IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1268

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

vs.

CORA McRAE, et al., *Appellees.*

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

REPLY BRIEF OF INTERVENING DEFENDANTS-APPELLEES JAMES L. BUCKLEY, JESSE A. HELMS, HENRY J. HYDE, AND ISABELLA PERNICONE IN SUPPORT OF APPELLANT HARRIS

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ARGUMENT

Introduction

Intervening Defendants-Appellees ("Intervenors") have, for the most part, anticipated and adequately answered the arguments of Plaintiffs-Appellees ("Plaintiffs") in support of the district court decision. A limited reply is appropriate, however, to the extent that Plaintiffs

place heavy reliance on their claim under the Establishment Clause of the First Amendment and on an asserted "statutory entitlement" which they contend somehow brings into being a substantive, as opposed to a procedural, due process claim. A reply is also appropriate to their claim that the Hyde Amendment is unconstitutionally vague.

Throughout their brief, Plaintiffs emphasize what they perceive to be the unfairness and even cruelty of the Hyde Amendment. Seemingly, they appeal to what they hope to be this Court's sense of "equity." This emphasis, together with the failure of their brief to articulate any coherent theory showing violations of established constitutional rights, vindicates the central argument of the Intervenors: to affirm the decision of the lower court would be to transform policy argument into constitutional dogma, and to give to the judiciary the function of the legislature.

I.

WHETHER AN ABORTION IS THERAPEUTIC IS NOT INHERENTLY A MEDICAL DECISION, BUT RATHER A SOCIETAL OR INDIVIDUAL DECISION

After a study of 350 different societies, the noted anthropologist George Devereux concluded:

> Every pregnancy, however normal it may be and however joyfully it may have been planned and anticipated, involves certain physiological, psychological and social readjustments which, in the broadest sense, represent "stress." . . . Insofar as an abortion is allegedly undertaken for the purpose of alleviating or forestalling some situation of stress, it may be described, in theory, at least, as "therapeutically indicated. . . ." [W]hen the woman herself, or someone else, decides that an abortion should take place, this implies that the abortion is *subjectively* viewed as

> "therapeutically indicated," since its assumed nominal purpose is to alleviate or forestall one kind of "stress." Sometimes, this definition of the situation is in harmony with prevailing social codes and value systems. In other cases, the individual's decision is made in terms of a subjective system of values which is sharply at variance with more generally accepted social codes or value systems. In other words, what the individual deems to represent "therapeutic indications" for abortion, . . . may . . . not satisfy social criteria for what constitutes a "good and sufficient" —*i.e.*, "socially legitimate"—"therapeutic indication" for abortion. In brief . . . , social criteria, based upon existing systems of values, determine what *kinds* and *degrees* of stress are accepted as constituting a . . . "therapeutic indication" for abortion.

G. Devereux, *A Typological Study of Abortion in 350 Primitive, Ancient, and Pre-Industrial Societies,* in Therapeutic Abortion 97 (H. Rosen ed. 1954) (emphasis in original).

Plaintiffs do not shrink from openly citing the broadest possible examples of indications for what they call "medically necessary" abortions. For example, they maintain, "For . . . teenagers . . . an unwanted pregnancy, if not terminated, may be the factor which transforms a precarious and difficult life into one with which they are unable to cope either physically or mentally." Brief of Appellees at 50. *See also id.* at 39-40, 41, 43, 44-45. *Cf.* Brief of Intervening Defendants-Appellees at 15-18.

Yet they wish to insist that these factors are consigned to the exclusive discretion of physicians, as though the value judgment of what sorts or kinds of stress create a "therapeutic" indication were one over which the medical profession exercises exclusive jurisdiction. The district

court went so far as to say that, when an abortion is determined by a physician to be "medically necessary," any alternative to abortion is not medically "*possible.*" Slip op. at 311) (emphasis added). Plaintiffs, and the court below, thus consider that the Congress and our society is irreversibly bound by the value judgments of abortion-performing physicians. The record is clear that these physicians are perfectly willing to characterize *any* level of undesired stress as creating a "medical necessity" for an abortion. Brief of Intervening Defendants-Appellees at 16.

As Devereux's study indicates, however, this assumption that medical professionals, rather than the society at large, determine what is and what is not a "therapeutic" indication for an abortion is not soundly based. Rather, at least for the purpose of determining how taxpayers' money is to be spent, the Congress, as the body most representative of our "society," should be seen as the proper organ to set the limits on what constitutes "therapeutic" abortion. *See* U.S. Const., art. I.

What the Plaintiffs urge upon this Court is, in effect, the proposition that whether particular abortions are paid for with public funds should be decided by the subjective decisions of individual women and their concurring physicians that such abortions are "therapeutically indicated," and thus "medically necessary." In practice, under Plaintiffs' theory the definition of whether an abortion is therapeutic must be left to the subjective will of the individual seeking the abortion. But this determination, embodying as it inherently does a balancing of values in accord with cultural mores, must be left to the democratically responsive branch of government, the legislature.

II.

SUBSTANTIVE DUE PROCESS ANALYSIS DOES NOT WARRANT STRIKING THE HYDE AMENDMENT

Plaintiffs argue that substantive due process analysis would allow this Court to invalidate the Hyde Amendment by finding that among the substantive liberties protected by the Due Process Clause is a "constitutional protection of life and liberty [which] shields the individual from arbitrary governmental action demanding sacrifice of life or health" and that the Hyde Amendment unconstitutionally infringes on this liberty by failing to meet "minimal constitutional standards of fundamental fairness." Brief of Appellees at 140.

But the standard for substantive due process analysis is not whether this Court considers a particular piece of legislation to be "fair." In the words of Mr. Justice Stewart, dissenting in *Moore* v. *City of East Cleveland*, 431 U.S. 494, 539 (1977), "[W]e are [not] to use our power to interpret the United States Constitution as a sort of generalized authority to correct seeming inequity wherever it surfaces." Instead, as Justice Stewart has suggested, the "proper concerns" of such analysis are:

> [T]he nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, the existence of alternative means for effectuating the purpose, and the degree of confidence we may have that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen. Williams v. Illinois, [399 U.S. 235,] 260 (Harlan, J., concurring in result).

Zablocki v. *Redhail*, 434 U.S. 374, 396 (1978) (Stewart, J., concurring in the judgment).

The crucial aspect here is the "nature of the individual interest affected." Even if Plaintiffs are correct that governmental action "demanding sacrifice of . . . health" could infringe on substantive due process rights, this is not the sort of governmental action at issue in this case. Even assuming that the government, except in compelling circumstances, cannot constitutionally cause harm to one's health, this does not mean the government violates substantive due process when it fails to pay for the *treatment* of one's health. Even if the government cannot arbitrarily take away one's health, it has no obligation to give health to one who does not have it. The right to be free from state interference does not include a right to compel the State to interfere on one's behalf. *See* Brief of Intervening Defendants-Appellees at 7 *et seq.*

In *Zablocki* v. *Redhail*, 434 U.S. at 392, 392 n.1, Mr. Justice Stewart drew on the classic formulations of Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.F. 16 (1913). Hohfeld's terminology is also illuminating in this context: the right to privacy which encompasses the termination of pregnancy is more accurately termed an "immunity" than a "right." "A right is one's affirmative claim against another . . . whereas an immunity is one's freedom from the legal power or 'control' of another." *Id.* at 55. A "right" (which Hohfeld considers the synonym of a "claim," *id.* at 32) creates a correlative "duty" for the other against whom one has the "right." On the other hand, an "immunity" creates only a correlative "disability" for the other from whose interference one is immune. In this context, "disability" means that the State has no "power" to trespass in the zones of immunity by interfering with a woman's private decision to have an abortion. But this "immunity" does not give the woman a "claim" on the State for assistance in having the abor-

tion. The "right to privacy" is an immunity from state interference, not a claim-right to state aid.

Of course, in refering to "the individual interest affected," neither Mr. Justice Harlan nor Mr. Justice Stewart could have meant the mere subjective interest of an individual in the sense of any desire or need that individual may have, however weighty or important the desire or need may appear. Instead, "We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property." *Board of Regents* v. *Roth*, 408 U.S. 564, 571 (1972) (*per* Stewart, J.). Any other understanding would vest every want with constitutional significance.

Justice Stewart, in his concurring opinion in *Roe*, has suggested that the basis of the Court's holding in that case is a substantive due process right of the pregnant woman. *Roe* v. *Wade*, 410 U.S. at 169. But what is the nature of this substantive due process right? *Maher* is conclusive: "*Roe* did not declare an unqualified 'constitutional right to an abortion. . . .' Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." *Maher* v. *Roe*, 432 U.S. 472, 473-474 (1977). *See* Brief of Intervening Defendants-Appellees at 33-37. This description of the interest at stake is no less applicable to a substantive due process analysis than to an equal protection analysis. By definition, it is an interest which is not infringed here.

The other aspects of Justice Stewart's substantive due process test are also met. The choice not to pay for the destruction of subjects of legitimate state interest certainly is rationally connected to the legitimate interest in those subjects. In the context of government funding, it is hard to envisage an "alternative means for effectuating the purpose" of preserving fetal life to that chosen here:

reimbursing the costs of pregnancy, treatment of pregnancy complications and childbirth, while refraining from paying for abortion. Finally, the extensive legislative debates conclusively document that "the statute reflects the legislative concern" for fetal life, which "legitimately support[s] the means chosen."

Thus, the legislative choice to refuse to fund abortion does not impinge on the substantive due process "right" to privacy.

III.

THE PRINCIPLES OF PROCEDURAL DUE PROCESS ANALYSIS CANNOT BE TRANSMUTED TO CREATE ANY "RIGHT" TO PUBLIC FUNDING OF ALL "MEDICALLY NECESSARY" ABORTIONS

Proceeding upon the assumption that the "Social Security Act . . . requires that Medicaid programs pay for all medically necessary services," Plaintiffs contend that through the Hyde Amendment "Congress affirmatively withdrew funding to which plaintiffs would otherwise be legally entitled." Brief of Appellees at 115. This, they say, distinguishes it from the situation faced in *Maher* where they claim the State "simply did not extend the scope of Medicaid to include payment for elective services." *Id.* They then attach constitutional significance to a difference between "merely failing to extend a benefit not otherwise available" and "affirmatively reaching out to destroy entitlement to essential medical services." *Id.* Conceding there is no "abstract . . . right to funded abortions," *id.*, Plaintiffs apparently assert that if the legislature once enacts an entitlement to funded abortions, it thereby creates a constitutional right to funded abortions which precludes the legislature from simultaneously or thereafter limiting the entitlement which it has itself created. Plaintiffs' analysis is faulty for several reasons.

First, this argument—though couched in due process terms such as "entitlement"—is no more than an equal protection argument that the State cannot fund other medical services without also funding abortions. This equal protection argument, as demonstrated in the Brief of Intervening Defendants-Appellees at 54-69, was resolved by this Court against Plaintiffs in *Maher*.

Second, assuming that their argument is in fact a due process argument, the attempt of the Plaintiffs to distinguish this case from *Maher* is unsupported by the facts. Plaintiffs apparently assume that only "medically necessary" procedures were funded under the Connecticut regulatory scheme, and that therefore the failure to fund medically *un*necessary abortions was consistent with that scheme. Plaintiffs' understanding of the Connecticut medical welfare scheme, however, is incorrect. Under the Connecticut policy, *all* expenses related to pregnancy and childbirth were funded, without any requirement that they be certified as "medically necessary." *Maher,* 432 U.S. at 468; *Roe* v. *Norton,* 408 F. Supp. 660, 663 (D. Conn. 1975), *rev'd on other grounds sub nom. Maher* v. *Roe.* Indeed, were this not the case, the lengthy equal protection analysis of *Maher* would have been inappropriate: if medically *un*necessary treatment for pregnancy were a "benefit not otherwise available" under the Connecticut plan, there would have been no occasion to consider whether abortions which were not certified to be "medically necessary" could or could not be excluded under the Equal Protection Clause.

Of course, *Maher* upheld the Connecticut regulation which, expressed in the terms of Plaintiffs' argument here, "affirmatively withdrew funding to which plaintiffs would otherwise be legally entitled."

Third, Plaintiffs mistake the nature of "entitlement." It is true that a statute establishing a governmental wel-

fare program can create a "property interest" for an individual who under the conditions set forth in the statute is eligible for a benefit therein described. Such an individual may not be deprived of that property (*e.g.*, by being declared ineligible) without due process of law. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). In this sense, there is no constitutional distinction among entitlements, privileges, and rights. *Board of Regents* v. *Roth*, 408 U.S. 564, 571 n.9 (1972). It is also true that when a statute creates such an interest, although the "dimensions of the interest are defined" by the statute, *id.* at 577, the statute may not establish procedures by which one may be deprived of the interest that fall below constitutionally required levels. *Vitek* v. *Jones*, 48 U.S.L.W. 4317, 4320 (March 25, 1980).

But there is a crucial distinction between statutory provisions which affect the procedures under which a property entitlement, once created, can be taken away and statutory provisions which demark the substantive nature of the property entitlement initially created. The distinction is one between "the nature of one's property interest" and "the extent of the procedural protection to which he may lay claim." *Arnett* v. *Kennedy*, 416 U.S. 134, 166 (1974) (Powell, J., concurring), adopted by a majority of the Court, *Vitek* v. *Jones*, 48 U.S.L.W. at 4320 n. 6.

There is a crucial distinction between, on the one hand, statutory provisions or administrative practices which relate individuals to a system of structured benefits and affect those individuals' access to the benefits and, on the other hand, statutory provisions or administrative decisions which deal with the general scope of coverage or nature of such benefits. The latter confer property; the former determine whether or not particular individuals are eligible within the bounds of what is conferred. "It is a purpose of the ancient constitution of property to

protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity to vindicate claims." *Board of Regents* v. *Roth,* 408 U.S. at 577. Here, we deal with what creates a justifiable reliance, not with whether there is an opportunity to vindicate claims.

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . . Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in Goldberg v. Kelly . . . had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them.

Id. at 577.*

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* This Court's recent holding in *Branti* v. *Finkel,* 48 U.S.L.W. 4331, 4332 n.6 (March 31, 1980), that "the lack of a reasonable expectation of continued employment is not sufficient to justify a dismissal based solely on an employee's private political beliefs" is not to the contrary. There is a distinction between dismissal based solely on private political beliefs which, the Court held, has no basis in legitimate state interest, and a decision not to provide funding on the basis of the legitimate and strong interest in the fetus. Even when no fundamental right is impinged a statutory distinction must pass muster under the rational relationship test. *Maher* v. *Roe,* 432 U.S. at 478. The question here is whether there somehow exists an entitlement in this case, not present in *Maher,* which invokes strict scrutiny by invoking a fundamental right. For this purpose, the lack of a "reasonable expectation" confirms the nonexistence of an entitlement, and hence preserves the applicability of the lower level of scrutiny.

If this distinction is ignored, it will deprive the legislatures of that flexibility and power to experiment which is crucial to the governance of a changing society. It will eliminate democratic responsiveness. And it will not advance the needs of the poor, since Congress is likely to be greatly deterred from enacting any further social welfare programs if it knows it can not thereafter reduce or alter the benefits to be provided under them.

Like the foster parent-child relationship dealt with in *Smith* v. *Organization of Foster Families,* 431 U.S. 816, 856 (1977) (Stewart, J., concurring), the Medicaid system "is, of course, wholly a creation of the State." Just as "New York law provides no basis for a justifiable expectation on the part of foster families that their relationship will continue indefinitely," *id.* at 860, federal law provides no basis for a justifiable expectation on the part of welfare recipients that the government will indefinitely fund all forms of medical treatment, never limiting or altering the scope of coverage.

This Court has never held that creating a general entitlement with an exception somehow triggers a property interest in the subject matter of the exception. The Court has specifically affirmed the authority of the legislature to alter a statute which, had it not been altered, would provide an entitlement. *Richardson* v. *Belcher,* 404 U.S. 78, 80-81 (1971).

IV.

THE HYDE AMENDMENT IS NOT UNCONSTITUTIONALLY VAGUE

Although it is not clear that the district court held the Hyde Amendment unconstitutional on vagueness grounds (*see* slip op. at 322-323), Plaintiffs nevertheless argue that the lower court's decision should be sustained based on

the alleged "strangeness to medical thinking of the [Hyde Amendment's] 'life-endangerment'" standard coupled with a "realistic threat" of prosecution for medicaid fraud. Brief of Appellees at 143.

Plaintiffs argue that the existence of federal criminal sanctions for medicaid fraud and abuse place the physicians under a constant threat of criminal prosecution for mistaken conclusions that abortions are necessary because continued pregnancy poses a danger to maternal life. This supposed threat exists because reimbursement certifications filed by physicians seeking compensation for performing an abortion might be subject to administrative review. Plaintiffs fear that such a review might conclude that the physician's certification was an unwarrantedly broad interpretation of the Hyde Amendment restriction, and further fear that on this basis a criminal prosecution could be initiated against the physician under 42 U.S.C. § 1396h(a) (1976). Plaintiff's apprehensions follow their misunderstanding of § 1396h(a) which, they claim, provides that "a false statement by a physician or a recipient in an application for payment is a felony, punishable by imprisonment up to five years, or a fine of up to $25,000, or both, even if the medicaid payment is never made." Brief of Appellees at 145 n. 173.

It is certainly *not* the case that physicians can be subjected to prosecution under the federal medicaid fraud statute for making a mistaken certification that an abortion is reimbursible under the Hyde standard. The statute actually states as follows:

> Whoever—
>
> (1) *knowingly and willfully* makes or causes to be made any false statement or representation of a material fact in any application for any benefit or pay-

> ment under a State plan approved under this subchapter,
>
> (2) at any time *knowingly and willfully* makes or causes to be made any false statement or representation of a material fact for use in determining right to such benefit or payment, . . .
>
> . . .
>
> shall (i) in the case of such statement, representation, concealment, failure, or conversion by any person in connection with the furnishing (by that person) of items or services for which payment is or may be made under this subchapter, be guilty of a felony and upon conviction thereof fined not more than $25,000 or imprisoned for not more than five years or both, ...

42 U.S.C.A. § 1396h(a) (1976) (emphasis added).

The physician may only be prosecuted for "knowing" and "willful" misrepresentations—the government must prove that the physician lied, intended to lie, and knew he was lying before it may successfully prosecute him for medicaid fraud. The existence of not only intent but also scienter requirements insulates the physician against criminal prosecution for mistaken judgments in the manner this Court has contemplated. *See Colautti* v. *Franklin,* 439 U.S. 379, 394-397 (1979). Significantly, the knowing and willful misrepresentations must be of "material facts," suggesting that mere medical conclusions, even if erroneous, do not fall within the scope of the statute. Moreover, the United States has specifically stated that it will not prosecute physicians for fraud where a physician's judgment has been made in *subjective* good faith. Slip op. at 97. *See United States* v. *Vuitch,* 402 U.S. 62 (1971). It simply does not follow, therefore, that the physician can claim any "realistic threat" of criminal prosecution for mere mistaken judgments under the Hyde Amendment coupled with the fraud provisions of the Medicaid Title.

The remedy would have been worse than the cure if specific categories of maladies had been enumerated for which the physician might be reimbursed under the Amendment. Such categories could have been subjected to the same "vagueness" attack that the Plaintiffs level here: physician discretion would have been lost; certain categories might have been improperly excluded and others improperly included; advances in medical knowledge and technology could not have been so easily taken into account.*

Finally, the Plaintiffs' claim that the district court's finding that the Hyde Amendment standard is so alien to medical practice that it is unintelligible to the physician is simply not supported by the record. Time and time again the Plaintiffs' witnesses answered inquiries in a manner which demonstrated that they understood the meaning of the term, even in the face of their alleged confusion. *See, e.g.*, Hodgson, T. at 102, 107, 108; Eliot, T. at 389, 390, 391, 392, 393, 394, 397, 398, 416 (1-3% of all pregnancies), 418 (a "very low percentage . . . . [Modern medicine] can carry to term almost any pregnancy"), 440, 446; Bingham, T. at 493 (.1% of pregnancies). As the dis-

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* No provision in a government grant-in-aid program has ever been held *unconstitutionally* vague, and if the Amendment were to be so stricken there is no doubt that most of the entire Medicaid Title could be subjected to attack in the manner the Plaintiffs suggest here.

It is the administrative duty of HEW to issue regulations to carry forth the intent of the Amendment. Even if, as the Plaintiffs argue, the actual effect of the Amendment were inconsistent with its legislative intent (Brief of Appellees at 143), the proper remedy would then be to order HEW to issue clarifying regulations, not to strike the Amendment as unconstitutionally vague. *See, e.g., Relf v. Weinberger*, 372 F. Supp. 1196 (D.D.C. 1974).

trict court judge himself commented during the course of the trial,

> Now I feel it is possible to inject uncertainly into this language, it can be done, but to say soberly that doctors don't know within the limits of professional error when they believe that a woman's life will be endangered by carrying the fetus to full term, that seems to me is a statement that none of us laymen can tolerate.
>
> We go to doctors for just these things.

T. at 293.

To claim that the term "life endangerment" is vague merely because it is "strange" to medical usage begs the question. "Insanity" is not a medical term either and, as such, is foreign to medical practice. But it is not unconstitutional to require physicians to employ non-medical terms—either "insanity" or "life endangerment"—in order to asses the legal significance of conduct or treatment.

In any case, the record establishes that the standard which the Plaintiffs claim should replace the Hyde criterion—"medical necessity"—is *less* intelligible than the "life endangering" standard. Those who testified on this matter may have claimed they understood the meaning of "medical necessity," but they certainly understood it to mean different things. Hodgson, T. at 52 ("Hundreds of indications [are] . . . considered medical indications for abortion . . . . There would be no total agreement in any group of physicians on the necessary medical indication . . . .").

> In my medical judgment every pregnancy that is not wanted by the patient, I feel there is a medical indication to abort a pregnancy where it is not wanted.

> In good faith, I would recommend on a medical basis, you understand, that, and it would be 100%. . . . I think they are all medically necessary. . . . Occasionally we will advise these women to carry their pregnancy to term, but most of these are medically necessary because I am considering the woman's physical, mental, emotional and social and welfare and family and environment and all that. . . . I am concerned with the quality of life not physical existence.

Hodgson, T. at 99-101.

See also Eliot, T. at 428 ("half of all women . . . [have] problems connected with their pregnancies . . . [so] that I would classify [abortions] as medically necessary"); Hoffman, T. at 1342 ("I consider all abortions medically necessary in adolescents . . . ."); Sloan, T. at 1741 (abortion is never medically indicated for a "wanted" pregnancy). As Plaintiffs' witness Dr. Christopher Tietze testified:

> Q. [D]o you have an opinion on whether the medical necessity standard can be applied uniformly?
> A. Yes, I do have that opinion.
> Q. Can you tell us what it is?
> A. That it cannot.

Tietze, T. at 1003.

Thus, the "vagueness problem" perceived by Plaintiffs would not be alleviated by adopting Plaintiffs' proposed "medically indicated" or "medical necessity" standard. Does "medically necessary" suggest that a given treatment is the necessary condition precedent to obtaining health, thereby rendering an abortion medically necessary only when alternative means of treatment are not available? Or does it simply suggest a means to *improve* health? Or is it a "preventive medicine" standard? The medicaid fraud statute would apply to the "medically necessary" standard and would create the same problems for the physi-

cian which the Plaintiffs allege to arise from "life endangerment."

The fact that the "medical necessity" standard which Plaintiffs urge this Court to adopt does not resolve the problem of vagueness which Plaintiffs claim exists suggests that Plaintiffs do not like the more restrictive funding standard, rather than that they are sincerely confused over the meaning of life endangerment.

It must be concluded that the Plaintiffs' claim that the Hyde Amendment is unconstitutionally vague is unsupported by law or by fact.

V.

THE HYDE AMENDMENT DOES NOT ESTABLISH RELIGION

Although the district court rejected the Plaintiffs' claim that the Hyde Amendment represents an Establishment of Religion (slip op. at 323-326), the Plaintiffs argue that, as an alternative ground for affirming the lower court, this Court should find that the Amendment so contravenes the First Amendment.

For a law to be held unconstitutional under the Establishment Clause, it must have no clear secular purpose, its primary effect must be to advance or to inhibit religion, or it must involve excessive entanglement of government with religion. *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 773 (1973). None of these defects can be found in the Hyde Amendment.

Plaintiffs claim that this case presents the "threshhold question of whether legislation that promotes the belief that the human fetus is a human life is impermissibly religious." Brief of Appellees at 169. They argue that legis-

lation enacted to protect the fetus—at least if enacted because the fetus is perceived to be "actual" human life, as opposed to "potential" human life—cannot serve a "secular purpose." Brief of Appellees at 170-171, 170 n.191.

Such an argument necessarily involves the claim that the State has no legitimate interest in the fetus. To accept such a proposition, this Court must overrule *Roe* v. *Wade* and every subsequent abortion related decision of this Court, all of which have held that the State maintains a direct and legitimate interest in the fetus. *Roe* v. *Wade,* 410 U.S. 113, 162 (1973). *See also Colautti* v. *Franklin,* 439 U.S. 379, 386-87 (1979); *Maher* v. *Roe,* 432 U.S. 464, 472, 478, 478 n.11 (1977); *Beal* v. *Doe,* 432 U.S. 438, 446 (1977); *Planned Parenthood* v. *Danforth,* 428 U.S. 52, 61 (1975). The primary effect of the Hyde Amendment is to protect this important and legitimate interest. The legitimacy of the State's interest in potential human life does not vanish because some or even a majority of the Members of Congress believe that the fetus is actual human life.

Under the legislative scheme of the Hyde Amendment, there is no administrative involvement by the State with religious institutions; thus, there is no entanglement of the one with the other.

Plaintiffs' argument that the Hyde Amendment is unconstitutional because it results in political divisiveness along religious lines is naive. Striking the Hyde Amendment would cause greater divisiveness. It hardly serves the interests of religious comity to force the members of religions whose members believe that abortion is tantamount to homicide to finance effectuation of abortion decisions sanctioned by pro-abortion religions. To avoid entanglement in a purportedly "divisive" religious issue, the government should withdraw from the area of contention—as the Hyde Amendment withholds governmental

support for abortion decisions—rather than enter the fray in support of those religious which favor unrestricted abortions.

CONCLUSION

Neither the Plaintiffs' brief nor the district court opinion produces constitutional, as opposed to policy, reasons for overturning the legislative enactment of the Hyde Amendment.

The district court ruling must be reversed.

Respectfully submitted,

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