IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1268

PATRICIA R. HARRIS, Secretary of Health, Education, and Welfare, *Appellant,*

v.

CORA McRAE, et al.

PATRICIA R. HARRIS, Secretary of Health, Education, and Welfare, *Appellant,*

v.

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE

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(1)

OPINIONS BELOW

The opinion of the district court on remand is not yet reported.[1] The initial opinion of the district court (76-1113 J.S. App. 1a-25a) is reported at 421 F. Supp. 533.

JURISDICTION

The judgments of the district court (A. 86-89) were entered on January 15, 1980. On the same day, the Secretary of Health, Education, and Welfare filed a notice of appeal to this Court (A. 19), and, on February 11, 1980, the Secretary applied for a stay pending disposition of her appeal. On February 19, 1980, this Court denied the stay, treated the application as a jurisdictional statement, and noted probable jurisdiction (A. 332). This Court's jurisdiction rests on 28 U.S.C. 1252.

QUESTIONS PRESENTED

1. Whether the Hyde Amendment violates the equal protection component of the Due Process Clause of the Fifth Amendment by authorizing the use of federal funds for medically necessary services generally and for abortions only "where the life of the mother would be endangered if the fetus were carried to term" but not for other "medically necessary" abortions.

2. Whether, by restricting the availability of federal funds for "medically necessary" abortions, the

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[1] On March 17, 1980, the Court granted the Secretary's motion to dispense with the printing of the district court's opinion and accompanying annex.

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.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in the appendix to this brief (App., *infra*, 1a-2a).

STATEMENT

1. Title XIX of the Social Security Act, as amended, 42 U.S.C. 1396 *et seq.*, establishes a medical assistance program, commonly known as "Medicaid," under which the federal government provides financial assistance to those states that choose to reimburse the costs of medical treatment for needy persons. For a state to qualify for federal assistance under Title XIX, its Medicaid plan must include coverage for the "categorically needy" [2] for at least five gen-

[2] The "categorically needy" group includes families with dependent children eligible for assistance under the Aid to Families with Dependent Children program (42 U.S.C. 601 *et seq.*) and the aged, blind, and disabled eligible for benefits under the Supplemental Security Income program (42 U.S.C. 1381 *et seq.*). See 42 U.S.C. 1396a(a)(10)(A). The states may also choose to extend Medicaid coverage to other persons, termed the "medically needy," who would be eligible for AFDC or SSI payments if they did not have income or resources in excess of the statutory standards and who have insufficient income and resources to pay for necessary medical care. See 42 U.S.C. 1396a(a)(10)(C).

eral categories of medical treatment: (1) inpatient hospital services, (2) outpatient hospital services, (3) other laboratory and x-ray services, (4) skilled nursing facilities services, periodic screening and diagnosis of children, and family planning services, and (5) physician's services. 42 U.S.C. 1396a(a)(13)(B) and 1396d(a)(1)-(5).

The Act does not expressly require that participating states pay for the cost of abortions or any other particular medical procedures,[3] but the statute does provide that Medicaid beneficiaries must receive, at minimum, services within the categories specified above. A federal regulation under the Act provides that state Medicaid agencies "may not arbitrarily deny or reduce the amount, duration, or scope of a required service [*i.e.*, a service within any or the five mandatory categories] * * * to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition." 42 C.F.R. 440.230(c)(1), as corrected, 43 Fed. Reg. 57253 (Dec. 7, 1978).

With respect to the persons eligible for Medicaid benefits and the level of payments available, the Act requires each state Medicaid plan to "include reasonable standards * * * for determining eligibility for

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[3] Indeed, when Title XIX was added to the Social Security Act in 1965 (79 Stat. 343), most "medically necessary" abortions were illegal in most states. *Roe* v. *Wade*, 410 U.S. 113, 118 & n.2 (1973). This Court's rulings in *Wade* and its companion case, *Doe* v. *Bolton*, 410 U.S. 179 (1973), established the constitutional right of a woman to seek an abortion during the first trimester of pregnancy.

and the extent of medical assistance under the plan which * * * are consistent with the objectives of [Title XIX] * * *." 42 U.S.C. 1396a(a)(17)(A). An implementing regulation permits participating states to place reasonable limits on the amount of a particular kind of care that will be covered. 42 C.F.R. 440.230(b). The same regulation authorizes state agencies to "place appropriate limits on a service based on such criteria as medical necessity * * *." 42 C.F.R. 440.230(c)(2), as corrected, 43 Fed. Reg. 57253 (Dec. 7, 1978).

2. In September 1976, Congress limited the availability of federal funds to reimburse the cost of medically indicated or "therapeutic" abortions. Section 209 of Pub. L. No. 94-439, the appropriations act for the Department of Health, Education, and Welfare for fiscal year 1977, provided that "[n]one of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term." 90 Stat. 1434. This provision is commonly known as the Hyde Amendment, after its original congressional sponsor, Representative Henry J. Hyde of Illinois.

On December 7, 1977, Congress passed a joint resolution providing appropriations for HEW for the last 10 months of fiscal year 1978 and including a modified version of the Hyde Amendment to govern the availability of federal Medicaid funds for abortions during that period. Pub. L. No. 95-205, 91 Stat.

1460; 123 Cong. Rec. S19439-S19446, H12769-H12776, H12827-H12831 (daily ed. Dec. 7, 1977).[4] The modified Hyde Amendment listed two additional exceptions to the general prohibition against the use of appropriated funds for abortions. It stated:

> [N]one of the funds provided for in this paragraph shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

This revised version of the Hyde Amendment was repeated in the HEW appropriations act for fiscal year 1979 (Pub. L. No. 95-480, 92 Stat. 1586).

In large measure because the Senate and the House of Representatives could not agree on whether this modified approach to federal funding for abortions should be retained for fiscal year 1980, Congress was unable to enact a new annual appropriations bill for

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[4] HEW appropriations for October and November 1977, the first two months of fiscal year 1978, were provided by joint resolutions that simply continued in effect the original version of the Hyde Amendment passed the previous year. Pub. L. No. 95-130, 91 Stat. 1153; Pub. L. No. 95-165, 91 Stat. 1323.

HEW by the October 1979 deadline.[5] Instead, on October 12, 1979, Congress adopted a joint resolution providing appropriations for HEW for the period ending November 20, 1979, and deleting the third exception in the modified Hyde Amendment language originally enacted in December 1977. Pub. L. No. 96-86, 93 Stat. 659, 662; 125 Cong. Rec. H9075-H9082, S14491-S14497 (daily ed. Oct. 12, 1979). The new appropriations measure stated:

> [N]one of the Federal funds provided by this joint resolution * * * shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service.

After further debate, the same language was included in another joint resolution adopted by Congress on November 16, 1979, making appropriations for HEW for the remainder of fiscal year 1980. Pub. L. No. 96-123, 93 Stat. 925, 926; 125 Cong. Rec. S16882-S16885, H10953-H10960 (daily ed. Nov. 16, 1979).

Thus, the currently effective statutory limitation on the use of federal funds for abortions under the

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[5] The details of the legislative disagreement during the summer of 1979 are summarized in *United States* v. *Zbaraz*, No. 79-491, Jurisdictional Statement 6 n.3. See also the annex to the district court's opinion at pages 293-313.

Medicaid Act is broader than the original Hyde Amendment in that it permits the use of federal funds to terminate pregnancies resulting from promptly reported rape or incest. It is narrower than the modified version of the Hyde Amendment that governed during fiscal years 1978 and 1979 in that it does not permit the use of federal funds to terminate pregnancies that will result in severe and long-lasting damage to the mother's physical health.

3. These consolidated cases were filed in the United States District Court for the Eastern District of New York on September 30, 1976, the day that Congress enacted the initial version of the Hyde Amendment. The original plaintiffs in No. 76-C-1804 were Cora McRae, a New York resident and Medicaid recipient who was in the first trimester of pregnancy and wished to have an abortion but did not allege that the procedure was medically necessary or that continuation of the pregnancy would endanger her life;[6] Irwin B. Teran, a physician who performs abortions for Medicaid recipients;[7] and Planned

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[6] Plaintiff McRae sued on her own behalf and on behalf of "the entire class of pregnant or potentially pregnant women in the State of New York who are eligible for Medicaid, who with their physician have decided on abortions, for whom abortions are medically appropriate and who are prevented from obtaining medical termination of their pregnancies by the Hyde Amendment" (A. 33).

[7] Plaintiff Teran sued on his own behalf and on behalf of "the entire class of duly licensed physicians and surgeons certified for participation in Medicaid and presently performing or desiring to perform the termination of pregnancies of members of the * * * class of women" named in the complaint (A. 34).

Parenthood of New York City, a non-profit corporation that provides family planning services and operates clinics where abortions are performed for Medicaid recipients. The plaintiff in No. 76-C-1805 is the New York Health and Hospitals Corporation, a public benefit corporation that operates 16 municipal hospitals, 12 of which provide abortion services.

Both complaints named the Secretary of Health, Education, and Welfare as the sole defendant. On October 19, 1976, the district court permitted Representative Henry J. Hyde of Illinois, Senator James L. Buckley of New York, and Senator Jesse A. Helms of North Carolina to intervene as defendants. The court also appointed Isabella M. Pernicone as the guardian *ad litem* for unborn children and permitted her to intervene as a defendant.[8]

Plaintiffs sought to enjoin enforcement of the Hyde Amendment. They complained that by prohibiting federal financial assistance for abortions except where the mother's life was in danger but at the same time permitting federal payments for costs associated with childbirth, the statute violated the equal protection principle embodied in the Due Process Clause of the Fifth Amendment. Plaintiffs asserted that the Hyde Amendment drew an invidious distinction between Medicaid recipients who carry their pregnancies to term and Medicaid recipients who choose to have an

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[8] Under Rule 10(4) of the Rules of this Court, the intervenor-defendants are appellees in the Secretary's direct appeal to this Court. When the term "appellees" is used in the remainder of this brief, however, it refers only to the parties who were plaintiffs in the district court.

abortion for any reason other than the preservation of their own lives. (A. 37). They further contended that the statute deprived the plaintiff pregnant women of "their right to control their own persons, and to privacy and liberty in matters relating to marriage, sex, procreation and the family, all in violation of the Fourth, Fifth and Ninth Amendments to the Constitution" (A. 37). In addition, the complaint alleged that the Hyde Amendment deprived the plaintiff physicians of "the right to practice medicine in accordance with their best medical judgment as guaranteed by the First, Fourth, Fifth and Ninth Amendments to the Constitution" (A. 39). Finally, plaintiffs maintained that the Amendment served no secular purpose and therefore constituted an establishment of religion, in violation of the First Amendment (A. 40).

4. After a hearing, the district court entered a preliminary injunction on October 22, 1976, prohibiting the Secretary from enforcing the Hyde Amendment and requiring him to "[c]ontinue to authorize and expend federal matching funds for abortions provided to women eligible for Medicaid at the proportionate level and in accordance with the standards under which they were being paid before enactment of" that statute. *McRae* v. *Mathews*, 421 F. Supp. 533, 543, reprinted in 76-1113 J.S. App. 23a-24a. In addition, the court ordered the Secretary to give notice of the injunction to all state and local Medicaid authorities and providers (*id.* at 24a-25a). The court certified No. 76-C-1804 as a class action on behalf of

(1) pregnant or potentially pregnant Medicaid-eligible women in the State of New York who decide to have an abortion within the first 24 weeks of pregnancy; and (2) duly-licensed and Medicaid-certified providers of abortion services to Medicaid-eligible pregnant women (*id.* at 23a).

On October 29, 1976, the district court denied the Secretary's motion to amend the preliminary injunction to provide that Medicaid funds paid to the states as a result of the court's order would be subject to recoupment if the order were reversed on appeal (76-1113 J.S. App. 26a-29a). At the same time, the court observed that, because its preliminary injunctive order was not the final judgment, the accompanying opinion "did not explicitly hold that [the Hyde Amendment] was unconstitutional." The court added, however, that such a holding was "implicit in the granting of the injunction" (*id.* at 29a).

The Secretary appealed to this Court and suggested that the case be held for disposition in light of two other abortion funding cases then pending before the Court, *Maher* v. *Roe*, 432 U.S. 464 (1977), and *Beal* v. *Doe*, 432 U.S. 438 (1977). After deciding *Maher* and *Beal*, this Court vacated the injunction in *McRae* and remanded the case for further consideration in light of those decisions.. *Califano* v. *McRae*, 433 U.S. 916 (1977). See also *Califano* v. *McRae*, 434 U.S. 1301 (1977) (Marshall, Circuit Justice).

5. On remand, the district court permitted several additional plaintiffs to intervene. Plaintiffs Jane Doe, Mary Doe, Susan Roe, and Ann Moe are Medicaid re-

cipients who wished to have abortions that allegedly were medically necessary but did not qualify for federal funding under either the 1977 or the 1978 version of the Hyde Amendment (A. 60-61).[9] Plaintiffs Jane Hodgson, David Bingham, Hugh Savage, Edgar Jackson, and Lewis Koplik are physicians who practice in states other than New York and who perform abortions for Medicaid recipients (A. 62-63).[10] Plaintiff Women's Division of the Board of Global Ministries of the United Methodist Church is the policy-making body for United Methodist Women, an organization whose membership allegedly includes (1) "poor, pregnant women who are dependent on Medicaid to obtain safe, legal abortions, whose ability to

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[9] Plaintiff Jane Doe is a resident of Connecticut and the other three named pregnant women who intervened as plaintiffs on remand are residents of Minnesota. Together with plaintiff McRae, these plaintiffs asked the district court to certify a class of all "pregnant or potentially pregnant women who are eligible for medical assistance provided under their state plans; who with their physicians have decided on abortions; for whom abortions are medically necessary; who have been, are or will be prevented from or impeded in obtaining medical termination of their pregnancies by the Hyde Amendments" (A. 65). The amended complaint asserts that the class includes women "of all religious and nonreligious persuasions and beliefs who have, in accordance with the teaching of their religion and/or the dictates of their conscience determined that an abortion is necessary" (*ibid.*). None of the named plaintiffs claimed that she personally sought an abortion for reasons of religion or conscience. See A. 60-61.

[10] Together with plaintiff Teran, the intervening physician plaintiffs sought to proceed as representatives of the class of all "duly licensed and Medicaid certified providers of abortional services to eligible women" (A. 66).

obtain such is impeded or precluded by the Hyde Amendments, and who object to having someone else's religious beliefs about abortions imposed upon them thereby inhibiting their freedom of conscience" and (2) "federal taxpayers who object to the Hyde Amendments as violating the First Amendment's limitations on the taxing and spending powers" (A. 63-64). Plaintiffs Theressa Hoover and Ellen Kirby are officers of the Women's Division and federal taxpayers (A. 64-65).

In January 1978, plaintiffs filed an amended complaint challenging the various versions of the Hyde Amendment on numerous grounds. They alleged first that the Hyde Amendment, to the extent it permits states participating in the Medicaid program to refuse to fund some medically necessary abortions, violates the Medicaid Act (A. 72-73). In the alternative, they argued that, notwithstanding the Hyde Amendment, participating states remain obligated under the Medicaid Act to fund all medically necessary abortions (A. 72, 73).

Plaintiffs further asserted that the Hyde Amendment violates the equal protection component of the Due Process Clause of the Fifth Amendment in several ways: (1) by distinguishing between medically necessary services generally and medically necessary abortions; (2) by distinguishing between women, for whom federal Medicaid funds are not available for one kind of medically necessary care, and men, for whom federal Medicaid funds are generally available for medically necessary services; (3) by distinguish-

ing between women who choose to carry their pregnancies to term and women who seek to terminate their pregnancies by abortion; (4) by distinguishing between indigent women and women who are able to pay for abortions; and (5) by distinguishing between women who are members of racial or ethnic minorities and other women (A. 72-76). Plaintiffs also alleged that the Hyde Amendment "punishes" pregnant women who choose to exercise the right to obtain an abortion guaranteed by the First, Fourth, Fifth, and Ninth Amendments to the Constitution (A. 75).

With respect to the plaintiff class of physicians, the amended complaint contended that the Hyde Amendment denies those doctors "the right to practice medicine in accordance with their best medical judgment" and also deprives them of "substantial income from abortion services normally rendered to Medicaid-eligible women" (A. 77).

Finally, plaintiffs asserted that "[t]here is no secular justification for the Hyde Amendments" and that the federal abortion funding restrictions "constitute enactment into law of one religious belief respecting abortions and the nature of the fetus and the imposition of that religious view on Medicaid-eligible women who would otherwise choose abortion in accordance with their religious or nonreligious beliefs" (A. 79). On this basis, plaintiffs maintained that the Hyde Amendment violates both the Establishment Clause and the Free Exercise Clause of the First Amendment.

6. Between August 1977 and September 1978, the district court conducted a trial during which plaintiffs introduced voluminous evidence concerning the medical reasons for abortions and the diverse religious views on the subject.[11] On January 15, 1980, the district court issued an opinion that summarized the evidence at length and invalidated all versions of the Hyde Amendment on equal protection grounds. The court held that the statutory distinction between medically necessary abortions and other medically necessary services bears no rational relationship to any legitimate governmental interest (Opinion 310-315, 316-323). In the court's view, when an abortion is "medically necessary to safeguard the pregnant woman's health, * * * the disentitlement to medicaid assistance impinges directly on the woman's right to decide, in consultation with her physician and in reliance on his judgment, to terminate her pregnancy in order to preserve her health" (*id.* at 313). In addition, citing a provision in the Adolescent Health Services and Pregnancy Prevention and Care Act, 42 U.S.C. (Supp. II) 300a-21(a), the court ruled that the Hyde Amendments are invalid because they "clearly operate to the disadvantage of one suspect class, that is to the disadvantage of the statutory class of adolescents at a high risk of pregnancy * * * and particularly those seventeen and under" (Opinion 315).

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[11] The record contains more than 400 documentary and film exhibits. The transcript of the district court proceedings exceeds 5,000 pages.

Turning to plaintiffs' First Amendment challenges to the abortion funding restrictions, the court rejected the Establishment Clause argument but held that the Hyde Amendments violate the constitutional right to the "free exercise" of religion (Opinion 323-328). Although the court acknowledged that the purpose of the Hyde Amendments was not "identifiably religious" and did not become so merely because "the most vigorous spokesmen for [the statutes] put their case in religious terms" (*id.* at 324), it ruled that the Amendments "do raise grave First and Fifth Amendment problems affecting individual liberty" (*id.* at 326). Relying on evidence regarding the teachings of Conservative and Reform Judaism, the American Baptist Church, and the United Methodist Church (*id.* at 178-199), the court stated that, in some cases at least, a pregnant woman's decision to have a medically necessary abortion may be based on religious considerations. The court declared that "[t]he liberty protected by the Fifth Amendment extends certainly to the individual decisions of religiously formed conscience to terminate pregnancy for medical reasons" (*id.* at 327-328). The opinion concluded with the following paragraph (*id.* at 328):

> A woman's conscientious decision, in consultation with her physician, to terminate her pregnancy because that is medically necessary to her health, is an exercise of the most fundamental of rights, nearly allied to her right to be, surely part of the liberty protected by the Fifth Amendment, doubly protected when the liberty is exer-

> cised in conformity with religious belief and teaching protected by the First Amendment. To deny necessary medical assistance for the lawful and medically necessary procedure of abortion is to violate the pregnant woman's First and Fifth Amendment rights. The irreconcilable conflict of deeply and widely held views on this issue of individual conscience excludes any legislative intervention except that which protects each individual's freedom of conscientious decision and conscientious nonparticipation.

Accordingly, the district court ordered the Secretary to "[c]ease to give effect" to the Hyde Amendments insofar as they forbid federal Medicaid payments for abortions that are "necessary in the professional judgment of the pregnant woman's attending physician exercised in the light of all factors, physical, emotional, psychological, familial, and the woman's age, relevant to the health-related well-being of the pregnant woman" (A. 87). The court directed the Secretary to "[c]ontinue to authorize the expenditure of federal matching funds" for such abortions (A. 87). In addition, the court ordered the Secretary to inform HEW's regional directors of the court's decision and to require them to instruct participating states to notify all Medicaid providers of the existence of the injunction (A. 87). Finally, the court recertified the *McRae* case as a nationwide class action on behalf of all Medicaid-eligible pregnant women who wish to have medically necessary abortions and all Medicaid-certified providers of abortion services for such women (A. 92-93).

SUMMARY OF ARGUMENT

I

The Hyde Amendment is a legislative measure rationally designed to further the legitimate governmental interest in preserving potential human life and encouraging childbirth. Medically necessary services other than abortion do not involve the termination of potential human life, and Congress therefore had a rational basis for permitting Medicaid payments for abortion on a more limited basis than for other medically necessary services. The district court's decision to the contrary is similar to the ruling of another district court in *Zbaraz* v. *Quern*, 469 F. Supp. 1212 (N.D. Ill.), question of jurisdiction postponed, Nos. 79-4, 79-5, and 79-491 (Nov. 26, 1979), and we rely primarily on the government's brief in the latter case to demonstrate the flaws in the district court's "equal protection" reasoning here.

Although the opinion of the district court is somewhat cryptic, the court may have intended to invalidate the Hyde Amendment on the independent ground that the statute discriminates impermissibly on the basis of age. That ruling is also erroneous. The Hyde Amendment treats pregnant women of all ages identically, and there is no indication that the statute was passed in order to impose a special disadvantage on persons below the age of 21. If teenage women are disproportionately represented within the group directly affected by the Hyde Amendment, it is because they are more likely to become preg-

nant and to seek abortions, not because Congress adopted a statutory classification based on age.

II

A. The Hyde Amendment does not violate the Establishment Clause of the First Amendment. There are substantial secular reasons for seeking to encourage childbirth and to discourage the premature termination of pregnancies. As this Court observed in *Roe* v. *Wade*, 410 U.S. 113, 130-131, 134-135, 141-143 (1973), opposition to abortion can be traced to such diverse and secular sources as the ancient Greeks, common law authorities, and the American Medical Association. Congressional judgments on matters of public morality are not invalid merely because they happen to harmonize or coincide with the tenets of a particular religion or religious denomination. *McGowan* v. *Maryland*, 366 U.S. 420, 442 (1961). Nor does the participation of religious organizations in public debate on a subject automatically render any resulting statute that is consistent with the views of such organizations vulnerable to attack on Establishment Clause grounds.

As the district court recognized (Opinion 323-324), the Hyde Amendment reflects "traditionalist" attitudes toward abortion more than the position of any single religious group. Acceptance of the contrary position advocated by appellees in the district court would have implications far beyond this case. In particular, it would cast substantial doubt on the constitutionality of numerous criminal statutes—for example, those prohibiting polygamy or adultery—

that parallel the rules of conduct espoused by various religious groups.

B. The Hyde Amendment does not violate the Free Exercise Clause of the First Amendment. The constitutional right to practice the religion of one's choice does not entail a corresponding government obligation to pay the cost of conduct undertaken in fulfillment of a person's perceived religious duties. Even assuming that the district court correctly determined that one or more religious denominations teach that abortion is the proper course where necessary to preserve the health of the mother, appellees are not entitled to relief on free exercise grounds.

In the first place, no named pregnant appellee has alleged that her personal religious beliefs impelled her to seek an abortion. Under such circumstances, neither the individual appellees nor the members of the class they represent have standing to assert a cause of action based on the Free Exercise Clause.

Furthermore, even if the free exercise argument is properly presented here, it is incorrect on the merits. The Constitution guarantees numerous personal rights, but it does not require the government to expend public funds in order to ensure that indigent persons may engage in constitutionally protected activities. Religious observance is no more entitled to public subsidy than the speaking and publishing activities protected by other portions of the First Amendment. Indeed, because of Establishment Clause constraints, religious activity may, if anything, be less eligible for public financial support.

Although this Court has recognized a pregnant woman's constitutional right to obtain an abortion, that right does not become imbued with a special status simply because, in a particular instance, its exercise may be religiously motivated. As in the case of other constitutional rights, the government may not interfere with private decision-making, but it need not provide financial encouragement for every conceivable choice a person might make.

ARGUMENT

I

THE HYDE AMENDMENT DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT BECAUSE CONGRESS HAD A RATIONAL BASIS FOR TREATING ABORTION DIFFERENTLY FROM OTHER MEDICALLY NECESSARY PROCEDURES

To the extent that the district court invalidated the Hyde Amendment on equal protection grounds, its decision is similar to the ruling in *Zbaraz* v. *Quern*, 469 F. Supp. 1212 (N.D. Ill.), question of jurisdiction postponed, Nos. 79-4, 79-5, 79-491 (Nov. 26, 1979).[12] Both district courts have held that no legitimate governmental interest justifies the congressional

[12] Unlike the district court's holding in *Zbaraz*, the decision in the present case is not limited to medically necessary abortions prior to fetal viability. When the district court certified the plaintiff classes in January 1979 (A. 92-93), it removed the earlier language limiting the class of pregnant women to those who sought abortions within the first 24 weeks of their pregnancies. See page 11, *supra*.

choice to fund medically necessary services generally but to restrict the availability of federal payments for medically necessary abortions. In our view, the district court decisions are incorrect because the Hyde Amendment, in each of its forms, is a rational legislative measure for advancing the legitimate governmental interest in preserving potential human life and encouraging childbirth. The statute also serves the legitimate congressional goal of limiting the expenditure of public funds for a purpose that many taxpayers find morally objectionable.

Because this Court has decided to hear the present case in tandem with *Zbaraz*, we do not repeat in detail the equal protection arguments already advanced by the government in the Illinois case. Instead, we rely primarily on the relevant portion of the government's brief in *Zbaraz* (pages 50-64) to demonstrate the errors in the district court's reasoning here.[13] We add only a brief comment on two aspects of the district court's equal protection ruling that distinguish it to some extent from the decision in *Zbaraz*.

1. In attempting to assess the rationality of the Hyde Amendment, the district court compiled a massive evidentiary record on the nature of the social problem addressed by Congress. During a 13-month trial, the court investigated such matters as the number of abortions performed annually in the United States and other countries, the ratio of abortions to

[3] We have furnished a copy of the government's brief in *Zbaraz* to all of the parties in this case.

live births, the percentage of maternal deaths attributable to abortions, the practical consequences of abortion funding limitations, the relationship between poverty and maternal health, the possible psychological effects of an unwanted pregnancy, and the special medical problems encountered in adolescent pregnancies. The extensive inquiry conducted by the district court reflects the fundamental flaw in the court's approach to judicial review of the Hyde Amendment. The court addressed itself to the question whether the challenged congressional action is a good idea rather than the question whether the limitation on federal funding for abortions satisfies constitutional requirements. The questions are not identical. Courts do not sit as general fact-finding and policy-making bodies charged with the task of identifying and implementing the most desirable solution to broad social problems. That is Congress' responsibility. Reviewing courts decide only whether the legislature has acted within permissible bounds.

Here, the district court uncovered no evidence to contradict this Court's conclusion that Congress and the state legislatures have an "important and legitimate interest in protecting the potentiality of human life." *Roe* v. *Wade*, 410 U.S. 113, 162 (1973). See also *Beal* v. *Doe*, 432 U.S. 438, 445-446 (1977). Nor did the court disagree with the proposition that abortion is the only medically necessary service that involves the purposeful termination of potential human life. See *Maher* v. *Roe*, 432 U.S. 464, 480 (1977). Nor did the court find that the Hyde Amendment's

funding restrictions will not contribute to the preservation of fetal life by discouraging abortions and encouraging childbirth. In the absence of any such finding or evidence, the court should have sustained the validity of the statute.

By undertaking instead an elaborate inquiry into the practical implications of pregnancies among Medicaid-eligible women, the court revealed its misconception of its own role; by concluding that public funds must be provided for medically necessary abortions, the court substituted its judgment for that of Congress and usurped the function of the people's elected representatives. Even if the court's lengthy opinion proved beyond any doubt that the Hyde Amendment is an unwise measure, it would not justify invalidation of the statute on equal protection grounds. Nothing that the court has said detracts from the critical considerations that support the statute's constitutionality: Congress had a rational basis for treating abortions differently from other medically necessary services in dispensing public monies, and that is all that the Due Process Clause requires.

2. An unclear passage toward the end of the district court's opinion (Opinion 315-316) suggests that the court may have held the Hyde Amendment invalid on an independent equal protection ground, separate from and in addition to the allegedly impermissible statutory distinction between abortion and other medically necessary services. The court stated that the Hyde Amendment "clearly operate[s] to the

disadvantage of one suspect class, that is to the disadvantage of the statutory class of adolescents at a high risk of pregnancy * * *, and particularly those seventeen and under * * *." The "statutory class" to which the court referred is derived from the Adolescent Health Services and Pregnancy Prevention and Care Act, 42 U.S.C. (Supp. II) 300a-21 *et seq.* Apparently on the basis of statistics indicating that women under 21 years of age may be disproportionately represented among those for whom an abortion is medically necessary (see Opinion 133-150), the district court determined that the Hyde Amendment discriminates against teenagers and that "[n]o legislative interest outweighing the interest in the teenagers' health can be advanced to justify the discriminatory denial of necessary medical care" (Opinion 316). The court's use of the phrase "suspect class" may have been intended to suggest that a heightened level of equal protection scrutiny must be applied when a statutory classification discriminates on the basis of age. If so, the court erred in two respects.

In the first place, the Hyde Amendment does not treat pregnant teenagers differently from other pregnant women. Federal funds for abortions are available to prospective teenage mothers on the same basis as they are available to older women. Pregnancy, of course, is a condition that does not occur before puberty or after menopause. Any law affecting pregnancy therefore invariably applies only to females within an age range far narrower than the full spectrum from birth to death. This does not mean that

Congress discriminates on the basis of age whenever it legislates on the subject of pregnancy or abortion.

Despite its exhaustive discussion of the legislative history, the district court cited no evidence whatever to show that Congress intended to discriminate against teenagers when it passed the various versions of the Hyde Amendment or that it "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 279 (1979).[14] A mere statistical showing of disproportionate impact does not suffice to establish a legislative classification when the statute itself draws no such distinction. See *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 413 (1977); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Washington* v. *Davis*, 426 U.S. 229, 239 (1976); *Jefferson* v. *Hackney*, 406 U.S. 535, 548 (1972). If the rule were otherwise, few Acts of Congress could survive equal protection scrutiny. Any tax or social welfare provision, for example, could be challenged on the ground

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[14] If anything, Congress has discriminated in favor of teenagers by enacting the Adolescent Health Services and Pregnancy Prevention and Care Act. The Act provides federal financial support for local efforts to prevent unwanted pregnancies among adolescents, to enable pregnant adolescents to obtain proper care, and to "assist pregnant adolescents and adolescent parents to become productive independent contributors to family and community life * * *." 42 U.S.C. (Supp. II) 300a-21(b)(1).

that the group directly affected does not represent a perfect cross-section of society. This Court's equal protection decisions have never suggested that the Constitution requires such an absurd result.

Moreover, assuming that Congress did intend to treat teenagers differently from adults, this Court's cases establish that age is not a "suspect" classification for equal protection purposes. *Vance* v. *Bradley*, 440 U.S. 93 (1979); *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976). Similarly, the Court has reviewed legislative classifications involving pregnancy in accordance with the rational basis test. *Geduldig* v. *Aiello*, 417 U.S. 484, 495-496 (1974). There is no principled reason why a legislative distinction based on both age and pregnancy should be held to a higher standard. Indeed, when this Court reviewed a classification that imposed special burdens on minors seeking abortions, it did not say that strict scrutiny was required, even though both an age classification and the "fundamental" right to obtain an abortion were involved. The Court invalidated a requirement that pregnant teenagers obtain the consent of one parent before obtaining an abortion, not because the State failed to show a compelling governmental interest, but because it failed to show any "significant" interest at all. *Planned Parenthood of Missouri* v. *Danforth*, 428 U.S. 52, 75 (1976).

The proper standard of review having thus been identified, it bears repeating, for purposes of the present case, that Congress has not adopted different Medicaid abortion funding rules based on the age of

the prospective mother. The Hyde Amendment treats all pregnant Medicaid recipients equally. If the class of Medicaid-eligible women who seek medically necessary abortions includes proportionally more teenagers than the population at large or the class of Medicaid-eligible women generally, that circumstance does not convert the Hyde Amendment into a statutory classification based on age. Not even a rational justification for age discrimination need be identified where no discrimination has occurred.

II

THE HYDE AMENDMENT DOES NOT VIOLATE THE FIRST AMENDMENT OR DEPRIVE MEDICAID-ELIGIBLE PREGNANT WOMEN OF THE LIBERTY GUARANTEED BY THE FIFTH AMENDMENT

A. The District Court Correctly Concluded that the Hyde Amendment is not a "Law Respecting an Establishment of Religion"

Appellees argued vigorously in the district court that the Hyde Amendment violates the Establishment Clause of the First Amendment because it allegedly incorporates into law the Roman Catholic Church's doctrines concerning the time at which human life begins and the sinfulness of abortion (see Plaintiffs' First Amendment brief 206-299). The district court properly rejected this argument (Opinion 323-326). As this Court held in *McGowan* v. *Maryland*, 366 U.S. 420, 442 (1961), a statute does not violate the Establishment Clause merely because it "happens to coincide or harmonize with the tenets of some or all religions."

To be sure, neither a state nor the federal government can "pass laws which aid one religion, aid all religions, or prefer one religion over another." *Everson* v. *Board of Education*, 330 U.S. 1, 15 (1947). But that does not mean that Congress violates the Establishment Clause whenever it regulates conduct or spends public funds in a way that provokes different reactions among different religious groups. When Congress legislates for the general welfare of society, the Establishment Clause is not offended simply because the resulting statute elicits greater approval from one religious denomination or sect than from another. As the Court explained in *McGowan* (366 U.S. at 442):

> Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation. So too with the questions of adultery and polygamy. [Citations omitted.] The same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decalogue.

The belief that life begins at conception is not exclusively religious in character and is not solely attributable to the Roman Catholic Church.[15] This

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[15] For this reason, the Court's decision in *Epperson* v. *Arkansas*, 393 U.S. 97 (1968), does not control here. In that case, the Court reviewed a state statute that banned the teaching of Darwinian evolution because that theory supposedly conflicted with the Biblical account of creation. The Court invalidated the statute because it had no secular justification whatsoever. *Id.* at 107-108. The Court did not suggest

Court has traced the belief to such diverse secular sources as the Pythagorean school of Greek ethical philosophy and the American Medical Association. *Roe* v. *Wade*, *supra*, 410 U.S. at 131, 141. The Court also noted that, although it is uncertain whether the common law treated abortion as a crime, Coke did describe the artificial termination of pregnancy as "a great misprision," and Coke's view influenced the development of the law in some American jurisdictions. *Id.* at 135-136.

During the 19th century, the vast majority of states passed strict criminal abortion laws. *Roe* v. *Wade*, *supra*, 410 U.S. at 138-141. Those laws remained in force for more than a century, and they had a significant effect in shaping public morality with respect to abortion. Within six months of this Court's decision in *Roe* v. *Wade*, 30 states imposed restrictions on the use of their public funds for abortions. Note, *Medicaid and The Abortion Right*, 44 Geo. Wash. L. Rev. 404, 405 n.7 (1976), citing 2 *Family Planning Pop. Rep.* 82, 83 (1973). Such a widespread reaction, occurring in states with very different demographic patterns and ethnic populations, demonstrates that the legislative refusal to fund abortions except in the most compelling circumstances is the product of deeply felt public sentiment and not an outgrowth of the political activities

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that a state law based on secular considerations, including notions of public morality, must fall simply because those considerations parallel the views of some religious groups.

of a single religious group.[16] Accordingly, the district court properly held that the Hyde Amendment reflects "traditionalist" attitudes towards abortion and is not a "law respecting an establishment of religion" within the meaning of the First Amendment.

B. The Hyde Amendment Does Not Restrict the Free Exercise of Religion Or Deprive Pregnant Women of the Liberty Guaranteed by the Fifth Amendment

The district court ruled that the various versions of the Hyde Amendment "raise grave First and Fifth Amendment problems affecting individual liberty" (Opinion 326). Although the court did not explain its view of the relationship between the two constitutional provisions cited, it did hold that the congressional refusal to fund some medically necessary abortions "violate[s] the pregnant woman's First and Fifth Amendment rights" (*id.* at 328). Relying on testimony from representatives of several church bodies, the court determined that, in some instances, a woman's decision to seek a medically necessary abortion may be a product of her religious beliefs.[17]

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[16] Religious persons and organizations have the same right to participate in the political process as anyone else. *McDaniel* v. *Paty*, 435 U.S. 618 (1978). To hold that a religious group can speak on a political issue only at the risk of having any resulting legislation invalidated under the Establishment Clause would significantly chill the group's members in the exercise of their First Amendment rights of freedom of speech and association.

[17] Although we regard the matter as essentially irrelevant to the disposition of this case, we question the propriety of the procedure employed by the district court to ascertain the

The court concluded that "[t]he liberty protected by the Fifth Amendment extends certainly to the individual decisions of religiously formed conscience to terminate pregnancy for medical reasons" (*id.* at 327-328). We believe the court's decision is wrong both because appellees lack standing to raise the Free Exercise Clause argument and because Congress does not violate the Constitution by refusing to fund constitutionally protected activity.

1. None of the appellees has demonstrated the injury in fact necessary to confer standing to challenge the Hyde Amendment as an unconstitutional imposition on the First Amendment right freely to exercise one's religion. Cora McRae, Jane Doe, Mary Doe, Susan Roe, and Ann Moe are the named appellees who sued on behalf of the class of indigent pregnant women. They made no allegations in the complaint, much less submitted evidence, concerning their actual religious or moral beliefs. None of them testified at trial, and their affidavits do not suggest that they sought abortions for reasons of conscience or, if so, what those reasons were. Accordingly, none of the appellee pregnant women has standing to present a contention with respect to the Free Exercise Clause. *McGowan* v. *Maryland*, *supra*, 366 U.S. at 429.

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views of different religions and religious denominations. The testimony of selected representatives of particular religious groups hardly seems a sufficient basis on which to make findings about the personal beliefs of pregnant women who are members of those groups.

The amended complaint does allege that the named appellees sued on behalf of "women of all religious and nonreligious persuasions and beliefs who have, in accordance with the teachings of their religion and/or the dictates of their conscience determined that an abortion is necessary" (A. 65). But such an allegation, even if it is endorsed by the district court (as it was in the present case [18]), cannot create standing for the class unless the named appellees have established their own standing to sue. *O'Shea* v. *Littleton*, 414 U.S. 488, 494-495 (1974); *Bailey* v. *Patterson*, 369 U.S. 31, 32-33 (1962). Likewise, the possibility that some class members might have been able to bring their own lawsuit alleging a violation of the Free Exercise Clause is not enough to confer standing on the named appellees. *Warth* v. *Seldin*, 422 U.S. 490, 502 (1975). It follows, therefore, that neither the named pregnant women nor the class of Medicaid-eligible women whom they represent can pursue a "free exercise" cause of action on this record.

Appellees Theressa Hoover and Ellen Kirby are officers of the Women's Division of the Board of Global Ministries of the United Methodist Church.

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[18] In an order entered on January 29, 1979 (A. 92-94), the district court recertified the plaintiff class of pregnant women in accordance with the allegations in the amended complaint. The order stated that "[t]he class includes women of all religious and nonreligious persuasions and beliefs who have, in accordance with the teaching of their religion and/or the dictates of their conscience determined that an abortion is necessary."

They did provide the district court with a detailed description of their personal religious beliefs. However, neither woman alleged that she is pregnant or likely to become pregnant or that she is eligible for Medicaid. The Hyde Amendment therefore has absolutely no practical effect on appellees Hoover and Kirby or on their right to choose an abortion in accordance with the tenets of their faith.

The Women's Division itself intervened as a plaintiff on behalf of its members, and the amended complaint alleges that the organization's membership includes "poor, pregnant women who are dependent on Medicaid to obtain safe, legal abortions, whose ability to obtain such is impeded or precluded by the Hyde Amendments and who object to having someone else's religious beliefs about abortion imposed upon them thereby inhibiting their freedom of conscience" (A. 63-64). But the Women's Division does not identify a single member who was deterred or prevented by the Hyde Amendment from seeking a medically necessary abortion for reasons of religion or conscience. It is thus not at all certain whether the Hyde Amendment actually influences the individual moral choices of the Division's members. Moreover, an association may not assert the constitutional rights of its members where those rights are so personal as to require individualized proof. *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333, 342-343 (1977); *Warth* v. *Seldin*, *supra*, 422 U.S. at 511. A lawsuit that challenges an alleged governmental interference with personal religious or moral choice

ordinarily requires individualized proof focused on the beliefs of a particular plaintiff. Such a case presents precisely the kind of situation in which associational representation is inappropriate. As this Court has stated, "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *Abington School District* v. *Schempp*, 374 U.S. 203, 223 (1963). Following this principle, the Court has found no violation of the Free Exercise Clause where the litigants "have not contended that the [statute in question] coerces them *as individuals* in the practice of their religion." *Board of Education* v. *Allen*, 392 U.S. 236, 249 (1968) (emphasis added).

It is possible, of course, that in a particular case there may be a compelling reason why the members of a religious organization cannot speak for themselves, and in such circumstances it might be desirable to permit the organization to assert the free exercise rights of its members. Cf. *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958) (association permitted to assert members' constitutionally protected interest in not having membership status revealed). Or a particular free exercise claim might, for some reason, be especially amenable to resolution in a lawsuit brought by an association rather than an individual. Even conceding the existence of such possibilities, however, there is no reason in the present case to permit the Women's Division to press the cause of its unnamed members.

The Division has argued that the abortion decision is a personal moral choice that each pregnant woman must make for herself in light of her own individual conscience and circumstances and "the principle of responsible parenthood." See Opinion 192-197, 327. The only thread that unites the membership of the Women's Division on this subject is an avowed commitment to respect a diversity of views. In such a situation, the principles established in *Warth*, *Hunt*, and *Abington School District* are particularly compelling. The association should not be permitted to assert its members' interest in a matter of personal moral choice.

2. Assuming that appellees' free exercise argument is properly presented in this case, it should be rejected because the Constitution does not require the government to subsidize the exercise of First Amendment rights. Similarly, the Fifth Amendment does not require the use of public funds to support every activity comprehended within the "liberty" protected by the Due Process Clause.

The Free Exercise Clause of the First Amendment guarantees the right to practice one's religion without government interference. This does not mean that the government must bear the cost of each person's religious observances.[19] This Court has never required the government to expend public funds in order to

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[19] Indeed, the Court has upheld secular laws that have the incidental effect of making some forms of religious observance more expensive than others. See *McGowan* v. *Maryland*, *supra*; *Braunfeld* v. *Brown*, 366 U.S. 599 (1961). See especially *id.* at 605-606 (plurality opinion).

enable indigent persons to engage in whatever constitutionally protected activity they choose. On the contrary, the Court has recognized numerous constitutional rights for which public financial assistance need not be provided. For example, in *Maher* v. *Roe*, *supra*, the Court observed that, although the Constitution protects the right to travel interstate, it does not obligate the government to pay the bus fares of indigent travelers. 432 U.S. at 474-475 n.8. By the same token, although the Court has sustained parents' right to select private rather than public school education for their children, it has rejected the argument that a state violates that right if it chooses to fund public but not private education. *Id.* at 476-477; *Norwood* v. *Harrison*, 413 U.S. 455, 462 (1973).[20]

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[20] Additional examples are not difficult to find. The First Amendment protects the freedom of speech and the freedom of the press, as well as the free exercise of religion, yet it would be foolish to suggest that the constitutionally guaranteed rights to speak and publish entail a corresponding entitlement to federal financial assistance to support those activities. Cf. *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 9 (1978) (plurality opinion). Similarly, this Court has recognized a constitutionally protected right to use contraceptives, but the existence of that right does not require public funding to aid its exercise.

The logic of the First Amendment portion of the district court's opinion, it should be noted, would apply equally even if the Medicaid Act had never been passed. If Congress infringes appellees' free exercise rights by refusing to pay for medically necessary abortions, that refusal would offend the First Amendment no less if Congress also refused to pay for other medically necessary services. The district court's decision, therefore, apparently holds that the Constitution requires public funding of medically necessary abortions, even

This reasoning applies with even greater force when the constitutional right involved is the right to the free exercise of religion. If the government must provide publicly funded abortions so that indigent women may act in accordance with their religious beliefs, there is no principled reason why it should not also be required to distribute Bibles and other religious materials at public expense, in order to assist poor persons in their religious devotions. Such efforts surely would run afoul of the Establishment Clause and therefore are not compelled by the Constitution.

The Hyde Amendment does not preclude or interfere with "individual decisions of religiously formed conscience to terminate pregnancy for medical reasons." It simply prohibits the use of federal Medicaid funds for such abortions, unless a continuation of pregnancy would endanger the life of the mother. Pregnant women are neither barred from nor penalized for acting in accordance with their religious beliefs. The Hyde Amendment therefore does not violate the Free Exercise Clause of the First Amendment or the Due Process Clause of the Fifth Amendment.

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if Congress provides no other medical services for indigents. This result is inconsistent with *Maher* v. *Roe, supra,* in which the Court declared that "[t]he Constitution imposes no obligation on the States [or the federal government] to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents" (432 U.S. at 469).

CONCLUSION

The judgments of the district court should be reversed.

Respectfully submitted.

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