proposition that the state doesn't have to fund a right that a person has to

get an appendectamy. The state doesn't have to do that. I suspect the state could exclude it.

As a matter of fact, the Hyde amendment does exclude certain kinds of procedures, in-hospital care for tuberculosis patients --

QUESTION: Do you mean the Hyde amendment or the --

MR. McCREE: I beg your pardon, the medicaid act.

QUESTION: The medicaid act.

MR. McCREE: The medicaid act, Title 19 of the Social Security Act does exclude those --

QUESTION: Mental illness.

MR. McCREE: -- mental illness, institutionalized tuberculosis and so forth, and no one suggests that it can't do that consistent with the equal protection component of the Fifth Amendment.

Addressing the other grounds for the District Court's opinion, the District Court seems to say that since some women as a matter of their religious convictions or conscience would seek an abortion, that to refuse funding for them would somehow deny their First Amendment right to freedom of religion and free exercise of religion.

We have a great deal of difficulty with that because it would seem that the free exercise clause

presents interference with but doesn't obligate the state to finance it, and we suggest in our brief that a person who has no right to expect the state to furnish him with religious objects, for example, a bible or any religious artifacts to enable him freely to exercise his religion. But this seems to be the thrust of that aspect of the opiion and we think that this is a sufficient answer to that.

QUESTION: Do you think the Court would have ruled the same way had the government simply placed a very high tariff on Manichiewitz, which is certainly part of a ritual of at least Orthodox and perhaps conservative Jewry?

MR. McCREE: I want to make certain I understand the question. You are saying that if the government had placed an excessive tax on it, whether this would violate --

QUESTION: So as to substantially raise the price in the guise or protecting and perhaps in the legitimate guise of protecting the local manufacturers of Manischiewitz wine.

MR. McCREE: Oh, no, I think it would not be at all if the government had a sectarian purpose for doing that. Now, I --

QUESTION: My question was did you think the

Court would rule the same way? The only possible answer is you don't know.

MR. McCREE: Of course, and I appreciate the Court's suggestion of that.

(Laughter)

QUESTION: Don't you think the logic of the Court's ruling on the free exercise clause would have led it to the same result in that hypothetical?

MR. McCREE: Not quite, because --

QUESTION: Mr. Solicitor General, why don't you recognize the difference between drinking wine and having a baby?

MR. McCREE: I think that is a profound utterance with which I will concur immediately. I would like to suggest one other --

QUESTION: Mr. Solicitor General, may I ask you, in Maher v. Roe, the state interest was described there as a policy choice to favor normal childbirth. Your brief throughout, as I read it, speaks of it as a desire to encourage childbirth. You don't say normal childbirth. Is that intentional? Are you speaking of a different state interest than we would --

MR. McCREE: If the Court please, we do not attach any special significance to the use of "normal" in the Maher case and that is --

QUESTION: Should we view it as normal?

MR. McCREE: -- that explains --

QUESTION: Are we to read yours as meaning normal? It doesn't use the word "normal" anywhere in the brief.

MR. McCREE: As reading normal without any special significance. We think it adds nothing or detracts nothing --

QUESTION: And that is why you omit it?

MR. McCREE: And that is why we omitted it. It was a deliberate omission.

QUESTION: It was, you say?

MR. McCREE: It was a deliberate omission, because we felt it was not significant.

QUESTION: Mr. Solicitor General, is it not correct though that there are two kinds of medical problems that may make medical necessity the reason for -- if we didn't have the Hyde amendment, might justify funding the abortion? One would be harm to the mother, and the other I suppose would be potential harm to the newborn child. Isn't there sometimes a finding of medical necessity that can be based on a prediction that some health problem will affect the child, isn't that true?

MR. McCREE: Well, I think there is no question

about it.

QUESTION: Then is there the same state interest in encouraging that kind of birth as in encouraging the kind of birth that was involved in Maher?

MR. McCREE: I think there might not be, and what you are doing is putting content into the word "normal" and I agree.

QUESTION: The word the Court used in that case.

MR. McCREE: Yes, and I agree that there is that difference and I agree with the Court's suggestion.

QUESTION: Well, didn't the District Court indicate that there may be some medically necessary abortions because you couldn't have a normal childbirth?

MR. McCREE: I believe that is correct, if the Court please.

QUESTION: And yet you don't think it is significant?

MR. McCREE: Well, I believe that -- yes, I believe in that sense it is significant, I have to concede.

QUESTION: Well, I get back, I don't understand quite why you omitted "normal" from your statement of what the policy is.

MR. McCREE: Well, we still think that the Congress has to make that judgment. The Congress doesn't have to fund medical procedures even where there might be

an abnormal child.

QUESTION: Even then, I see. That is your position.

MR. McCREE: Because the Congress just doesn't have to solve all of the social problems in a single pattern or program of legislation. It can solve those that it believes in its judgment have the greatest priority for it at a given time.

QUESTION: Isn't it possible, Mr. Solicitor General, that the adjective "normal" in that setting could have a range of different meanings? It might mean normal as distinguished from complicated. It might mean several other things. I suppose it has not one fixed meaning, does it?

MR. McCREE: No, it certainly can, I certainly would have to concede that.

QUESTION: General McCree, would you summarize how the government describes the state interest that it relies on as supporting the Hyde amendment?

MR. McCREE: Yes. If the Court please, the state interest in the interest in preserving potential human life, this is the only procedure that would affect potential human life and we suggest that this alone is sufficient reason. There are other reasons that we touch on in our brief. We suggest the Congress might have a

sufficient reason in being reluctant to appropriate funds for procedures of some persons, large numbers of persons find morally repugnant, but we don't rest solely on that. We think that either or both is a sufficient statement of a legitimate government interest.

If the Court please, I have a very few minutes left and I would like to reserve the time for rebuttal, if I may.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Solicitor General.

MR. McCREE: Thank you.

MR. CHIEF JUSTICE BURGER: Miss Copelon.

ORAL ARGUMENT OF RHONDA COPELON, ESQ.,

ON BEHALF OF THE APPELLEES

MISS COPELON: Mr. Chief Justice, and may it please the Court:

This case is one of simple principle and singular magnitude. It involves the survival and the health of potentially millions of poor women in this country, and it involves reaffirmation of the simple rule of law of the written Constitution that this Court recognized in Roe v. Wade.

It is very basic that, as the Solicitor General says, this case arises in the context of a medicaid program designed to provide a broad range of medically

necessary and essential services to poor people throughout the country. And it is very significant, as the Solicitor General agrees, that it is comprehensive and that but for the Hyde amendment it would cover abortions as a mandatory medically necessary service.

Does the Hyde amendment single out one medically necessary service? They preclude the exercise of sound medical judgment about the health of a pregnant woman or indeed even of the fetal life. They prefer fetal life at the expense of maternal health and even maternal life.

If the District Court found the Hyde amendment repugnant to the entire scheme of the medicaid statute, they are also repugnant to the most minimal safeguards of the Constitution.

QUESTION: What do you say is the higher scheme of the Hyde amendment? Don't we have to take the enacted will of Congress as a whole, that medicaid plus the Hyde amendment is the enacted will of Congress?

MISS COPELON: Your Honor, we do but we have to consider whether the singling out of the one service of abortion in the context of an intent to provide medically necessary services is rational and --

QUESTION: But the intent of Congress was to provide medically necessary services with the exception of abortion except in certain circumstances.

MISS COPELON: That's right, Mr. Justice Stewart.

QUESTION: That is the thrust of my brother's question.

MISS COPELON: And the constitutional question that is presented to this Court and the one we will discuss today is simply whether under the minimal standard of rationality in the equal protection component of the Fifth Amendment the Congress can single out that one service.

QUESTION: But then you must be arguing not that it doesn't serve a legitimate or rational state interest, because presumably virtually any act of Congress will do that if applied -- if rational scrutiny is applied. You have to say that one purpose of Congress conflicts with another, which is almost incomprehensible to me.

MISS COPELON: No, Mr. Justice Rehnquist, our argument is that in the context of this scheme and also, and more importantly, in the context of the equal protection the preference for fetal life at the expense of maternal health and maternal life is irrational and therefore that preference cannot be drawn by the Congress.

QUESTION: As I understand it, Miss Copelon, your argument would be no stronger and no weaker if the so-called Hyde amendment were part and parcel of the statute originally enacted by Congress, is that correct?

MISS COPELON: That's correct, Your Honor, because

it would be an exclusion in the context of that program.

QUESTION: Exactly.

MISS COPELON: And it emphasizes in a sense the difference and the very critical differences between this case and Maher v. Roe decided three years ago. In Maher, the Court was dealing only with the question of covering elective abortions in the context of a program which covered only medically necessary services, and the Court found that not part of the general mandate of the program.

Here the Solicitor concedes that it would have been but for the Hyde amendment. No doctor's judgment which this Court has consistently protected and recognized the importance of, from all of the abortion decisions, no doctors judgments about the health of the pregnant women were at issue in that case. The plaintiffs in that case were asking that the program effectively be extended. We are saying the exclusion of one service, the singling out of one service raises the fundamental equal protection problem and --

QUESTION: Miss Copelon, you say it is irrational to prefer the fetal life interest to the health of the mother. That involves a weighing of respective interests and suggests that the Court just say that, although Congress thought it was a rational choice, that we should just disagree with them?

MISS COPELON: Your Honor, I think that when one looks at the decisions of this Court, that --

QUESTION: Well, isn't that answerable yes or no?

MISS COPELON: The answer is it is not a rational choice in the context of a medical program involving medically necessary service and --

QUESTION: Even though Congress thought it was quite rational, we should disagree with that value judgment?

MISS COPELON: Your Honor, it is not a value judgment. It is basic to the Constitution and basic to what this Court held in Roe v. Wade.

QUESTION: But anyway, you suggest we disagree with Congress in that judgment, whatever kind of a judgment it was?

MISS COPELON: However one characterizes the congressional judgment, Your Honor, yes, we suggest that the Court must disagree and --

QUESTION: And the Constitution disagrees?

MISS COPELON: That's right, and the reason that the Constitution disagrees I think is best illustrated if one looks at what the Court did in Roe v. Wade when it looked at the third trimester. The relationship between that situation and ours compels the conclusions that the tradeoff here between fetal life and maternal health and life is irrational.

QUESTION: When you say the word "irrational," I take it you mean literally those who voted to adopt the Hyde amendment belong in the looney bin.

MISS COPELON: No, Your Honor, I wouldn't say that at all.

QUESTION: Well, that to me is what the word "irrational" means, that they just went off the wall.

MISS COPELON: As a legal matter I would not make that contention, Mr. Justice Rehnquist. The point here is not how one characterizes that but rather whether in the scheme of our Constitution it is rational to make that preference, and I would like to go back to the third trimester in Roe v. Wade, if I may. That is the point where there was no privacy interests of the woman.

QUESTION: What if we had a Jones amendment, let us say, that excluded, as the Hyde amendment does with respect to these abortions, excluded the treatment for drug addiction on the grounds perhaps that drug addiction is self-induced and just excluded it, would your position be the same?

MISS COPELON: Your Honor, it would raise very different questions because there would be a question of whether to include --

QUESTION: It would be irrational?

MISS COPELON: I wouldn't want to say whether

it was irrational unless I saw the context in which the exclusion came up.

QUESTION: Well, the context would be exactly the legislation we now have and add in exactly the words of the Hyde amendment "drug addiction."

MISS COPELON: Your Honor, it might be irrational. However, this case has a different kind of question and the question here is really the validity of that tradeoff between fetal life and maternal health and life, and I would just in -- so that the Court understands, when I speak of a tradeoff here, I am relying on the findings of fact of the District Court that the Hyde amendment resulted in basically a virtually total exclusion of certifications of medically necessary abortions, and that given the way the Hyde amendment functions with all its uncertainty and with the impossibility of prediction of serious problems of pregnancy, to have a statute which says a doctor can be paid for, he waits for the patient to get worse means that that woman is placed in life jeopardizing situations, and when the maternal mortality studies show that abortions are frequently performed at the brink of death and frequently fail, so what we are talking about here is in practice a statute which prefers fetal life not only to the health of women but to their very lives. Now, I want to --

QUESTION: Do you think that the evidence taken by a single federal judge over a period of months under our constitutional scheme was intended to be allowed to invalidate a judgment of the elected representatives of the people under the equal protection clause?

MISS COPELON: Your Honor, I think that facts must always be relevant to the question --

QUESTION: But who decides the facts?

MISS COPELON: Well, in this case the Court decides the facts and the Constitution decides whether or not the ultimate judgment is rational. Here the findings of fact of the District Court with regard to some of the questions earlier to the Solicitor demonstrate and the Court found that normal childbirth cannot be affected through the Hyde amendment, that normal childbirth is medically impossible for reasons that the encouragement here, as the Chief Justice said, encouragement complicated pregnancy and also of abnormal fetal birth.

In addition to that, the contention here cannot be that there is just a state interest in encouraging childbirth today. The panoply of family planning programs attest to the fact that that alone is not the interest. So the interest that the state is asserting over the health and the life of the woman is the interest in fetal life itself and --

QUESTION: Counsel, may I interrupt there for just a minute. You have properly emphasized the importance of maternal life. Does the record provide any statistics as to the mortality rate of expectant women associated with pregnancy?

MISS COPELON: Your Honor, there is a fairly extensive indication of mortality rates in the early findings of the District Court and they are cited in our brief.

QUESTION: What number per 1,000 or per 10,000?

MISS COPELON: The normal is 16 women per 100,000; among black women, for example, it is 32 per 100,000.

QUESTION: 32 per --

MISS COPELON: 100,000 among black women.

QUESTION: 32 per 100,000 pregnancies.

MISS COPELON: Right. The point, Your Honor, is that the life endangering standard of the Hyde amendment is supposed to protect women against life endangering risks. The measure of those who ultimately die is not the measure of life endangering risks, and once a woman, as the testimony showed in the District Court found, is in a life threatening situation, there is no guarantee for her survival. There are examples that are manifold in the record of the problem with this standard. Let me just cite to you one which is the problem of the woman who gets pregnant with

an IUD in place. She suffers a 50 times higher risk of death because of an infection that occurs in the late second trimester. You can never tell in the early stages of pregnancy which woman will suffer it, and the risks go 50 times higher is not a clearly substantial risk before the infection strikes. The FDA and even HEW recommend that the IUD cannot be removed. It is medically essential to do an abortion because of the danger of that rapid infection which if it strikes it is very difficult to control.

So this is a situation where -- and the HEW statistics show that between 1972 and '74, 17 women died in this manner in this country. So it is an example, Your Honor, of the problem of using maternal mortality statistics to measure the scope of life endangerment. Even the defendant-intervenors' witnesses in this case, one in particular testified that the risks of poor women are twice as high, two to three times higher than for women of the middle and upper classes, and that in addition he would estimate that his population, which is at a Catholic hospital and involves people coming for prenatal care, would estimate 15 percent of those pregnancies would encounter life endangering circumstances. So when one compares that with the fact that you have less than one percent of prior abortions now certified under medicaid, the District Court's conclusion that really the effect of

the uncertainty of the standard and the fear of investigation really leads to a crisis intervention standard which is simply too late.

I would like to get back to what I think is the crucial question in this case, which is this question of the balance that Congress struck between fetal life --

QUESTION: Before you day, you put considerable emphasis on the Hyde amendment does not encourage normal childbirth --

MISS COPELON: That's right.

QUESTION: -- and encourages abnormal childbirth. Why does that make a difference?

MISS COPELON: Your Honor, I think that makes a difference because it changes the balance of concern that is involved in this case. What it says is that at the expensive of maternal health and maternal life and even, as Mr. Justice Stevens indicated, fetal life, one is going to have this virtually absolute preference for fetal life. And we say that in the context of the Constitution, which is written for the people, and as Roe v. Wade said, which protects born people, one cannot make that tradeoff between people who exist and the potentiality of future life. It is the Constitution upon which we rely that says that this is a fundamentally irrational tradeoff.

QUESTION: Well, is this an argument that the

fetus is not a person for purposes of the Constitution?

MISS COPELON: Your Honor, that has been decided, it is not a person for the purposes of the Constitution, and I dare say that in our health care system, even if some whole person's life is at stake, we don't ask another person to involuntarily sacrifice their health and their life for their well-being.

In the third trimester in Roe v. Wade, where the Court found the fetal interest, the interest in potential fetal life so compelling that you could criminalize and prevent abortion, still the Court said where maternal life or health is at stake, the abortion must be permitted. And we submit, Your Honors, that you have decided what the Constitution requires and what the minimum of rationality is or legitimacy of purpose is under the Constitution and you decided that in Roe v. Wade. And the difference between the regulatory context of Roe v. Wade and the funding context of this case is not a difference which is relevant to that balance, because something that is fundamentally irrational, not under some heightened standard of scrutiny but fundamentally irrational simply cannot survive whether you are dealing with funding or not, and the basic teaching of Maher was to reaffirm that balance of interests that the Constitution commanded in Roe v. Wade, and to reaffirm that even where the state is simply

giving out benefits, it must do it in a basically rational way.

QUESTION: Miss Copelon, let me ask you in connection with the case that is non-funding, which you are not now talking about, Stanley v. Georgia, where the Court found that the government couldn't prohibit the possession of pornography even in one's own home as well as any number of other books in one's own home, based on an implied by the privacy, nevertheless two or three years after Stanley, in United States v. Ridell, the Court held that the government could prohibit the purchase or sale of pornography even though the purchaser intends to use it in his home, doesn't that suggest that although the government must allow certain things if they are done entirely apart from government support, the government may proscribe access to avenues that would enable the person to enjoy that right?

MISS COPELON: Your Honor, I think it is a very different case, the case of pornography and also the case of distribution and sale as opposed to use. In terms of Griswold and Eisenstadt, it seems to me that the Court has dealt with the difference between distribution and sale as founded in a regulatory context not to be relevant. The pornography example just doesn't involve the kind of violation of what we would call either basic or rational

permissible judgment under the Constitution, whether one calls it rational or one calls it the absence of a legitimate state interest in light of the constitutional decision of Roe v. Wade.

QUESTION: The Court had held that the State of Georgia could not prohibit the reading of whatever book one wanted in his own home, and yet in Ridell the Court said that a federal statute making inaccessible in effect books which the person might want in his own home was perfectly constitutional.

MISS COPELON: But, Your Honor, I think that the more apt anaology would be if there were some kind of funding program involved, and it would be hard to see how there could be a claim for the payment of pornography under some kind of funding program that involved --

QUESTION: I thought you were arguing that the funding distinction was irrelevant and that we ought to get back to the case where the government simply prohibits or allows, rather than as in Maher fund.

MISS COPELON: I am not saying that it is irrelevant. I am saying that it is irrelevant to the question of the rational reltionship or legitimacy of a preference for fetal life over maternal health and life, and that that base line irrationality in Roe v. Wade has to carry over, because something can't become rational in one context and

not rational in another.

We are not dealing today with any question here of heightened scrutiny. We have done that in our brief. What we are saying is minimal scrutiny says that this is not rational in this context, and that Roe v. Wade as a constitutional matter has decided that question.

QUESTION: Was there any consideration in the court below or any argument about whether the court should simply declare the amendment unconstitutional and leave it up to Congress as to whether to eliminate the funding for all abortions or just some or --

MISS COPELON: Your Honor, it wasn't exactly raised in that way. It was more raised in terms of the total --

QUESTION: Because there was an order to -- in effect, there is an order now to fund all medically necessary abortions.

MISS COPELON: That's correct, and --

QUESTION: Rather than leaving the solution up to Congress?

MISS COPELON: Right, and I think what you are referring to is what one might enhance by calling the separation of powers argument here. That was made below. The court denied it. The court relied very strongly on this Court's decision in Lovett which states the basic

principle and has been reaffirmed since in Powell v. McCormack, that the legislature, even with powers particularly confided to it, cannot act in an unconstitutional manner, and the Court held basically --

QUESTION: Well, that may be true. That is just begging the question of which way should it cure the -- of course it can't violate the Constitution -- which way to cure it.

MISS COPELON: Well, I think it should cure it in the same exact way, Your Honor, as the Court cures the problem in Califano v. Westcott. There is basically no difference between this case and Califano in that the funding rider, as the Solicitor General interprets it, modifies the program and the question then is what would Congress have wanted if Congress were to choose and I --

QUESTION: Well, should that be left up to Congress after the Court has held that what Congress did do is unconstitutional?

MISS COPELON: Mr. Justice Stewart, I think that the majority was correct in Califano and that that holding is even more correct here. In both cases, there was an explicit indication from Congress that they didn't want to fund something, and the question was, given the favorability clause of the Social Security Act, would Congress have intended to eliminate the program.

QUESTION: Well, that is just an informed guess on the part of the Court, but Congress knows what it wants to do.

MISS COPELON: Your Honor --

QUESTION: It has been told that what it has done is unconstitutional.

MISS COPELON: I think that it would be unimaginable that Congress would eliminate a medicaid program that we have had for fifteen years, that millions of poor people around this country rely on every day of their lives for this --

QUESTION: Maybe you are quite right, as a matter of political prediction, but isn't that for Congress to decide?

MISS COPELON: Your Honor, I think the obligation of the Court in deciding what remedy is appropriate is to decide that question, and there is evidence -- for example, in 1975, Congress failed to pass a rider. They didn't stop the HEW appropriations, they have never stopped the NEW appropriations, even though the proponents of the Hyde amendment yearly tried to cut back on the additional language --

QUESTION: But it would be, Congress would be totally free under the Constitution to completely repeal Title 19, would it not?

MISS COPELON: That's correct, after this Court's judgment, Congress could --

QUESTION: Before or after, at any time.

MISS COPELON: Yes, they would be free, but the question of what remedies should come from this Court is based on the kind of assessment the Court made in Califano v. Westcott, and we submit that the devastating impact and the importance and centrality of the medicaid program argue even more powerfully than in Califano v. Westcott that the injunction should remain intact.

QUESTION: Well, are you saying that a court may direct and command the Congress how to exercise the taxing and spending power? Isn't that what your statement comes down to?

MISS COPELON: Your Honor, I think every time the Court reviews a classification in a welfare program, like in Califano v. Westcott or Goldfarb v. Califano, it is doing effectively that. It is basically deciding whether Congress can make exceptions that it has made or whether it has to fund something that it may not have wanted to. If you couldn't do that, you could never look at a statute under inclusiveness of involving the payment of benefits --

QUESTION: Well, let's say the Hyde amendment does say something different from what it did say, or

let's not call it the Hyde amendment but the Smith amendment, had said Title 19 shall be applicable only to non-white people, shall not cover anybody who is Caucasion or who is white. That, I presume we could agree, would violate the equal protection clause of the Fourteenth Amendment.

MISS COPELON: Yes, it would.

QUESTION: But wouldn't that be the extent of a court's power to so state and then leave it up to Congress whether they wanted to include everybody or not anybody?

MISS COPELON: Your Honor, I think that is a different case and one would have to look at --

QUESTION: Constitutionally, why is it different?

MISS COPELON: Constitutionally, basically I think the Court should order the expansion of the program but constitutionally it might be different if, for example, you had a program where there were so few people benfitted and so many not benefitted that it would not be clear --

QUESTION: Let's say that a great many people would be benefitted, it just wouldn't cover white people, that's all.

MISS COPELON: The difference here, I think that is unconstitutional and I think that the Court would probably --

QUESTION: Well, clearly it is unconstitutional

but the --

MISS COPELON: Right.

QUESTION: -- but the point is what is the remedy.

MISS COPELON: And the court --

QUESTION: And what is the extent of the Court's power, appropriately exercised?

MISS COPELON: A court clearly has the power to remedy that --

QUESTION: What is the extent of the appropriate exercise of its power?

MISS COPELON: By including it. The only distinction I was trying to make, Mr. Justice Stewart, is this, and that is I don't know the exact proportions of white people and non-white people in this country --

QUESTION: Nor do I.

MISS COPELON: -- but it would potentially have significance if the non-included class were so large that one really had to doubt whether or not Congress can continue the program if they had to include the --

QUESTION: Well, Miss Copelon, Westcott involved an extension of benefits, didn't it?

MISS COPELON: That's right, Your Honor.

QUESTION: And therefore an increase in the expenditure of public funds. Is that right?

MISS COPELON: That's correct.

QUESTION: And I gather that it may be that even in the situation of that light, you could argue on the basis of Westcott that the Court could extend, as it did --

MISS COPELON: That's absolutely right and --

QUESTION: Of course, with the Hyde amendment, if you invalidate those restrictions that saves federal money --

MISS COPELON: That's right, Your Honor. So it is not actually an expenditure of any additional Treasury funds.

I would like to turn now with the minutes remaining to me to the First Amendment arguments and the First Amendment claims that were treated by the District Court. The fact I think, going back to the tradeoff between maternal life and health and fetal life, brings into full picture in this Court the nature of the underlying interests, and that is that Congress wanted to and the proponents of the Hyde amendment sought to take a position and they did take a position on the question of when human life begins. That question this Court held in Roe v. Wade is impermissible and I submit that is impermissible under the Fifth Amendment.

It is in addition, as the record will extensively document, is impermissible under the First Amendment, in both the First Amendment establishment clause and free

exercise clause. This is the first time in at least a decade that this Court has had before it a case which raises at once the establishment and free exercise claims, and it requires a special scrutiny.

We are concerned here, as the Chief Justice said in Walz, with a law whose basic purpose -- with a law which violates the basic purpose of the religion clauses which is to insure that no religion be sponsored or favored, none commanded and none inhibited. Here --

QUESTION: Now, if your argument is correct that would be -- what you say would invalidate almost every criminal law we have, because most of them coincide with at least if they don't stem from religion tenets, the laws against murder and theft and --

MISS COPELON: You Honor, we are not talking about --

QUESTION: -- all come from the Ten Commandments.

MISS COPELON: -- we are not talking about a law which merely coincides with religious belief and we are not talking about a law which, like the constraint on murder, is something which is part of the secular fabric of society and is accepted by everyone.

QUESTION: Well, it becomes so and its origins were religious, aren't they?

MISS COPELON: That's right, Your Honor, but

today is the point at which one has to examine what the purpose and what the character is of the belief that human life, full actual human life begins at conception. The District Court made extensive findings of fact. It refused to hold as a matter of law that the establishment clause is violated, but the precedents of this Court we submit support the invalidation of the Hyde amendment which trade off maternal life for fetal life on the basis of the premise that life begins at conception.

QUESTION: And this is an establishment clause argument that you are making?

MISS COPELON: Yes, Your Honor, exactly like Epperson v. Arkansas in terms of the purpose of this law.

QUESTION: This would mean, I suppose, the result would be that religiously motivated people wouldn't be free effectively to lobby Congress to enact legislation.

MISS COPELON: No, Your Honor, it is not a matter of their freedom to enact legislation. They have an equal right to try. It is the question of --

QUESTION: But if they succeed, then the legislation that is enacted violates the exception clause.

MISS COPELON: Because as this Court has said many times, the establishment clause places a limit on the political entanglement of religion, and it is only if the legislation that is enacted is wholly lacking in a secular

purpose which we think the documented record of the District Court, particularly with respect to the character of the anti-abortion movement. I am not even talking about the predominance of the Roman Catholic Church. That is important. But the critical fact is that in looking at the entire anti-abortion movement, he found pervasive religious themes, references, advocacy and a religious purpose expressed, like Epperson, based on a creation perspective without --

QUESTION: Miss Copelon, don't you have to say that the Congressmen were biased, religiously biased?

MISS COPELON: That's right, Your Honor, but --

QUESTION: Do you say that?

MISS COPELON: I do say that, because they --

QUESTION: Well, do we have to say that? Would you mind if we don't?

MISS COPELON: Your Honor, you do not have to say that, but the fact of the matter is that I think the issue will continue to be before the Court --

QUESTION: And if Judge Dooling had ruled the other way, he would have been biased?

MISS COPELON: He --

QUESTION: Yes or no?

MISS COPELON: I'm sorry, I didn't hear your question.

QUESTION: I say if Judge Dooling had ruled the

other way, he too would have been biased, is that your position?

MISS COPELON: Well, Your Honor, our position is that the problem here is that not only is the anti-abortion movement essentially religious, but it is taking a position on a religious question and therefore it is religiously biased legislation which impacts particularly on poor women in a medicaid program which has as a principle to accommodate religion.

QUESTION: Would you apply the First Amendment argument to non-therapeutic abortions, the Maher v. Roe type situation?

MISS COPELON: Your Honor, I am not --

QUESTION: If you had argued Maher, would you be making the First Amendment argument?

MISS COPELON: One would have to look at the record in Maher to see whether or not it was premised as wholly as this on that fundamental belief about when human life begins. Our basic argument here is that it is the tradeoff between the maternal life itself, it is the preference for fetal life as an actual human being that trades off the well-being of the maternal life and maternal health that really brings our First Amendment question into focus.

QUESTION: Before you sit down -- your red light

is on -- would you say that the exception of the Volstead Act for wine used in religious rituals was therefore unconstitutional?

MISS COPELON: No, Your Honor, I think it was probably essential.

QUESTION: But it was certainly motivated in a desire to accommodate religious interests.

MISS COPELON: As this Court has held many times, the accommodation of religious interests is permissible so long as there is not a direct establishment of religion, the same principle as Sherbert, and I think that would --

QUESTION: Well, do you think that the Hyde amendment was an establishment of religion?

MISS COPELON: Yes, Your Honor, I do.

If I may just take a moment to conclude, Your Honor --

MR. CHIEF JUSTICE BURGER: Your time is expired, counsel.

Thank you, counsel. The case is -- excuse me, Mr. Solicitor General, do you have anything further? You have a few minutes left.

ORAL ARGUMENT OF WADE H. McCREE, JR., ESQ.,

ON BEHALF OF THE APPELLANT -- REBUTTAL

MR. McCREE: I have just two points to make, if I may. On the first instance, no plaintiff in this case

claims that she wanted an abortion because of an abnormal child. That isn't in the case at all.

And the second point, we didn't address the establishment clause argument because the Court had ruled against it and we would rely on our brief in its discussion of McGowan and cases of that sort on that point.

QUESTION: Mr. Solicitor General, may I ask you a question. Your opponent has focused more narrowly on the precise interests of the government at stake here than I had really caught before. In your summary of argument, you describe the interest as that in preserving potential human life and encouraging childbirth. But she makes the point that there is no overriding government interest in having a largerpopulation, as some countries sometimes want to encourage childbirth generally. I take it you do not mean by that just encouraging more births throughout the country, you really are talking, or am I wrong, about the notion of preserving fetal life and the unborn fetus a chance to survive? That is what it is limited to, isn't it?

MR. McCREE: That's the point in our brief and that is --

QUESTION: There isn't any national or state interest in having more people in the country.

MR. McCREE: Although we are not making that

argument, although that would be a legitimate reason for the Congress to enact such legislation.

QUESTION: There is no indication that that was in fact the reason that motivated anybody in this case.

MR. McCREE: That's correct, there is no such fact.

QUESTION: If you had a negative birth rate for a sustained period of time, I should think that would be quite a significant and important argument. It would eventually shrink to a point where it might not be able to exist economically, if you project yourself a hundred years down the road.

MR. McCREE: We would agree with that, Mr. Justice Powell.

QUESTION: Of course, the other side of the coin is that over-population is a greater threat, I suppose.

MR. McCREE: We say these are considerations of the Congress.

QUESTION: General McCree, certainly a hundred years ago a large family was considered social security for the parents, because they realized that they would have to derive the work from the farm from the children who would in turn support them. So I would think it would be difficult to say it wasn't at least a rational interest to say to bring more people into the world was not such.

MR. McCREE: We would agree with that proposition.

QUESTION: But I take it your point is, Mr. Solicitor General, that at any given time, whatever the population situation may be, this is a matter for Congress to decide and not for the Court?

MR. McCREE: Its wisdom is committee to the Congress and not to the Court.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

(Whereupon, at 11:08 o'clock a.m., the case in the above-entitled matter was submitted.)

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