fulfillment of existing life. *School District of Abington v. Schempp*, 374 U.S. at 219, citing *Everson*, 330 U.S. at 52.

The unconstitutional impact of the excision of Medicaid reimbursement for abortion is not simply symbolic; the riders seek to prevent poor women from obtaining legal, medically necessary abortions, and they succeed in doing so. By exacting submission to childbearing as the price of retaining their Medicaid entitlement, the riders pressure poor women to forego their convictions and conform their conduct to that segment of religious opinion which condemns abortion.

The impermissibility of the Hyde Amendments does not depend, however, on their efficacy in forcing women to carry pregnancies to term or in barring them altogether from safe, legal abortion. The establishment clause forbids schemes which require people to take special measures to avoid acquiescence in the state-sponsored religious view. *School District of Abington v. Schempp*, 374 U.S. at 224 n. 9. *Engel v. Vitale*, 370 U.S. at 430-31. "The absence of any element of coercion, . . . is irrelevant to questions arising under the Establishment Clause." *Committee for Public Education v. Nyquist*, 413 U.S. at 786; *Torcaso v. Watkins*, 367 U.S. 488 (1961).

The existence of an excusal provision does not save school prayers from unconstitutionality; it is likewise irrelevant that some members of plaintiffs-appellees' class may succeed in scraping up the fee or finding a free abortion. Not only are such "alternatives" available to but a portion of plaintiffs-appellees' class, but the desperation and health risks suffered as a result of delay itself are every bit as offensive to the First

Amendment as the embarassment or isolation suffered by the school child who must seek exemption from religious exercises. *Engel v. Vitale*, 370 U.S. at 430; *see: Illinois ex rel. McCollum v. Board of Education,* 333 U.S. at 227.

Although the establishment clause is violated without "proof that particular religious freedoms are infringed," *School District of Abington v. Schempp*, 374 U.S. at 224 n. 9, here the free exercise rights of indigent women who do not believe that human life begins at fertilization and for whom abortion may be the moral and religiously required choice, are simultaneously violated. The violation of free exercise is *a fortiori* an impermissible inhibition of religion under the effect test.

Our society is divided on religious and conscientious grounds on the question of when human life begins and on the morality of abortion. The effect test enjoins the state from discriminating on religious grounds—preferring one side of the controversy over the other and imposing those beliefs on those who reject their validity in the distribution of necessary health care benefits. *Everson v. Board of Education*; *Torcaso v. Watkins*. The excision of funding for medically necessary abortion under a program of comprehensive service is classic "religious gerrymandering" which cannot survive the neutrality demanded by the Establishment Clause. *Walz v. Tax Commission,* 397 U.S. at 696 (Harlan, J., concurring).

State neutrality on this matter of private conscience is furthermore essential to preserving the public peace. While philosophers, theologians and ethicists might debate the contours of "religious", courts look for their

definitions to those concrete phenomena which threaten the evils the First Amendment was designed to avoid. When an issue is perceived as religious, particularly by opposing religions, state sponsorship sacrifices the reality of neutrality necessary to the preservation of religious harmony and public peace. The danger is heightened when the law, as here, inhibits as well as deprecates a moral decision-making process which is sacred to the dissenting faiths. It is a particularly significant indicator of impermissible religiosity that pro-choice theologians and *amici curiae* unequivocally identify the law as advancing a religious view of abortion. *See Illinois ex rel. McCollum v. Board of Education,* 333 U.S. at 228 n.19.

### C. The Riders Compel And Invite Excessive Entanglement Of Government And Religion.

The excessive entanglement test has often been described as preserving the integrity and independence of both religion and government. As Justice Black wrote in *Engel v. Vitale*, the "first and most immediate purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy the government and to degrade religion." 370 U.S. at 431.

Two components of the excessive entanglement test have been recognized by the Court: administrative interference with or surveillance of religious activities; and political entanglement of religious institutions in the government process for sectarian ends. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The Hyde Admendments violate the administrative component because they impermissibly entangle the

state in a religious decision-making process. Civil authority is forbidden to set the standards for the abortion decision here just as it may not review doctrinal matters affecting internal religious affairs. *Jones v. Wolf*, ___ U.S. ___, 99S. Ct. 3020 (1979). *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *see also, United States v. Ballard, 322 U.S. 78, 86* (1944).

The riders also reflect and exacerbate the divisiveness that normally attends religiously based legislation. The political entanglement test is rooted in the framers understanding that the intermeddling of church and state threatens the social fabric.[200] *Everson v. Board of Education*, 330 U.S. at 3-11; *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. at 228, n. 19 (Frankfurter, J., concurring); *School District of Abington v. Schempp*, 374 U.S. 219 (1963). In the school prayer cases, which came to this Court in a

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[200] James Madison explained this in his historic Memorial and Remonstrance:

> [I]t will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions. . . . If . . . we begin to contract the bonds of Religious freedom, we know no name that will too severely reproach our folly. At least let warning be taken at the first fruit of the threatened innovation. The very appearance of the Bill has transformed that 'Christian forbearance, love and charity,' which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased. What mischiefs may not be dreaded should this enemy to the public quiet be armed with the force of law?

*Everson v. Board of Education*, 330 U.S. at 69-70.

context nearly as explosive as this one, the Court emphasized that "bitter strife" is the ultimate result of the struggles of "religious groups . . . with one another to obtain the Government's stamp of approval." *Engel v. Vitale,* 370 U.S. at 426-29; *see also, School District of Abington v. Schempp,* 374 U.S. at 230 (Brennan, J., concurring).[201]

In *Lemon v. Kurtzman,* this Court adopted the suggestion of Justice Harlan, concurring in *Walz v. Tax Commission,* 397 U.S. at 695, that a law's potential for political divisiveness along religious lines should be an independent test for excessive entanglement. *See: Committee for Public Education v. Nyquist,* 413 U.S. 756 (1973); *Meek v. Pittenger,* 421 U.S. 349, 372 (1975).

As they were explained by the Chief Justice in *Lemon v. Kurtzman*, the dynamics of divisiveness along religious lines aptly describe the present day effort to restrict abortion funding. Political action to enact the religious belief that the fetus is human life has been spearheaded by religious institutions and a religiously grounded movement, *see* Facts, *supra*, at § 11; heated political opposition on religious, constitutional and other grounds has inevitably resulted; and the issue has assumed single-issue importance such that "[c]andidates . . . [have been] forced to declare and voters to choose . . . and many people confronted with issues of this kind . . . [have found] their votes

[201] In *Schempp*, Justice Brennan, concurring, observed that "deep feelings are aroused when aspects of [the] relationship [between religion and the public schools] are claimed to violate the injunction of the First Amendment . . ." 374 U.S. at 230.

aligned with their faith." *Lemon v. Kurtzman*, 403 U.S. at 622. *See* Facts, *supra*, § 12.[202]

The political divisiveness attending the Hyde Amendments corroborates the religious nature of the "human life" tenet and requires the amendments' invalidation. The dangers of divisiveness may justify a finding of unconstitutionality even when a clear and substantial secular interest can be discerned. As Mr. Justice Powell noted in *Nyquist*, "while the prospect of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decisions of this Court, it is certainly a 'warning signal' not to be ignored . . ." 413 U.S. at 797-98. *See: Meek v. Pittenger*, 421 U.S. 349 (1975).

Whether political divisiveness is an independent test or a "warning signal", it is clear that the dangers perceived for both religion and democratic government are far greater here than in the parochial school aid cases. The effort to restrict abortion affects not only Congress but every level of government, every aspect of

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[202] *Lemon* also noted that "the need for continuing annual appropriations . . . and the likelihood of larger and larger demands [with] pressures for expanding aid" intensifies divisiveness in the context of parochial school aid. 403 U.S. at 623. The district court erred, however, in regarding the annual nature of appropriations as an essential rather than an additional criterion of political entanglement. Slip op. at 325-26. While it is true, as the lower court notes, that the annual battles attending the Labor-HEW riders would be obviated if a constitutional amendment were adopted, the fact is that, for four years, the issue has been a virtually intractable one and promises no respite. Moreover, that this issue, like the issue of school prayer, might be immunized by a constitutional amendment from scrutiny under the Establishment Clause, does not relieve the present obligation of the Court to invalidate religious enactments.

the political process and every legislative matter which has a direct or tangential impact on the availability of abortion in this country.

Moreover, the dangers of divisiveness are enhanced, first because of the volatility of a movement which invokes divine obligation to oppose abortion as murder, and, second, because the effect of these riders is not simply to aid religious institutions, but to impose the moral view of one segment of the religious community on those whose conscience dictates otherwise. As the district court recognized, the political divisiveness created by the Hyde Amendments signals the need for strict scrutiny where liberty protected by the Fifth Amendment and the rights of conscience, harbored by the First, are at stake. Slip op. at 328.

Though this Court's injunction will not, in one fell swoop, end the destructive fragmentation we are experiencing, it will nonetheless preserve the integrity of our constitutional system, which, by insisting upon a super-majority to amend the Constitution, checks the power of a fervent single-issue minority to victimize the poor.

Indeed, the Court fulfills its highest office in precisely these circumstances when, against the deepest and most fervent of beliefs, it guards the separation of church and state and guarantees the liberty of individual conscience to all.

## Conclusion

For the reasons stated, the Hyde Amendments violate the First and Fifth Amendments and the judgment of the lower court should be affirmed.

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Respectfully submitted,

RHONDA COPELON
NANCY STEARNS
c/o Center for Constitutional Rights
853 Broadway
New York, New York 10003
(212) 674-3303

JANET BENSHOOF
JUDITH LEVIN
American Civil Liberties Union
132 West 43 Street
New York, New York 10036
(212) 944-9800

SYLVIA A. LAW
New York University School of Law
40 Washington Square South
New York, New York 10012
(212) 598-7642

*Attorneys for Women and Doctor Plaintiffs-Appellees and the Women's Division of the Board of Global Ministries of the United Methodist Church*

HARRIET F. PILPEL
Greenbaum, Wolff & Ernst
437 Madison Avenue
New York, New York 10022
(212) 758-4010

EVE W. PAUL
Planned Parenthood
Federation of America
810 Seventh Avenue
New York, New York 10019
(212) 541-7800
*Attorneys for Plaintiff-Appellee Planned Parenthood of N.Y.C., Inc.*

ELLEN K. SAWYER
Corporation Counsel of the
City of New York
Municipal Building
New York, New York 10007
(212) 566-2665

*Attorneys for Plaintiff-Appellee New York City Health and Hospitals Corporation*

*Of Counsel:*

PATRICIA HENNESSEY
425 Park Avenue
New York, N.Y. 10022
(212) 759-8400

ANNE R. TEICHER
36 Horatio Street
New York, N.Y. 10014
(212) 691-2048

KATHLEEN WHELAN
35 Tanager Lane
Levittown, New York
11756
(516) 796-3238