ORIGINAL

In the

Supreme Court of the United States

JASPER F. WILLIAMS AND EUGENE F. DIAMOND,
APPELLIANTS,
V.
DAVID ZBARAZ, ET AL.,
APPELLEES.

JEFFREY C. MILLER, ACTING DIRECTOR, ILLINOIS DEPARTMENT OF PUBLIC AID, ET AL.,
APPELLIANTS.
V.
DAVID ZBARAZ, ET AL.,
APPELLEES.

UNITED STATES,
APPELLIANT,
V.
DAVID ZBARAZ, ET AL.,
APPELLEES.

No. 79-4

No. 79-5

No. 79-491

Pages 1 thru 63

Washington, D. C.
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IN THE SUPREME COURT OF THE UNITED STATES

JASPER F. WILLIAMS AND EUGENE F. DIAMOND, Appellants, v. DAVID ZBARAZ, ET AL., Appellees.	No. 79-4
JEFFREY C. MILLER, ACTING DIRECTOR, ILLINOIS DEPARTMENT OF PUBLIC AID, ET AL., Appellants. v. DAVID ZBARAZ, ET AL., Appellees.	No. 79-5
UNITED STATES, Appellant, v. DAVID ZBARAZ, ET AL., Appellees.	No. 79-491

Washington, D. C.,

Monday, April 21, 1980.

The above-entitled matter came on for oral

argument at 11:10 o'clock a.m.

BEFORE:

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

APPEARANCES:

WILLIAM A. WENZEL, III, ESQ., Special Assistant Attorney General of Illinois, 130 North Franklin Street, Chicago, Illinois 60606; on behalf of Appellants Miller, Et Al

VICTOR G. ROSENBLUM, ESQ., Americans United For Life Legal Defense Fund, 230 N. Michigan, Chicago, Illinois 60601; on behalf of Appellants Williams, Et Al

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

ROBERT W. BENNETT, ESQ., 357 East Chicago Avenue, Chicago, Illinois 60611; on behalf of Appellees

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Williams v. Zbaraz and the two consolidated cases.

Mr. Wenzel, you may proceed whenever you are ready.

ORAL ARGUMENT OF WILLIAM A. WENZEL, III, ESQ.,

ON BEHALF OF MILLER, ET AL

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

I am appearing here today on behalf of Jeffrey C. Miller, the Acting Director of the Illinois Department of Public Aid. Director Miller, the defendant below, appeals from a ruling of the District Court which invalidated Illinois Public Act 80-1091 as violative of the equal protection of the laws for women who were seeking medically necessary abortions but not abortions which were necessary to preserve their lives.

The issue today before the Court is two-fold: First, there is the equal protection issue, whether or not the state may validly limit abortion funding under its medical assistance programs in instances where the mother's life would be preserved, taking into account the state's interest in fetal life, and also taking into account the state's willingness to fund alternative treatments to abortion.

The second issue really should be discussed first because it certainly shapes and clarifies the equal protection issue. That issue is what is the state's obligations under Title 19 of the Social Security Act. A short background would be appropriate to bring these issues into focus.

The Illinois General Assembly, in December of 1977, enacted Illinois Public Act 80-1091 in response to two federal initiatives. Earlier that year this Court had issued its rulings in the cases of Maher v. Roe, Beal v. Doe, and Poelker v. Doe. Those cases stand for the proposition that indigent pregnant women have no constitutional right nor statutory entitlement to a non-therapeutic abortion.

Earlier the United States Congress, as was explored in the case that just preceded us, had enacted the first version of the federal Hyde amendment. The federal Hyde amendment limited abortion funding under the Medicaid Act except where an abortion was necessary to avoid the endangerment of the woman's life.

QUESTION: Mr. Wenzel, just let me see if I understand the appropriate statutory context of this case. When Title 19 was originally enacted, the criminal laws of many if not most states made the performance of an abortion a serious offense, and I suppose that nobody

could have argued back in those days, in 1965, when Title 19 was enacted by the Congress that Title 19 authorized or directed the states, let alone authorized them, to pay for therapeutic abortions.

MR. WENZEL: That is correct.

QUESTION: And then came along this Court's decisions in Roe and Doe and thereafter I suppose it was clear that Title 19 -- this is prior to any Hyde amendment -- authorized and directed the states to cooperatively finance such therapeutic abortions.

MR. WENZEL: We do not take that position.

QUESTION: You do not. Then clearly you do take the position that after the Hyde amendment the state is not required to.

MR. WENZEL: That is correct. Our view of Title 19 --

QUESTION: What is your position in that intermediate period, after this Court's decisions in Doe and before the Hyde amendment?

MR. WENZEL: After Roe v. Wade.

QUESTION: Yes, Roe v. Wade and Doe v. --

MR. WENZEL: States were operating under discretionary authority to fund abortions, whether they be medically necessary or elective abortions or not fund such abortions, according to the primary test under Title

19, that is whether there was a reasonable standard for establishing eligibility for the scope of medical assistance under the act.

QUESTION: Your position is that Title 19 itself prior to the Hyde amendment didn't put any requirement on the states with respect to therapeutic abortions, is that right?

MR. WENZEL: That's correct, Your Honor. Now, what the Hyde amendment did --

QUESTION: How about abortions relating to -- that would involve the health of the mother?

MR. WENZEL: Well, I was going to say I guess as a follow-up to Mr. Justice Stewart's question --

QUESTION: That is what I meant when I talked about therapeutic abortions.

MR. WENZEL: It depends on what we mean by therapeutic abortion. I would take the position here today that if by therapeutic abortion we mean simply health impairing but not necessary to preseve life --

QUESTION: That is what I meant.

MR. WENZEL: -- that the state would have been free to exclude funding for such abortions because that is in our view of things consistent with section 1396a-(a)(17), the reasonable standards language. But if by therapeutic abortion we mean an abortion which is

necessary to preserve life or to avoid a threat of death, then I would say that any state that had such a total prohibition on the funding of abortions in 1974, for example, would not be able to meet the statutory test set out in section 1396a(a)(17).

The Hyde amendment effectively strips states of the discretion to fund non-Hyde amendment abortions.

QUESTION: No, they can do it and pay for it themselves.

MR. WENZEL: It strips states of the discretion to fund them within the context of the Medicaid program. It lets them wholly --

QUESTION: It couldn't take that power away from the state, could it, constitutionally?

MR. WENZEL: I am making a distinction between stripping states of the discretion of doing something or funding something but in the context of the medical assistance program, that is the joint cooperative program, and what states do outside of that cooperative program within their own state authorized and state funded programs.

Illinois, in addition to the Medicaid program, has two wholly state authorized and state funded programs, programs of general assistance and a program of aid for the medically indigent.

QUESTION: Well, when you say joint assistance, you mean then partial reimbursement from the federal government?

MR. WENZEL: That is correct, Mr. Justice Rehnquist.

QUESTION: Just to be perfectly clear, Illinois is perfectly free to fund abortions if it wants to, isn't it?

MR. WENZEL: Under its own programs with its own funds, correct.

QUESTION: If it is willing to pay for it.

MR. WENZEL: If it is willing to pay for it.

QUESTION: But your position is that it is prohibited from doing so under the federal program?

MR. WENZEL: That is correct, which does not affect --

QUESTION: What in the Hyde amendment prohibits that? All it does is says the government won't put any money up, isn't that all it says?

MR. WENZEL: Well, our position rests with the analysis of the impact of the Hyde amendment on Title 19 itself as the First Circuit in Preterm v. Dukakis and the Seventh --

QUESTION: That didn't withdraw any requirement of the state doing -- but it didn't say the state wasn't

perfectly free to do it.

MR. WENZEL: I think the argument has to be made that the Hyde amendment has a substantive impact on Title 19. There is a substantive impact on Title 19 by modifying the state's discretion to fund or not to fund abortions. If it didn't have any substantive impact, then what it would be doing is altering impliedly the state's right to receive federal reimbursement, but there is no evidence of that either in the language of the Hyde amendment or in any of the debates in Congress that Congress intended to require states as a condition of participation in Title 19 to fund non-Hyde amendment abortions.

QUESTION: I understand that, but the Hyde amendment itself is merely a refusal to have any part of a particular annual appropriation, have any part of that money be spent to reimburse the state for its funding of abortion, isn't that right?

MR. WENZEL: We view the debates of Congress as having used an appropriation vehicle but that they were clear -- the intent was clear that what they were doing is engaging in substantive legislation.

QUESTION: Do you think that substantive legislation would survive if during the following year there were no such rider to the appropriation bill?

MR. WENZEL: No, Your Honor, they would either

have to come up with a --

QUESTION: They are one-year pieces of legislation, each one.

MR. WENZEL: But in this particular case, this Court in prior decisions has looked to see whether Congress has successively enacted the same sort of rider and when that sort of pattern of Congress intent is present then it strengthens the conclusion that they intended to engage in substantive legislation.

QUESTION: Are you getting any money for tuberculosis or mental health?

MR. WENZEL: Yes.

QUESTION: Yet you do have facilities for that in Illinois, don't you?

MR. WENZEL: Yes, we do, Your Honor.

QUESTION: Now couldn't you set up a facility for abortions the same way?

MR. WENZEL: Yes, sir.

QUESTION: And pay for it yourself?

MR. WENZEL: Yes, we could do that, Mr. Justice Marshall.

QUESTION: Let me be sure -- I am not sure what this debate about or discussion about the state's rights are. Prior to 1973, the State of Illinois, through its legislature, could have amended the law so as to achieve

the same status for abortions as the opinion of this Court did, could they not?

MR. WENZEL: Yes, sir.

COURT: And they could have either paid for all of them or paid for none of them, could they not, the state legislature?

MR. WENZEL: The state could have independent from its state medicaid program either paid for all or paid for none. But if the law, for example, had been amended in 1970, at that point in time Illinois was participating in Title 19. And as I answered the question of Mr. Justice White, I do not believe it would have been reasonable for consistent with the mandates under Title 19 for Illinois to exclude life preserving or life threatening abortions.

Essentially, this dispute is a result of a footnote in the Court's ruling in Beal v. Doe that said that serious questions would be raised if the states intended to exclude medically necessary care, and the Court in that opinion also made reference to the definition of medical necessity in Doe v. Bolton which said that an abortion is necessary when a physician, exercising his professional judgment, in light of all factors, whether they be physical, emotional, psychological, economic, familial, familial age, all of those factors, if they are relevant to health,

doctors should be given that leeway. That is an appropriate standard within the context of litigation dealing with criminal sanctions. We feel that it is wholly inappropriate to impose, as the District Court did below, the Doe v. Bolton definition of medical necessity.

What that does in effect is to transform the medicaid program into a program run and controlled by the providers as opposed to being run and controlled by the state. The state under medicaid has discretion, as we have pointed out. Illinois has exercised that discretion, has made exclusions beyond merely abortions. We do not pay for several services of categories of particular procedures. We do not pay for infertility and sterility procedures. We do not pay for transsexual surgery. We impose durational limitation requirements on in-patient care.

Illinois views its participation in medicaid as providing adequate, non-comprehensive care to the indigent, and I think that that is crucial in helping to frame the constitutional question. Congress, by repealing in 1972 the requirement that states achieve a goal of comprehensive medical care by 1975, left intact the original intent which was merely to provide adequate care.

When Illinois excludes medically necessary abortions and will only fund abortions necessary for the preservation of life, it is exercising the discretion that

Congress vested in it to make these sorts of choices.

QUESTION: Even though some -- even in a great many cases absent an abortion there would be a serious health risk to the potential mother?

MR. WENZEL: The reasonableness that Illinois' exclusion here I think hinges in part upon the availability of alternative forms of treatment on the one hand and that the type of abortions, using the Doe v. Bolton standard, that plaintiffs are seeking to have funded are so -- the definition is so elastic that basically it sweeps into its compass all elective abortions. There is nothing to prevent a physician from utilizing a Doe v. Bolton definition of medical necessity and signaling out the fact, for example, of age and saying that that is relevant to health and for then authorizing what would be an abortion that this Court said was not required to be funded under Maher or under Beal or Poelker.

QUESTION: Mr. Wenzel, did I understand you to say that without the Hyde amendment Illinois wouldn't do this, wouldn't finance abortions? Are you saying that?

MR. WENZEL: No, Your Honor, I am afraid I don't understand the question. We --

QUESTION: I don't understand you.

MR. WENZEL: Without regard to the Hyde amendment--

QUESTION: Right.

MR. WENZEL: -- I have described what Illinois' obligations would be, not what Illinois has actually chosen but what Illinois' obligations would be under Title 19 alone, without the Hyde amendment in it.

QUESTION: And your position is that, just as a matter of statutory federal law, preemptive federal law that Illinois would have been quite free to enact this legislation in the absence of any Hyde amendment?

MR. WENZEL: That is correct.

QUESTION: That is your position.

MR. WENZEL: As long as we didn't take that final step and unreasonably exclude funding for all abortions because I don't believe the state or any state could justify allowing maternal deaths.

QUESTION: Mr. Wenzel, I wonder if -- I would just like to test that for a moment. If there is a choice that has to be made in one of these terribly difficult situations where either the fetus or the mother has to die, would you say it was irrational for the state to say that the choice shall be made in favor of the fetus?

MR. WENZEL: That is a very hard case, and I am not sure that it ever would actually come down to that --

QUESTION: Isn't that the issue in the case that has just been argued?

MR. WENZEL: The physician always has two patients

that he is looking out for in pregnancy. I suppose there have been instances where in the third trimester, where there is a crisis situation, the physician must make a choice between saving the life of the woman or saving the fetus, but the --

QUESTION: Let's say the state makes the choice, the state passes a law that says in all those cases the choice shall be made in favor of the fetus, would that be irrational?

MR. WENZEL: I believe it may be, Your Honor, yes.

QUESTION: Well, may be or would be? Anything may be.

MR. WENZEL: It would be irrational, Your Honor. But what we have here --

QUESTION: I think that is precisely the state interest on which the United States relies in the previous case.

QUESTION: Do you mean irrational in my brother Rehnquist's sense of if you thought the other way you belonged in an insane asylum?

MR. WENZEL: I am sure that the members of the Illinois General Assembly were aware that there were hard choices, but I think that we could never come down to that either/or situation because of the state's willingness to fund alternatives, number one, and that the state's interest

in fetal life does not thereby necessarily denegrate the state's interest in maternal health. The state hopes by its policy to promote both of those interests.

If there are no other questions, I would like to reserve some time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Wenzel.

Mr. Rosenblum.

ORAL ARGUMENT OF VICTOR G. ROSENBLUM, ESQ.,

ON BEHALF OF APPELLANT WILLIAMS ET AL

MR. ROSENBLUM: Mr. Chief Justice, and may it please the Court: I represent the intervenors in both cases but I am addressing myself to the Zbaraz case this morning, and in the course of the limited time that I have I hope to be able to address the nature of the right to privacy within the context of the Constitution and whether the Hyde amendment infringes on that right, especially through penalty analysis, and I hope also to be able to address the appropriations issue which raises another theory of constitutional issue for this Court that at a minimum would counsel restraint.

With regard to the nature of the right to privacy, may I point out that the Court's use of the term "childbirth" in the Maher decision was used interchangeably with the language of "normal childbirth." So, for example, at page 474 of the U.S. Reports in Maher, the Court had said that it implies no limitation on the authority of the state to make

a value judgment favoring childbirth over abortion and to implement that judgment by the allocation of the funds.

It is our position that at least at that time that the use of childbirth and normal childbirth were used by the Court interchangeably and that in any event the Court's ruling was with regard to there being no limitation on the authority of the state to make a value judgment favoring childbirth.

Similarly, with regard to the Maher test, the Maher test, as we understand it, was a test that used three words as the standard, the words of "unduly burdensome interference," an adverb, an adjective and a noun, and we would take the position that with all respect the adverb is no violative, that the adjective is not violative, and that the noun standing alone is not violative either, that there is indeed no interference by the state or by Congress here with the defined right to privacy.

QUESTION: Mr. Rosenblum, let me pose to you the same question as I asked one of the earlier counsel about the Stanley v. Georgia and Ridell cases which were decided within two or three years of each other. One held that there was a right to read in your own living room obscene material, anything else that you could get ahold of. Two or three years later, the same Court held that although you had that right, the government could prevent shipment for that

purpose and prevent you in effect from getting ahold of some types of that literature.

MR. ROSENBLUM: We take the position, Mr. Justice Rehnquist, that that is the very essence of the difference between the Court's ruling in Roe and the Court's ruling in Maher, and that it is --

QUESTION: Wasn't the Court's ruling in Roe based on privacy?

MR. ROSENBLUM: No, the Court's ruling in Roe was indeed based upon privacy and the ruling in Maher was based upon entitlement and there is a vast sea of difference between the issue of privacy in Roe as it bears upon the exercise of a prohibition on the part of the state and the privacy issue as it bears upon the matter of entitlement, for there was indeed an impingement upon privacy as the Court found in Roe because there was a prohibition in the case of Maher. In the present case there is no prohibition on the woman's right, there is no denial of the benefit on the basis that infringes the right to privacy in any way. There is no pledge of allegiance or statement of belief that is required to keep the job, there is no switching of political party allegiance that is required in this instance, there is no finding, there is no retaliation. The woman is completely free to procure an abortion without recrimination of any kind, and free to advocate abortion to the fullest

that she may wish. And finally there is no coercion in any sense of belief. There is in the fullest sense in the legislation involved here the recognition on the part of the legislatures of that basic right to privacy in the classical Brandeis notion. The woman is indeed being left alone. She is in no different a position after the legislation than she was before the legislation with regard to the exercise of that right.

QUESTION: That indeed is her complaint, she is being left alone, not being given any help.

MR. ROSENBLUM: Well, that would be a 100 percent correlation with the original conception of the right to privacy, that is, it is the right to be left alone --

QUESTION: The original conception was a tort and not a constitutional invasion in the original Brandeis article.

MR. ROSENBLUM: Even preceding, Mr. Justice Stewart, to the constitutional determination, the test that was established by this Court for interference is the test of an unduly burdensome interference. So presumably the Court would still allow even an interference and we would assert that in this instance there is not even that, that there is the full regard and the full preservation of the woman's right to privacy in this instance. The penalty analysis consequently is peculiarly inappropriate in the type of

situation in which there is full respect for the exercise of that interest.

Now, if the position that is advocated by the plaintiffs were to prevail here, the legislature would be reduced to the position of implementing a notion of neutral principles. There would be no purpose served in having elections, there would be no purpose served in stimulating people to participate in those elections. Quite to the contrary, the consequence would be that it would make no difference because any time a legislature wished to exercise the initiative or make value judgment to fund A, it would be required at the same time to fund non-A or anti-A and consequently to reduce the legislature to engaging in mere empty ritual.

I would like for a moment also to be able to address the question of the special problem involved in the appropriations issue. This is really an appropriations question that, with all due respect, our intervenors view as significantly different from what the Court faced in the Califano v. Westcott case. This is indeed a case in which Congress' appropriations power under --

QUESTION: Mr. Rosenblum, I take it the Solicitor General does not join you in this argument.

MR. ROSENBLUM: That is our understanding, Mr. Justice Blackmun, that the Solicitor General is representing

the Secretary of HEW and our intervening clients have an additional view on this subject.

QUESTION: Before we leave this, did I understand you to say that the legislatures have the constitutional authority to make value judgments?

MR. ROSENBLUM: Yes, Mr. Chief Justice.

QUESTION: And would you say that includes the right, the power to make value judgments that are erroneous judgments in the minds of perhaps a majority of the people?

MR. ROSENBLUM: Yes, I would, Mr. Chief Justice, and I believe furthermore that this was a subject that this Court assisted significantly the legislature with in its decision in Baker v. Carr and its progeny, that is to say that the Court helped the integrity of the legislative process by assuring the fairness of apportionment, a decision which has been effectively implemented and counsels the additional recognition that value judgments are essentially for the legislature to make rather than for this Court to make with regard to crucial and often divisive issues of national policy.

QUESTION: Who is supposed to correct the wrong, the erroneous value judgments of the legislature?

MR. ROSENBLUM: The people through the elective process, a process which was significantly improved, as I say, through the decisions following this Court's action in

Baker v. Carr. When of course there is a constitutional violation, then under the separation of powers system this Court must assert its authority. But we submit that under the circumstances of this case that there is no such occasion which calls for the interposition of the Court's authority.

QUESTION: Mr. Rosenblum, what was the case of controversy between your clients and the plaintiffs? You intervene as defendants?

MR. ROSENBLUM: We intervened as defendants in the action.

QUESTION: And why should you have been allowed to intervene at all?

MR. ROSENBLUM: Well, sir, the intervention was granted by --

QUESTION: I understand it was granted, but I wondered --

MR. ROSENBLUM: Well, on the ground in the cases of Dr. Williams and Dr. Diamond that they had an economic interest as physicians and as taxpayers in the case.

QUESTION: As taxpayers?

MR. ROSENBLUM: And that --

QUESTION: Do you think that would have given them standing in the case?

MR. ROSENBLUM: Well, there was no specification on the part of the Court, as we recall, of the precise reason

for --

QUESTION: I know, but that is a question that is always --

MR. ROSENBLUM: But the economic interest argument was similar to perhaps the mirror image of the economic interest argument that was made on behalf of the plaintiffs.

QUESTION: It may be the mirror image, but do you mean it is just the opposite. What you mean is they didn't have an economic interest.

MR. ROSENBLUM: No, they did have an economic interest because, as an obstetrician and a pediatrician, that they had an economic interest in the continuity of childbirth and the continuity of clients would be the product of such childbirth.

QUESTION: And that was the approach in the District Court?

MR. ROSENBLUM: That is indeed our understanding.

Now, with regard to the appropriations question, the difference between this situation and the situation in Westcott is emphatically that in the Westcott case there was agreement on the part of all of the parties that it was appropriate to reach the decision that was reached there. In this case, there is a clear-cut --

QUESTION: Mr. Rosenblum, two questions. Are you talking -- let me ask them both. First of all, are you

talking about the Congress or are you talking about the Illinois legislature; and, secondly, are you talking about remedy or are you talking about constitutional --

MR. ROSENBLUM: I am talking here especially about the issue of remedy, and I am talking here especially about the issue of Congress. But in this respect we are dealing with --

QUESTION: Congress and that of remedy.

MR. ROSENBLUM: Yes. In this respect we are dealing with the appropriations power of Congress and that while this Court does, of course, as it showed in the Lovett case, that it does have the power to declare an appropriations act unconstitutional, that nonetheless even in the Lovett case the Court did not order funding. The Court left that matter for determination by the Congress. And the difference between the Westcott case and the present case is that in Westcott there was agreement on the part of all of the parties with regard to the funding issue, and in this case there is clearly not such agreement and this would counsel additional restraint on the part of the Court in invoking its constitutional powers.

QUESTION: Wasn't there something in the Lovett case to the effect that if the money were not otherwise provided, Lovett and his colleague could go to the Court of Claims and sue the government? In other words, there is no

suggestion that in the Lovett case Congress could be compelled to see that they were paid?

MR. ROSENBLUM: That's quite correct, Mr. Chief Justice. There was I believe scrupulous regard for the constitutional separation of powers on this issue and for the fact that Article I, clause 9, paragraph 7 reserves the funding power to the Congress of the United States.

QUESTION: I understand though, Mr. Rosenblum, you said counsels restraint, not that, as in Westcott, extention could not be directed by this Court?

MR. ROSENBLUM: Well, we are saying that the Court itself does not have the funding powers, it may not --

QUESTION: I am asking you, may we do what we did in Westcott in this case if we find the Hyde amendment unconstitutional?

MR. ROSENBLUM: We would submit no, that is you may find the Hyde amendment unconstitutional, but if the Hyde amendment is found unconstitutional, the effect of that is that there are no funds for abortion unless and until Congress appropriates those funds.

QUESTION: That was true in the Westcott situation, too. What I am trying to get at is do you say constitutionally we may not do it or that --

MR. ROSENBLUM: I am saying that --

QUESTION: -- I thought you said we must exercise

restraint and not do it.

MR. ROSENBLUM: I am saying that in general restraint should be counseled here with regard to the finding of unconstitutionality on the part of Congress' action, but that even if there were to be a finding of unconstitutionality that the Court does indeed not have the power to order the funding --

QUESTION: Constitutionally we do not have the power?

MR. ROSENBLUM: That would be the position of the intervenors, Mr. Justice, that the matter of funding is reserved under the Constitution in our separation of powers system to Congress.

QUESTION: How about a state? How about directing a state legislature?

MR. ROSENBLUM: Well, the directing of a state legislature involves another issue, Mr. Justice Powell.

QUESTION: Is that involved here?

MR. ROSENBLUM: Well, it could conceivably be involved here.

QUESTION: Well, are you involving it?

MR. ROSENBLUM: No, because the question here would come back to the question that is more like the question in Stewart Machine about whether the state wishes to participate or not in the Social Security program, and if the state

wishes to participate it was indeed the finding by the Court in Stewart Machine that there is no coercion upon the state, and there is a vast difference, of course, between coercion and motivation.

QUESTION: Well, what if there is a declaration that the Illinois statute was unconstitutional?

MR. ROSENBLUM: If there was a declaration that the Illinois statute was unconstitutional --

QUESTION: What do we do then?

MR. ROSENBLUM: It would then be up to Illinois to decide whether it wished to continue in the Social Security program or not.

QUESTION: Could we attempt to -- would we have the power to direct them or not?

MR. ROSENBLUM: Well, I think you reserved that question in the Usery case, that at that time you I believe in Footnote 17 --

QUESTION: That may be, but what is your position? What is your submission on that question? Would we have the power or not?

MR. ROSENBLUM: My submission on the question, sir, would be that it would be inappropriate to order the state to do so in that situation because that would place in jeopardy the federal system.

QUESTION: Well, it might be inappropriate, but

do we have the power?

MR. ROSENBLUM: I believe that you do have the power with regard to the state. It is not a separation of powers issue as specifically spelled out under the first article dealing with the legislative process.

QUESTION: Let me pursue that. If the state having that order served on them, that command and the state does what President Jackson did many, many years ago, what can be done about it? How does a Court force the state legislature to appropriate money?

MR. ROSENBLUM: That of course is the very essence of both the problem and the strength of our separation of powers system, that the uses of restraint within that system are expected to work out political compromises and that the users of coercion have been rare within that system precisely because coercion itself is alien to the success of the political system, and this is one more reason for the counseling of restraint even while the calling into question of this Court's power to deal with the issue would be inappropriate.

QUESTION: Do you view the constitutional issues in the state case and the prior case as the same or different?

MR. ROSENBLUM: I view the constitutional issues in the state case and in the prior case as having great similarities, Mr. Chief Justice, but as having some

differences by virtue of the difference between the nature of the system of separation of powers and the system of federalism. These were problems that were alluded to in the Usery case and I believe the Court reserved judgment on the issue of the impact of funding on the application of Usery.

QUESTION: Mr. Rosenblum, how about language in Article I of the Constitution that no money shall be drawn from the public treasury save in exercise of the execution of an act of Congress?

MR. ROSENBLUM: Well, that is what I was relying on, Mr. Justice Rehnquist, for the special point about the sanctity of the appropriations power of Congress and the inappropriateness in response to my question from Mr. Justice Brennan -- the inappropriateness constitutionally of the Court's making a funding decision in this manner.

QUESTION: Before you sit down, there is one point of clarification. You have argued that the unduly burdensome interference test is not met, that there is no interference whatsoever here. Are you therefore arguing that there really is not call for any equal protection analysis when one differentiates between different kinds of medically necessary service, that there doesn't even have to be a rational basis --

MR. ROSENBLUM: No, there is a call for equal protection analysis and it is a call for the application of

the rational basis test. But as this Court pointed out in the Murglia case in its per curium decision, the rational basis test is a more relaxed test and under that relaxed test of rationality, what is looked for first is the rational decision which the Court found in Roe to be at least a rational matter for concern for the life of the fetus. Consequently, if there is a rational relationship between that and the legitimate state interest the state has in the preservation of the life of the fetus, then that should be sufficient to meet the rational relationship test under the Murglia standard.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Solicitor General.

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

ON BEHALF OF THE UNITED STATES

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

The position of the United States in this matter is a limited one at this point because historical events have caught up with us. We appear principally here because on remand from the Court of Appeals the District Court was instructed to consider the constitutionality of the Hyde amendments which had not been drawn into controversy before, the plaintiffs did not claim that they were harmed at all by

reason of the Hyde amendment, and the District Court, obedient to the mandate, considered it but nobody was contending that it impinged on any right of his and it has been our position in this matter that there is no case or controversy within the meaning of Article 3, and because of that reason we think that the appropriate step for this Court to take is to vacate the judgment of the District Court to the extent that it declares the Hyde amendment unconstitutional, and we would respectfully ask the Court to do that if the Court agrees with us that there is no case or controversy and then I would like to reserve the rest of the time that has been allotted to the government in case some other interest appears in the course of the argument.

Thank you.

QUESTION: You don't, Mr. Solicitor General, make any argument that the Court does not have jurisdiction by reason of --

MR. McCREE: We do not make that argument, no, we do not. This Court has jurisdiction.

QUESTION: And you suggest, I take it, in your brief that we would still entertain and reach the question about the state statute?

MR. McCREE: We thought that the Court certainly can and we suggested that it might in its discretion do so.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Bennett.

ORAL ARGUMENT OF ROBERT W. BENNETT, ESQ.,

ON BEHALF OF THE APPELLEES

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

Unlike the Solicitor General, appellant Miller and the intervening appellants gloss over the central fact established by the record. Both appellant Miller and the intervenors suggest in their brief that nothing much is at stake here. To read their briefs and those of their amici, and to listen to their arguments, one would conclude that pregnancy for the diabetic, the cancer sufferer, for women with hypertension, with sickle cell disease, with severe varicosities poses no unusual problem. All we are dealing with here, to listen to them, is with women who desire an abortion for convenience and with doctors who simply like to abort.

The record reveals a very different picture, one of multiple diseases and conditions posing very serious but not imminently life-threatening health problems for the pregnant woman where the option of an early abortion is medically essential.

Delay in abortion rapidly increases risks. The record reveals that withdrawing the medical option of

abortion will hit poor women and indigent teenagers especially hard.

QUESTION: Mr. Bennett, when you said the record, I take it you mean the record before the District Court?

MR. BENNETT: That is correct, Your Honor.

QUESTION: Supposing that either the Congress or the Illinois legislature had had legislative hearings on this and found conflicting evidence, some of it supporting the evidence found in the District Court in the Northern District of Illinois, some of its exactly contrary, and the committee reported a bill out which was the Hyde amendment. Do you think that the Northern District of Illinois could then hold its own hearing, hear these same witnesses and come to a different conclusion as to whether or not the bill was rational or whether or not one witness was to be believed and the other not?

MR. BENNETT: Under the constitutional test I would assume that the legislature would be given the benefit of serious factual doubts and that that would be the duty of the District Court. Under the statutory standard, the federal statute entrusts those judgments to professional standard review organizations. But I would point out that we have no such question here. There is absolutely no indication that the legislature had any health concern or health question in mind when it passed the statute it did.

QUESTION: Well, does it have to appear on the face of some sort of piece of paper that they had a health concern in mind in order to say that they did?

MR. BENNETT: No, it doesn't have to appear on the face but then evidence about whether there was a plausible argument for such a health interest would be admissible in a District Court. In this case, we do have paper and the state is very clear about the interest it was serving. It was attempting to stop abortions and it cared not about health or life of pregnant women.

QUESTION: Well, supposing that the legislators had gone back to their various constituencies and talked to the people who voted for or against the person who represent that district and acquired information in that manner, would you say that was totally irrelevant?

MR. BENNETT: No, it was not, Your Honor, but the very process of constitutional adjudication, unless facts are to be entirely irrelevant to constitutional adjudication must rely upon the adducing of factual evidence in a court. As I said, if there is a debatable issue the legislature would clearly have the benefit of the doubt. Here there is no debatable issue.

QUESTION: Do you suggest that there is a monolithic basic set of reasons by all the members of the legislature who voted this law?

MR. BENNETT: Well, I --

QUESTION: Are they all doing it for the same reasons?

MR. BENNETT: I would never make any such sort of cosmic judgment, but here we do have a statement by the legislature itself in legislation passed in 1975 and again in 1979 still on the books, embraced by the attorney for the state in his brief as a statement of the state's interest in, as he puts it, fetal life, and that is in the legislation. It is quoted in his brief and in ours. The legislature makes it clear that what it was doing was trying to effectuate the judgment that life begins at conception and that the fetus has the right to life from the moment of conception.

On the merits, appellees rely on a federal statutory and a federal constitutional argument that Illinois' withdrawal of medicaid funding for medically necessary abortions is illegal. The statutory argument has two aspects.

First, the state's obligation under Title 19, the medicaid provisions of the Social Security Act; and, second, the effect if any of the annual appropriation measures that have been referred to here at the Hyde amendments, Smith and Jones amendments occasionally.

On the Title 19 question, the Court of Appeals concluded that Illinois was required to provide funding for

all medically necessary abortions under its medical assistance programs. A dozen other lower courts have reached essentially the same conclusion.

A state medicaid plan is required by Title 19 to provide for the inclusion of at least the first five services included in section 1396d(a) --

QUESTION: Are you addressing yourself to the decision of the Court of Appeals on remand?

MR. BENNETT: Your Honor, we urge that the statutory ground here is available to the Court as an alternative ground for decision. I was simply characterizing where that statutory ground came from.

QUESTION: But it isn't something that we have granted certiorari on, it is something -- you are just urging that as an appellee to support the judgment?

MR. BENNETT: That is correct. As I was saying, the state medicaid plan -- the federal medicaid statute uses mandatory language to express a minimal state obligation, that to provide at least the first five services listed in section 1396d(a). Those mandatory services include physician services, in-patient and out-patient hospital services, and early and periodic screening for children, all the services that are necessary to provide medically necessary abortions.

QUESTION: But isn't the Hyde amendment a much

more specific statutory enactment than the one you referred to?

MR. BENNETT: The Hyde amendment is a very specific statutory amendment. Our argument with regard to it is that it does precisely what its words specifically say, that is to say restrict the use of federal funds and say nothing about the state's obligation under Title 19.

QUESTION: Well, does that make much sense?

MR. BENNETT: Well, I think it makes a lot of sense. Of course, there are multiple opinions from this Court and others that the duty of a court is to follow the plain meaning of statutory language. There is an exception stated to that, and that is where there would be an absurd result produced by following that language, but I don't think there is any absurd result here. Congress was acting in a particular context, the context of appropriation, and it took a particular action and its words are very clear about what it intended to bring about by that action.

In those circumstances, we argue that there really is no need to look to legislative history at all in order to determine what effect the Hyde amendment has on the state's Title 19 obligations.

QUESTION: Your position, Mr. Bennett, is that Title 19 in the absence of any Hyde amendment clearly requires the state to participate in the funding of therapeutic

abortions.

MR. BENNETT: Yes, that is our position, Your Honor.

QUESTION: And even after the Hyde amendment, which by its terms simply limited the appropriation of federal funds, Title 19 continued to impose such a requirement?

MR. BENNETT: That is correct, Your Honor.

QUESTION: Has any court agreed with you on that?

MR. BENNETT: Yes, there have been a cpuple of lower courts that have.

QUESTION: Well, what do you do with the Dickerson case in 310 U.S.?

MR. BENNETT: Oh, yes, I do recall the Dickerson case actually, Your Honor. It seems to me that there the intent to repeal was manifest, intent to impliedly amend a statute. Here we have examples, we have cited a number of examples inour brief, the Solicitor General has offered some others, in which there is not the assumed congruance between the funding formula under these cooperative federal-state programs and the underlying substantive obligations.

Congressman Hyde himself, in the course of the debates, bemoaned on occasion the fact that he couldn't get the substantive questions -- constitutional amendments, the Social Security Act -- before Congress, and so the Congress was acting in a particular context, that of

appropriations. If it is appropriate to look at the legislative history in order to determine what Congress accomplished by passing words that are quite clear, that legislative history really reinforces the conclusion we are urging.

What members of Congress most frequently said was that they were restricting the use of federal funds. Congress knows how to amend the Social Security Act if it wants to. The Bowman amendment, which has recently passed the House and is now in the Senate, an amendment to the Child Health Assurance Act, says, "Nothing in Title 19 shall be construed to require any state funds to be used to pay for any abortion." The Hyde amendment could have said that, but it did not, and this Court's quite recent decision in TVA v. Hill counsels strongly against finding an implied amendment of an underlying substantive statute brought about by an appropriations act.

The equal protection clause commands the same result. Our claim here is depicted by the appellants as a claim for affirmative subsidy of the exercise of a fundamental right. But the plaintiffs here are making no claim for an affirmative subsidy for the exercise of a fundamental right. Their claim is not to be discriminated against in violation of the equal protection clause, and the equal protection clause applies to state medical care statutes just as much as it applies to any other statute.

QUESTION: And now you are talking not about the federal statute but about the state statute?

MR. BENNETT: That is correct, Your Honor.

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, counsel.

(Whereupon, at 12:00 o'clock noon, the Court was in recess, to reconvene at 1:00 o'clock p.m., the same day.)

AFTERNOON SESSION -- 1:00 O'CLOCK P.M.

MR. CHIEF JUSTICE BURGER: Mr. Bennett.

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

Appellants' constitutional arguments are premised on an attempt to identify this case with the situation presented in Maher v. Roe, but this case is not like Maher v. Roe and it differs in ways that are central to the constitutional analysis that is appropriate.

In Maher, the plaintiff complained that the state favored normal childbirth over abortion, and this Court held that it was permissible to express a value judgment in favor of childbirth. The value judgment was expressed by use of a medical assistance program in which refusal to fund elective abortions did no violence whatsoever to the medical assistance goals on which that program was grounded.

If a woman desiring an abortion could not obtain one, she could go through normal childbirth with all medically necessary expenses paid and neither her life nor her health would be put in jeopardy.

QUESTION: What if we disagree with you on what the medical goals of the act are? What if we decided that like the District Court did, that it is not inconsistent with the act?

MR. BENNETT: I guess I --

QUESTION: Well, with the Hyde amendment it is not inconsistent according to the District Court.

MR. BENNETT: Well, if the Hyde amendment, Your Honor, modified the state's obligations under Title 19, then I would agree that the totality of the state judgment and the federal judgment was one which excluded those procedures. That is clear, but that would be true of any state discriminatory action. That does not prevent the application of the equal protection clause, the equal protection analysis. Indeed, the Constitution commands the application of the equal protection analysis.

QUESTION: One reason for saying it violated the equal protection clause wouldn't be that it was inconsistent with the statute, which is what you were just arguing.

MR. BENNETT: No. I'm sorry, I was trying to distinguish this case from the situation in Maher.

QUESTION: I know you were, yes.

MR. BENNETT: In Maher, the state could express a valud judgment but do no violence to any health goals, do no violence to the general area of activity in which it itself had decided that it would undertake a very substantial program.

QUESTION: Did Congress express a value judgment in the Hyde amendment, do you think?

MR. BENNETT: I am sure that in some sense Congress

expressed a value judgment. Indeed, I think Congress expressed a pure sort of value judgment that abortions were evil and hence federal money was not to be associated with that.

QUESTION: Mr. Bennett, I am a little bit confused, the same way my brother White is. Is this a statutory as opposed to a constitutional argument that you are making now, or is it a constitutional argument but somewhat different than the other parties have made?

MR. BENNETT: I take it that all constitutional arguments about discrimination must define the area in which the discrimination takes place and against which the discriminatory denial of a benefit must be judged.

QUESTION: Well, I would think my question could be answered yes or no, whether this is a constitutional argument you are now advancing or whether it is a statutory argument, that really there isn't any constitutional question here for us to decide because the Hyde amendment didn't change the requirements of the medicaid act.

MR. BENNETT: I advance both of those arguments, Your Honor.

QUESTION: Which were you advancing at the time Mr. Justice White asked --

MR. BENNETT: The constitutional argument. The state obviously has wide discretion to choose its spending

and regulatory activity, but when it does make a choice that choice defines the area of discrimination for equal protection purposes. And regardless of the equal protection standard that is to be applied here, what Illinois has done cannot stand. The abortion decision essentially touches the health of indigent pregnant women. That theme has been reiterated time and again in this Court's decisions, and indeed two or three provisions in abortion regulations that have been upheld have all been I would submit carefully sculpted so as to avoid any serious jeopardy to the pregnant woman's health.

Here Illinois refuses to fund medically necessary abortions in pursuit I would submit of no legitimate interest at all. This Court has found that the state has a legitimate interest in protecting potential life, but Illinois was not attempting to protect potential life. What Illinois was doing was trying to prevent abortions with the view that a fetus was a human life in the same sense that a two-year-old was and in the same sense that a 22 and a 44-year-old was.

If Roe v. Wade stands for any proposition, it must stand for the proposition that a state cannot proceed on that assumption when proceeding on that assumption will do substantial harm to the interests of others involved.

QUESTION: Your constitutional argument, Mr.

Bennett, is exclusively an equal protection clause argument, is it?

MR. BENNETT: Your Honor, the equal protection standards and the due process standards are obviously closely related.

QUESTION: Well, is it any part of your argument as indeed it seemed to me logically to be part of your brother's argument in the preceding case that a state is under a constitutional duty to finance abortions quite apart from whether or not it finances anything else?

MR. BENNETT: No, Your Honor, we make no such claim.

QUESTION: So it is basically an equal protection clause argument?

MR. BENNETT: It is a claim of discriminatory denial of public benefits.

QUESTION: That are granted to others for similar things?

MR. BENNETT: That is correct, for all medically necessary procedures.

QUESTION: It is not your claim that there is any duty on the state to finance abortions or indeed to finance anything for health?

MR. BENNETT: That is correct, Your Honor. But this is not just any discrimination that the state has

undertaken here.

QUESTION: According to you it is unconstitutional discrimination?

MR. BENNETT: Yes, but it is not even an ordinary unconstitutional discrimination because the discrimination here is against exercise of a fundamental right, a right that this Court has repeatedly recognized to be fundamental, that is the woman's interest in making the abortion decision for herself. Illinois --

QUESTION: But Maher said that Congress could do that or a state could do it in the first trimester anyway?

MR. BENNETT: No --

QUESTION: It said that Congress needn't fund elective abortions.

MR. BENNETT: That is correct and we are not claiming that --

QUESTION: Even though it treaspasses on the results in the inability, practical inability of a woman to make her own decision?

MR. BENNETT: That is correct, Your Honor, but in Maher there was no discrimination in the sense that the equal protection clause makes relevant because there was no jeopardy to the health care interest that the state had defined for itself, whereas here there is disastrous significance. The state will fund all other medically necesary

procedures but these it will not, and that is precisely a discrimination based on the woman's exercise of a fundamental right.

QUESTION: Could the Illinois legislature provide a comprehensive program for drug addiction and not provide a comprehensive program for alcohol addiction or vice versa?

MR. BENNETT: It might well, Your Honor, if it had a rational basis.

QUESTION: Well, just take it as it is.

MR. BENNETT: Well, I would have to know more about both drug addiction and alcohol --

QUESTION: Most of the time state legislatures don't go to any great extent to telling us why.

MR. BENNETT: I understand. Most state decisions to fund or not to fund are justifiable by a value judgment in choosing between two goals.

QUESTION: Well, could they make the choice of one and not include the other, that is my question?

MR. BENNETT: I would think they might well be able to, without knowing more about the particulars of alcoholism and narcotics addiction I hesitate to make an unequivocal judgment, but my hunch would be that a state could make such a distinction, and it would be justifiable by the value judgment that alcoholism is a more significant problem or less, depending on how the judgment came out, in our society

than was drug addiction. But the state here is acting on the assumption that this Court has held to be impermissible, namely that abortion is to be stopped and the people whose desired abortions the state has chosen to stop and discriminate against are those of a helpless group of indigent citizens, those that the legislative process most easily can ignore when it decides to launch upon a discrimination.

Justice Rehnquist asked this morning whether one had to assume thatlegislators were irrational in order to decide that they had adopted an irrational means to the pursuit of a legitimate objective. I would point out first of all that there is no legitimate objective here. But even if there were a legitimate objective that the Illinois legislature had in mind, it is not at all necessary to assume that legislators may or did have acted irrationally as individuals in order to conclude that the constitutional test of irrationality is met.

Ever since James Madison and probably a long time before, our constitutional theorists recognized that a legislative majority would often be tempted to ignore utterly the interests of a legitlative minority and the judgment on a legislative level that the costs that have been exacted from a minority are too great is what justifies the conclusion that what the legislature has done is an irrational means to pursue even of legitimate objectives.

QUESTION: May I ask --

QUESTION: That is easy to say in the case of the Bill of Rights where you can't say that because appointed counsel costs so much that the state legislature is going to get together and say we are not going to appoint it and we are not irrational and therefore this is okay. Obviously that would be the wrong result because that is specifically proscribed in the Sixth Amendment.

When you come to the equal protection clause and the standard is the so-called rational basis, then to say that the legislature has in mind a goal which is perfectly acceptable but was totally irrational in pursuing it, to my mind does mean that they belong in the bug house.

MR. BENNETT: Forgive me, Your Honor, I read your dissent in Weinberger v. Weisenfeld to reach exactly that conclusion about the discrimination there. I don't understand how a state could ever have a legitimate objective and there could be any content to the requirement that they pursue a rational means unless this Court at some level was willing to make a judgment that the state had simply gone too far in exacting costs from a helpless political minority. I take it that that is precisely what the rational basis test both under the equal protection clause and under the due process clause means.

But I would repeat that we are not here dealing

with an ordinary, even an ordinary unconstitutional discrimination but rather a discrimination against a woman's exercise of her fundamental rights.

QUESTION: Now comes a question I was about to ask -- you are arguing, as I understand it, that there is no legitimate state interest --

MR. BENNETT: That's correct, Your Honor.

QUESTION: -- did the District Court in your case agree with that?

MR. BENNETT: Yes, the District Court --

QUESTION: I understood the District Court recognized a legitimate state interest but weighed it against the interests for which you are advocating.

MR. BENNETT: I think the District Court's language sort of straddled the two conclusions.

QUESTION: But you can't point to any language in the District Court that goes as far as you have gone?

MR. BENNETT: Well, the District Court did characterize what the state had done as illegitimate. It said it had no legitimate interest in favoring potential life at the expense of.

QUESTION: No legitimate interest -- none of the legitimate interests identified by the Solicitor General? He identified two primarily, that is the state interest in bringing a fetus to a normal type birth and a state interest

in not expending public funds to further a cause which a large segment of the population perceives to be an immoral one. I am not passing a judgment on those interests. I am just asking whether or not the District Court below in this case found no such state interest.

MR. BENNETT: Well, all I can say, Your Honor, is the District Court did not articulate its conclusion in those terms. It sub-theoried its conclusion of illegitimacy within its conclusion of illegitimacy, it subsumed an articulation of the interests of the state was ignoring here.

QUESTION: Did the 1973 opinion say something, having something to say about the interest of the state in encouraging natural births and normal term births?

MR. BENNETT: Roe v. Wade and Doe v. Bolton did recognize a legitimate state interest in furthering potential life, but those opinions also addressed the balance that a state was permitted to make in even the third trimester when the state's interest was held there to be compelling and concluded that even in that third trimester a state could not forbid abortion when that would pose jeopardy to the pregnant woman's life or health. That I think is essentially equivalent to the exact rationality balance that we are asking this Court to make even on the assumption that Illinois' interest here was to further potential life which it was not. Illinois wanted to stop abortions and it was willing to adopt

a health care funding program to do that because that was the only means that it saw available to it, and the victims of that desire are precisely the most helpless of Illinois' citizens.

QUESTION: What was the state interest involved in Maher v. Roe? We found a legitimate state interest in that case.

MR. BENNETT: That is correct, you found a legitimate state interest in furthering potential life --

QUESTION: That's right.

MR. BENNETT: -- and in expressing a value judgment in favor of childbirth. The potential life I am suggesting is not involved here because Illinois was not actually pursuing that interest.

QUESTION: Does the Illinois record, the legislative record support your view as to what its purposes were?

MR. BENNETT: Yes, Your Honor, the Illinois legislative record supports that view, but you don't even have to resort to that. Illinois in 1975 and again in 1979 adopted legislation which articulates that view of when life begins and of the interest that it is furthering and the state in its brief embraces that as a statement of what they refer to as the state's interest in fetal life.

Maher v. Roe, as you just indicated, spoke of a state favoring normal childbirth, and appellants would like

to expand that language to include all childbirth and then claim that Illinois is serving that interest. But Illinois has no actual interest in increasing the number of unwanted births. Illinois' medicaid program even funds non-therapeutic sterilizations. What Illinois is doing is effectively coercing indigent women to have abnormal childbirths sometimes resulting in death.

The United States' argument is that death is okay, too. The United States says that it would be perfectly rational for a state to decide, for the Congress or for a state to decide not to fund any abortions under its medical assistance program.

QUESTION: I thought you agreed that it would be perfectly constitutional for a state to decide not to fund any health care of any kind?

MR. BENNETT: I do agree.

QUESTION: Well, then that is involved there, isn't it?

MR. BENNETT: That is involved there, but deaht is involved in all sorts of things that the states --

QUESTION: We are all mortal.

MR. BENNETT: That's correct, but also all sorts of judgments to fund or not to fund that a state makes may have implications for the longevity of the population, but the equal protection clause insists that we look at the

context in which the state discrimination takes place, for then the state has itself told us a great deal about the things that it values and here the state has said for everyone else health is of surpassing significance but not for this one group that we will disfavor. That is a classic, I would submit, a classic case of discrimination where the equal protection clause test comes into play.

QUESTION: What if the Illinois legislature had said that we will fund all treatments medically necessary except for rabies and that we have come to the conclusion from evidence that the chances of survival of rabies are one in a hundred once a person gets it and we just don't want to spend our money, that a lot of money can be spent that way and it just isn't worth it, even though we realize that people might recover if they were treated but it would be only one out of a hundred?

MR. BENNETT: There being no fundamental right involved, I take it that only the rational basis test would then be properly applied and that state interest in conserving the funds so as to maximize the health care benefit in its program would be a rational basis. I take it that his Court's decision in Geduldig rested on an analysis similar to that. But here of course what Illinois does costs the state substantial funds, thus not only exacerbating the health problems of pregnant women when they cannot obtain the

necessary abortion, but of the health problems of others as well because the state actually -- the program actually costs more because of the refusal to fund medically necesary abortions. So that justification, even if it had motivated the state, is not available here and, of course, it did not motivate the state. Illinois --

QUESTION: Is your equal protection argument confined to what you submit is unconstitutional discriminatory classifications of all other health care and of not giving health care to in the case of abortions, or is it -- do you refine it as between men and women and between teenagers and adults and so on?

MR. BENNETT: No, Your Honor, we make no claim that there is sex discrimination here, for instance, though I would argue that the actual real life impact of discrimination is relevant to the analysis.

QUESTION: But you don't?

MR. BENNETT: I don't claim any special constitutional scrutiny is involved here because of a discrimination on the basis of sex. I do not think that there was --

QUESTION: So it is purely a discrimination as between all other health care and health care which would be implicated in the financing of abortions?

MR. BENNETT: That is correct.

QUESTION: Therapeutic abortions.

MR. BENNETT: That is correct.

QUESTION: You confine your equal protection case to that.

MR. BENNETT: That's correct.

QUESTION: Mr. Bennett, I understood you to say that the program as a whole costs more money because they deny funding for abortions. Does the record establish that because it is entirely possible that there would be fewer -- that the number of unfunded abortions doesn't necesarily mean all those want to full term, there could be abortions that were obtained by other means.

MR. BENNETT: The record quite conclusively establishes it. The state doesn't dispute it. The United States doesn't dispute it. The intervenors do dispute it and --

QUESTION: Not just a comparison between abortion and childbirth but the total program is more expensive because of this exception.

MR. BENNETT: That is correct, Your Honor.

QUESTION: Well, that is assuming the same number of pregnancies.

MR. BENNETT: No, I don't think it is necessary to assume --

QUESTION: At least arguably if this statute is upheld, there will be fewer pregnancies.

MR. BENNETT: Yes. Well, I understand the argument. Mr. Hardy made that argument in an Arizona law journal article that the intervenors have repeatedly relied upon, although I think that in their most recent submissions they have somewhat backed away from it and perhaps that is a sign of the weakness of the argument.

QUESTION: Of course we don't know but at least arguably this might inhibit carelessness, might it not?

MR. BENNETT: It arguably might, but the amount of carelessness that it would have to inhibit --

QUESTION: Who knows?

MR. BENNETT: Well, but it would have to be enormous in order to make this action not costly for the state. Mr. Hardy's argument is based on some studies done in Japan and in Eastern Europe where abortions were made available freely, not in response to medical necessity, and even there the mathematics that he employs comes out a little strained. We address this argument at more length in some of our briefs in the lower court and our brief in this Court does refer to those submissions which are in the record.

QUESTION: Let me go back again to the hypothetical about the program for care of drug addicts. Would you think it is reasonable from general knowledge available to everybody that there is a higher incidence of drug addiction among the youth and the poor in this country than other

categories?

MR. BENNETT: It could be.

QUESTION: Well, it has been widely stated by many experts, assume that to be true, and then does not the denual of drug addiction programs have the same or similar equal protection clause that you argue here?

MR. BENNETT: No, I don't think so, Your Honor. The state has to make judgments about some activities that it will undertake and others that it will not. Here the state has made that judgment and it is within the context, within a state defined context that the discrimination takes place. If drug addiction problem were part of a larger whole in which it made sense to view it as an integral part of that larger whole and the state discriminated against drug addiction, then we would have the classical equal protection questions presented.

QUESTION: Where you say that although the state has adopted both the affirmative part and the negative part, the negative part simply is inconsistent with the affirmative part?

MR. BENNETT: When the state discriminates --

QUESTION: That is what it amounts to, isn't it?

MR. BENNETT: No. Here the negative part I repeat is in the service of an illegitimate interest. But if we were to assume that it was in pursuit of a legitimate

interest, then the state would be permitted under the equal protection clause to call upon that interest in order to provide the justification for the discrimination. But the judgment of whether you have a sufficiently rational relationship to the pursuit of a legitimate interest is one that the equal protection clause commands this Court to make.

The United States' understanding of the equal protection clause in the content of a funding program such as this I submit drains that clause of all human content, but legislation serves human ends and its rationality must be judged in terms of human costs.

If there are no more questions, Your Honors, for the reasons stated I would ask that the judgment of the court below be affirmed.

Thank you.

MR. CHIEF JUSTICE BURGER: You have about three minutes remaining, Mr. Wenzel.

ORAL ARGUMENT OF WILLIAM A. WENZEL, III, ESQ.,

ON BEHALF OF APPELLANT MILLER ET AL -- REBUTTAL

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

We would like to reply to three points. The first point regards the record in the case below involving the effectiveness of alternative treatment. The record does contain the affidavit of Dr. Jasper Williams, Appendix 97,

and Dr. Williams did state in his affidavit that alternatives to abortion were available which were effective and as effective the state submits that no purposeful discrimination was intended by the Illinois General Assembly to harm state's interest or the interests of maternal health.

This is also supported in the appendix at 138 by a survey put together by the Center for Disease Control, and that survey concluded that there was no increase in abortion related complications observed after the implementation of the Hyde amendment in the project.

It is the willingness of the State of Illinois to fund alternatives to abortion which we believe satisfies within the context of a non-comprehensive medical assistance program for the indigent, the standard of reasonableness --

QUESTION: According to at least one of the amicus briefs, that is precisely the constitutional vice of what Illinois has done when it finances sterilization, for example.

MR. WENZEL: The equal protection discrimination that I understand the plaintiffs to be making is that Illinois has selected out of all the necessary medical categories of care solely medically necessary abortions. We have argued --

QUESTION: And does finance alternatives.

MR. WENZEL: And does finance alternatives, but

that is not an accurate statement of Illinois' practice nor is it an accurate statement of Illinois' obligations under the medicaid act. Illinois can, as this Court recognized in Beal, select which procedures to fund. The Court expressly stated that the state need not fund each and every kind of care or each and every procedure available. It is that discretion within the medicaid program, coupled with Illinois' reasonable efforts to fund alternatives to complications of pregnancy which satisfies the rational basis test for equal protection purposes.

The second point we want to make is that contrary to the suggestions of the Solicitor General, the Hyde amendment is at issue in this case. It is logically and we feel inextricably interrelated with plaintiffs' statutory claims, it was placed in issue by all of the defendants in their motions for summary judgment and finally it is before this Court insofar as the final judgment order on review incorporated in the statutory rulings.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General.

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

ON BEHALF OF THE UNITED STATES

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

There are two points I would like to make because

I do not wish to permit two assertions to go unanswered. One assertion that was made was that the United States says that death is okay, and I think this was the contention that I heard. This of course is not so. The other related contention was that the United States places fetal life above maternal life, and that explicitly is not so because the first exception in the Hyde amendment provides that funding is available when the life of the mother would be endangered if the fetus were brought to term.

The second point I wish to make is that since the entire medicaid act was passed to help indigents, drawing a line within the program then doesn't punish any of them.

With those two comments, we will rest on our brief. Thank you.

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

(Whereupon, at 1:34 o'clock p.m., the case in the above-entitled matter was submitted.)

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