IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 76-691 and 76-1113

JOSEPH A. CALIFANO, JR., Secretary of Health, Education & Welfare,

Appellant,

and

WEINBERGER, Secretary of Health, Education & Welfare, et al.,

Intervenor-Appellants,

v.

CARMEL MCRAE, *et ux.*,

Plaintiff-Appellee.

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

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM APPEALS

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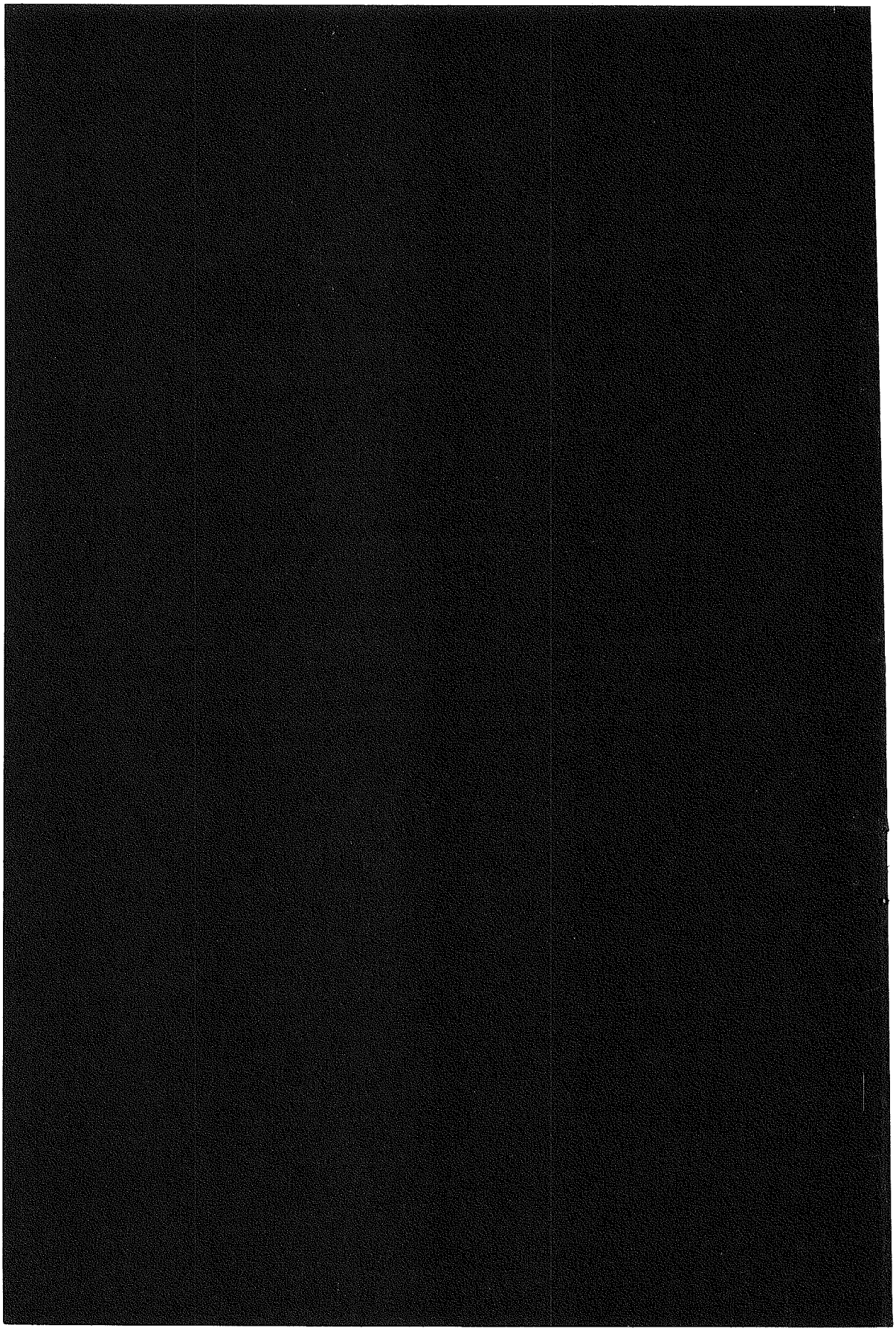

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JOSEPH A. CALIFANO, Secretary of Health, Education & Welfare,

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JAMES L. BUCKLEY *et al.* and ISABELLA M. PERNICONE, Esq., as Guardian *Ad Litem,*

Intervenor-Appellants,

—VS.—

CORA MCRAE, *et al.,*

Plaintiffs-Appellees.

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POINT I

Intervenor-Appellants present three substantial federal questions of sufficient public importance to warrant review by this Court.

This Court is respectfully referred to Intervenor-Appellants' Jurisdictional Statement, pp. 11-25, which clearly points out that the following substantial federal questions are involved:

A. *The Right to Abortion Does Not Include the Right to Compel the Public Funding of Abortion on Demand*

Roe v. *Wade* neither endorses nor requires abortion on demand nor commands public funding of any abortion, whether elective or otherwise, 410 U.S. 113, 152-166, 208 (1973) (opinion of the Court and concurring opinion of Burger, C.J.). Appellees argue that *Roe* v. *Wade* mandates public funding of elective abortions if any federal funds are used for maternity services or prenatal care. This statement of the issue involved clearly shows the presence of a substantial federal question.

B. *The Refusal by Congress to Fund Abortion on Demand Does Not Evidence an Unconstitutional Purpose*

Appellees have limited their argument to the *effect* of the Hyde Amendment, both real and imagined. It is stated that the effect is to discriminate against poor women who seek non-medically indicated abortions.

While this case falls short of the creation of classifications by legislation, and does not present one or more discriminatory effects of the legislation herein, there cannot be, under appellees' best argument, a sufficient basis for holding unconstitutional this otherwise valid legislative enactment. *Arlington Heights* v. *Metropolitan Housing Development Corporation,* —— U.S. ——, 50 L.Ed.2d 450, —— S.Ct. —— (Jan. 11, 1977); *Washington* v. *Davis,* 426 U.S. 229, 48 L.ed. 2d 597. 96 S.Ct. 2040 (1976).

C. *Article I, §9, Clause 7 Precludes the Judiciary From Mandating an Appropriation of Funds*

The justiciability of a constitutional challenge to a Congressional appropriations measure on Equal Protection grounds is an issue presently pending before this Court in a case in which probable jurisdiction has been noted. *Weeks* v. *United States,* 406 F.Supp. 1309 (W.D. Okla., 1975), probable jurisdiction noted 96 S.Ct. 2645 *sub nom. Delaware Tribe of Indians* v. *Weeks,* 75-1301, 75-1335, 75-1495 (oral arguments heard November 10, 1976).

POINT II

The District Court was correct in deciding that the interests of the unborn should be represented by a guardian pendente lite.

Appellant HEW cannot adequately protect the interests of the unborn since HEW lobbied against the Hyde Amendment (*Cong. Rec.,* S10795, June 28, 1976). HEW opposed intervenor-appellants' first application for a stay, and delayed the filing of a jurisdictional statement for three months. If an adversary process is the desired method of resolving constitutional issues, then the presence of intervenor-appellants is an absolute necessity.

Furthermore, the district court, in the case at bar, in a sound exercise of discretion, has granted standing to intervene for appellant Pernicone to represent the interests asserted. In a similar case, *Ryan* v. *Klein,* 412 U.S. 924, this Court affirmed, *inter alia,* the action of the 3-judge United States District Court in appointing a guardian to represent the interests of the unborn *pendente lite.*

POINT III

Jurisdiction of this Court on direct appeal from the interlocutory order of the District Court is well within the scope of 28 U.S.C. §1252.

All parties to this lawsuit, as well as the District Court, have treated the order appealed from as a final order. Furthermore, the motion for a preliminary injunction was in effect treated as a motion for summary judgment. There was no disputed fact and the taking of evidence or further legal argument would have been purely cumulative.

In addition, even if the order appealed from is treated as interlocutory, *McLucas* v. *DeChamplain,* 421 U.S. 21 (1975) clearly supports the jurisdiction of this Court since the finding of probable unconstitutionality was a "necessary predicate" for the relief granted. Indeed, appellee New York City Health and Hospitals Corporation does not doubt the jurisdiction of this Court on authority of *McLucas, supra.*

POINT IV

Intervenor-Appellants' Notice of Appeal to the Supreme Court of the United States was timely filed in the Eastern District Court of New York in accordance with the rules of this Court.

On October 29, 1976, one week after entry of the order appealed from, Intervenor-Appellants duly filed with the Clerk of the United States District Court for the Eastern District of New York their Notice of Appeal to this Court pursuant to 28 U.S.C. § 1252. See docket entries Nos. 33-34 in 76 C. 1804; docket entry No. 9 in 76 C. 1805.

CONCLUSION

Appellees' motions to dismiss or affirm should be denied.

Respectfully submitted,

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