IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

Nos. 79-4, 79-5, 79-491, and 79-1268

JASPER F. WILLIAMS AND EUGENE F. DIAMOND, *Appellants,*
v.
DAVID ZBARAZ, et al.

JEFFREY C. MILLER, Acting Director, Illinois Department of Public Aid, *Appellant,*
v.
DAVID ZBARAZ, et al.

UNITED STATES OF AMERICA, *Appellant,*
v.
DAVID ZBARAZ, et al.

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 APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE NORTHERN DISTRICT OF ILLINOIS AND THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE FEDERAL APPELLANTS

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No. 79-4

JASPER F. WILLIAMS AND EUGENE F. DIAMOND, APPELLANTS

v.

DAVID ZBARAZ, ET AL.

No. 79-5

JEFFREY C. MILLER, ACTING DIRECTOR, ILLINOIS DEPARTMENT OF PUBLIC AID, APPELLANT

v.

DAVID ZBARAZ, ET AL.

No. 79-491

UNITED STATES OF AMERICA, APPELLANT

v.

DAVID ZBARAZ, ET AL.

No. 79-1268

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

v.

CORA MCRAE, ET AL.

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We respond briefly to two constitutional arguments advanced by appellees in *McRae* and to a statutory argument advanced by appellees in *Zbaraz* and apparently joined by appellees in *McRae* (see McRae Br. 112).

1. Appellees in *McRae* repeatedly state (McRae Br. 115, 123, 127, 128, 140-142) that the Hyde Amendment "imposes a substantial burden" on the exercise of a woman's right to terminate her pregnancy. They also accuse Congress of "affirmatively reaching out to destroy entitlement to essential medical services" (*id.* at 115, 127). By their lengthy discussion of these assertions in the opening portion of the argument section of their brief (*id.* at 113-136, 139-142), appellees may intend to present a constitutional theory different from the equal protection reasoning adopted by the district courts in both *McRae* and *Zbaraz*. Through their references to impermissible burdens and statutory entitlements, appellees may be asserting a due process argument that focuses, not on the distinction between abortion and other medically necessary services, but rather on the right to seek an abortion recognized in *Roe* v. *Wade*, 410 U.S. 113 (1973). Appellees' position appears to be that, completely apart from whether Congress had a rational basis for treating abortion differently from other medical services, Congress had an independent obligation to provide funds for medically necessary abortions so as not to discourage exercise of the right recognized in *Roe* v. *Wade*. This argument is insubstantial.

Congress has not penalized women who wish to obtain abortions. Women who decide to terminate their pregnancies, whether for medical reasons or otherwise, do not suffer any disability as a result. The present case is thus substantially different from *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974), and *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977), on which appellees heavily rely. Here, Congress has not said that women who obtain abortions will be ineligible to receive medical care in the

future or will lose accumulated seniority rights or will be deprived of some other benefit to which they would otherwise be entitled. Congress has simply refused to pay for the exercise of a pregnant woman's constitutionally protected choice. For due process purposes, the situation is analogous to the government's failure to pay an indigent's interstate bus fares (*Maher* v. *Roe*, 432 U.S. 464, 474-475 n.8 (1977)) or to provide transportation to the polls on Election Day for voters who cannot get there on their own. The important distinction is that between refusal to subsidize a right's exercise and imposition of some present or future penalty as a consequence of a decision to exercise the right.[1] The former is permissible, and the Hyde Amendment is an example of legislation of that kind. The latter raises serious constitutional problems, but no such government action is at issue in this case.

This Court has explicitly observed that the concepts of "property" and "entitlement," developed in the context of procedural due process, "cannot be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits." *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971). Accord, *Flemming* v. *Nestor*, 363 U.S. 603, 608-611 (1960). The Court has applied the same standard in reviewing social welfare legislation that withdraws a prior statutory entitlement as it has in reviewing social welfare legislation that extends a benefit to an arguably under-inclusive class. In either case, the only relevant constitutional inquiry is whether Congress had a rational

[1]To the extent appellees present a due process rather than an equal protection argument, they apparently contend that Congress would be required to fund medically necessary abortions even in the absence of the Medicaid program. This Court has never held that Congress must expend public funds in order to enable indigents to exercise their constitutional rights.

basis for drawing the lines it did. If the legislative classification is permissible, no independent due process problem is presented. See, *e.g.*, *Califano* v. *Aznavorian*, 439 U.S. 170 (1978); *Califano* v. *Jobst*, 434 U.S. 47 (1977).

2. Appellees in *McRae* also contend (McRae Br. 142-150) that the Hyde Amendment is unconstitutionally vague. This argument, too, is without merit. In essence, appellees' submission is that doctors do not understand and cannot implement the Hyde Amendment. Appellees further assert that physicians fear prosecution for erroneous certifications that particular abortions satisfy the Hyde Amendment requirements. The answer is threefold.

In the first place, the vagueness doctrine only applies to punitive statutes. See *e.g.*, *Colautti* v. *Franklin*, 439 U.S. 379, 390-397 (1979). No version of the Hyde Amendment has ever contained a penalty provision. Moreover, the sanction provision in the Medicaid Act contains a clear scienter requirement. 42 U.S.C. 1396h. Only if a doctor "knowingly and willfully" makes fraudulent claims is he subject to prosecution or other sanctions. Good faith errors are not penalized. See *Colautti* v. *Franklin*, *supra*, 439 U.S. at 395.

Second, vagueness challenges are ordinarily adjudicated in response to particular factual situations that enable the reviewing court to assess the degree of difficulty encountered in applying the statutory language to a real set of circumstances. Here, although appellees offered testimony concerning various patients for whom physicians were purportedly unwilling to issue a Hyde Amendment certification, there is no evidence that either the physicians or their patients tried to ascertain at the time a Medicaid abortion was sought whether federal or

local administrators of the program would have regarded the procedure as one covered by the language of the Hyde Amendment. Appellees have not offered any evidence concerning the attempted imposition of sanctions for a physician's improper application of the Hyde Amendment standards, and their vagueness argument is therefore premature.

Third, even if the Hyde Amendment were a punitive statute subject to challenge under the vagueness doctrine, it would pass constitutional scrutiny. A statute is not unconstitutionally vague unless "'men of common intelligence must necessarily guess at its meaning.'" *Broadrick* v. *Oklahoma*, 413 U.S. 601, 607 (1973). This Court has recognized (*id.* at 608) that

> "[t]here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest."

Physicians routinely assess the varying degrees of risk faced by their patients or posed by alternative methods of treatment. They can certainly make a good faith determination of whether "the life of the mother would be endangered if the fetus were carried to term."

3. Appellees in *Zbaraz* argue vigorously (Zbaraz Br. 99-130) that the Hyde Amendment does not relieve states participating in the Medicaid program of the preexisting obligation to fund all medically necessary abortions.[2]

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[2]The question of which authority makes the final determination of whether a particular service is medically necessary has not been litigated in these cases and is not currently before the Court.

Accordingly, appellees urge this Court to affirm the judgment of the Illinois district court on statutory grounds, without reaching the constitutional issues.

As we have explained in our opening brief (No. 79-491 Br. 45-49), appellees' statutory argument is faulty because there is no evidence whatever that the Congresses that have enacted the various versions of the Hyde Amendment expected the statute to have the effect of requiring states to provide 100% funding for all medically necessary abortions as a precondition to participation in the Medicaid program. Appellees have collected a great many statements by legislators to the effect that the Hyde Amendment restricts the use of federal funds for abortions (Zbaraz Br. 109-112 & n.*), but that is a tautology. The significant question, which appellees do not adequately address, is what effect the Hyde Amendment's funding restrictions have on state obligations under the Medicaid Act. Despite appellees' best efforts (Zbaraz Br. 123-128), they have been unable to identify any medical service that states must cover as a condition of participation in the Medicaid program and for which the federal government will provide no reimbursement.[3] This is hardly surprising in light of the

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[3]Appellees' purported examples of situations in which states must bear the full expense of Medicaid coverage for a particular group of beneficiaries are all readily distinguishable from the present situation. In no case cited by appellees has the federal government refused to fund a particular form of treatment and nevertheless insisted that the states continue to fund that form of treatment. In virtually every instance cited by appellees, the states' obligation to provide funding to a particular group of beneficiaries without federal assistance is a consequence of some other fiscal policy decision made by the state and readily reversible by the state if and when additional federal contribution is desired. Here, by contrast, appellees would leave the states no choice but to withdraw from the Medicaid program or to provide full funding of all medically necessary abortions not covered by the Hyde Amendment. Congress intended no such result.

Medicaid program's fundamental characteristic: cooperative federal-state funding. Neither in 1965, when the Medicaid Act was passed, nor in the years since, during which the Act was amended several times and the Hyde Amendment restrictions were added to HEW appropriations legislation, has Congress suggested that the states must bear the full financial burden of a particular category of medical services as a precondition to the receipt of any federal Medicaid funds.

Appellees in *Zbaraz* rely heavily (Zbaraz Br. 122-123) on the Secretary of HEW's opposition to the 1977 Application for a Stay in *McRae*, but that document does not take the position that appellees attribute to it. The point of the Secretary's filing was not that the Medicaid Act *obligates* participating states to fund services for which federal contribution is not available, but that the Act *does not prohibit* participating states from funding as many medical services as they choose, even if the federal government refuses to finance one or more such services. This interpretation was correct in 1977, and it remains correct today. The corollary is equally true, and it is dispositive of the validity of the Illinois statute at issue in *Zbaraz*. Just as the Medicaid Act does not *prohibit* states from funding services not covered by federal contribution, so it does not ***require*** them to do so.

For these reasons and the reasons stated in the opening briefs of the federal appellants, the judgments of the district courts should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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