No. 75-442

In the Supreme Court of the United States

OCTOBER TERM, 1975

HONORABLE JOHN H. POELKER, Mayor of the City of St. Louis, et al.,

Petitioners,

vs.

JANE DOE, et al.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION AND BRIEF, AMICUS CURIAE OF AMERICANS UNITED FOR LIFE, INC. IN SUPPORT OF PETITIONER JOHN H. POELKER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

PURPOSE OF THIS MOTION

Eugene P. Freeman, attorney for John H. Poelker has given consent for the filing of this amicus brief. Frank Susman the attorney for Jane Doe does not object to the filing of this amicus brief. Letters from each attorney stating the above has been filed with the Clerk of this Court.

INTEREST OF THE AMICI

Americans United for Life (AUL) is a national educational foundation organized to educate and promote better understanding of the humanity of the unborn and the value of human life. Its national office is located in Chicago, Illinois, and its membership includes approximately 20,000 persons located in every state of the union.

The Board of Directors and Officers of Americans United for Life include the following:

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This brief Amicus Curiae is filed in support of Mayor John H. Poelker and also filed to present the arguments to this Court that Equal Protection does not require abortion on demand nor does it require public hospitals to perform abortions which are not medically indicated.

Respectfully submitted,

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August 20, 1976.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-442

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vs.

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BRIEF AMICI CURIAE

NOTE

The Questions Presented and The Statement of the Case are omitted from this Amicus Curiae Brief since they are amply stated in the Brief of Petitioner, the Honorable John H. Poelker.

ARGUMENT

EQUAL PROTECTION DOES NOT REQUIRE ABORTION ON DEMAND AND DOES NOT REQUIRE PUBLIC HOSPITALS TO PERFORM NON-MEDICALLY INDICATED ABORTIONS.

The Court below found the City of St. Louis policy excluding non-medically indicated abortions from its public hospitals "a denial of equal protection to indigent pregnant women." 515 F.2d at 546. On this basis the Eighth Circuit Court of Appeals held the hospital policy unconstitutional; mandated that the hospital provide abortion facilities and services even to the extent of hiring physicians who would agree to perform abortions; and awarded attorney's fees personally against the Mayor of St. Louis on the theory of vexatiousness.

This case involves one of the most important issues arising under *Roe* v. *Wade,* 410 U.S. 113 (1973). In *Roe* v. *Wade,* this court found in the constitutional right of privacy, a right of a woman in consultation with her physician to make the decision to abort. In *Roe,* this court emphasized that the decision was one which involved the medical judgment of the physician. *Roe* v. *Wade* does not require abortion on demand.

The instant case presents this court squarely with the issue of whether a woman may demand an abortion of a public institution where the physicians explicitly disagreed with that decision and concluded that no medical reasons existed to warrant an abortion. Must a public hospital provide abortions on demand?

This Court in *Roe* was careful to note that:

> The abortion decision in all its aspects is inherently and primarily a *medical decision* and basic responsibility for it must rest with the physician. *Roe* at 166, (Emphasis added).

Chief Justice Burger was in agreement with this statement when he said:

> The vast majority of physicians observe the standards of their profession and act only on the basis of carefully deliberated medical judgments relating to life and health. *Roe* at 208.

Thus the abortion decision is a "medical decision" which cannot be effectuated unless it is arrived at in consultation and in agreement with a physician.

There is no determination in the present case that the abortion was medically necessary. The evidence is to the contrary (Transcript pp. 85, 91, 94, 104, 113). No physician at the city's hospital facilities believed the appellee's claim for an abortion to be warranted and no clear and convincing evidence was offered to show that the physicians' judgment was vitiated by the "practice and procedure" of the city hospitals or that, in fact, their judgment was erroneous. Thus, the physicians themselves did not rely on the policy of the city of St. Louis but instead refused the procedure on the basis that it was not medically indicated. The Circuit Court overturned the decision of the District Court dismissing this action by substituting its judgment for the clinical judgment of the examining physicians. This is contrary to the teachings of *Roe* v. *Wade,* 410 U.S. 113 (1973).

Public hospitals are established to further a *public* policy designed to meet the often urgent and immediate medical requirements of a community, obviously not to satisfy

every possible alternative activity incident to the exercise of private rights. Where a public hospital distinguishes between medically indicated and non-medically indicated abortions, that classification is a reasonable allocation of medical resources and cannot be construed otherwise.

This Court stressed in *Roe,* that abortion is primarily to be viewed as a medical procedure, presumably indistinguishable from other medical procedures requiring similar expertise and posing similar risks to the patient. If it is true that the abortion decision is a medical decision, and if abortion is not akin to a rite which hospitals are universally required to perform by the Constitution, then a hospital policy which excludes abortion should be tested with no greater scrutiny than a policy which excludes cosmetic surgery, open heart surgery, kidney dialysis, heart transplants or any other medical procedure because in the sound discretion of its governing body it is not feasible or simply not within the scope of its public purpose.

Such were the teachings of *Dandridge* v. *Williams,* 397 U.S. 471 (1970) where an exclusion in a governmental program which allegedly burdened the exercise of a private fundamental right (the right to procreate) was subjected not to the strict scrutiny test as in *Shapiro* v. *Thompson,* 394 U.S. 618 (1969) but rather to the traditional analysis.

Indeed, the instant case would not be properly measured by the *Shapiro* test even without the distinction drawn between private fundamental rights and those necessarily exercised in the public forum. The *Shapiro* case involved the infringement of a fundamental right *once exercised* where welfare payments were denied to potential clients who had not established residency. To carry the principals of the instant case urged upon this Court into the context of *Shapiro* would be to propose *not* that states may not

discriminate on the basis of the fundamental right to travel, but that when an indigent decides to travel the state of destination is constitutionally obliged to provide transportation. Further, the appellee in the instant case does not here properly assert a fundamental right. This is so not only because private rights may be vitiated when they enter the public domain, but because the right to abort is a joint right which arises upon the concurrence of woman and physician. No physician in his medical judgment concurred with the appellee so no zone of privacy which might include the right to effectuate an abortional act arose.

This Court's reluctance to apply the standards of *Shapiro* and its progeny to the area of private rights is further reflected in its continued application of traditional standards to discriminations based upon the legitimacy of children. *Weber* v. *Aetna Casualty & Surety,* 406 U.S. 164 (1972); *Levy* v. *Louisiana,* 391 U.S. 68 (1968); *Gomez* v. *Perez,* 409 U.S. 535 (1973). This is so, despite the fact that such classifications arguably affect the right of the individual to procreate, *Skinner* v. *Oklahoma,* 316 U.S. 535, 541-542, (1942), whether married or unmarried, *Eisenstadt* v. *Baird,* 405 U.S. 438, 453 (1972), by establishing separate standards by which the exercise of those private fundamental rights would be measured.

Thus the present case is concerned with a social and economic program which cannot be said to defeat fundamental rights in any meaningful sense. The city's exclusion of non-medically indicated abortion is a classification which should not be subject to strict scrutiny under the Equal Protection Clause. To deny that the state may make distinctions between medically indicated abortions and nonmedically indicated abortions in its social and economic

programs would be to deny to executive and legislative authorities the right to make rational classifications based on valid public interests. It would conflict with this Court's holding in *Roe, Doe* and *Planned Parenthood* v. *Danforth.* It would be anamolous in the context of the nature of "private" rights and cases relied upon in *Roe.* A right to be free from governmental interference in private matters does not imply a reciprocal right to public implementation of private decisions. "The function of the Fourteenth Amendment is negative and not affirmative and it carries no mandate for particular measures of reform." *Ownby* v. *Morgan,* 256 U.S. 94 (1921). The *Shapiro* test is plainly inappropriate. The standards articulated in *Dandridge* may and should be applied to the instant case.

In *Dandridge* traditional standards of equal protection were applied to a governmental program which limited maximum allotment to welfare families, where the primary effect was to burden the *private fundamental right* to procreate. This Court said:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality. . . ." A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. . . . (The application of the traditional test) is a standard that is true to the principle that the Fourteenth Amendment gives the Federal Courts no power to impose upon the States their economic view of what constitutes wise economic policy or social policy. 379 U.S. at 486.

* * *

> Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public assistance programs are not the business of this Court . . . the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriads of potential recipients. Id. at 487.

We respectfully submit that the principles of *Dandridge* bear directly upon the instant case.

Application of the *Shapiro* standard to this case would cast a burden upon the city hospitals to justify exclusion of nonmedically indicated abortions in a manner which this Court would certainly not require of other medical procedures, and in conflict with this Court's intent in *Roe*. This is so despite the fact that a non-medically indicated or elective abortion is not even akin to cosmetic surgery since there, presumably, the surgeon has concurred in the medical appropriateness of the surgery or he would not perform it.

Even if it were true that abortion in the first trimester poses, in general, a lesser threat to maternal health than childbirth, we safely assume that the city hospitals are under no constitutional obligation to practice "preventative" medicine or pursue generalized medical hypotheses which may not apply to specific patients where the immediate needs of the public require attention. Most first trimester abortions are not performed in hospitals anywhere in America. Instead they are performed in free standing clinics. To demand that the city hospitals conform their practice to the abstractions of actuarial or mortality tables relevant to abortion and childbirth is, we believe,

beyond the proper authority of the federal courts which might just as easily conclude that elective tonsilectomies and appendectomies must be included in hospital services if statistics show that such in hospital surgery reduces subsequent medical risk. Application of a standard which would prevent public hospitals from excluding alternative activities incident to the exercise of private rights through "practice and procedure" as the court below held, would seriously impede the right of governmental bodies to determine what *public* interests they would serve through such institutions and would place necessary discretionary power out of the hands of executive and legislative authorities.

Moreover, as this Court recognized in *Roe,* 410 U.S. at 160, there is a variety of ethical, moral and religious attitudes toward abortion. The personal, sensitive nature of familial, marital and reproductive decisions is in fact the very reason why the Constitution protects them as *private* fundamental rights, as opposed to rights necessarily exercised in "public" or through governmental instrumentalities, e.g., the right to interstate travel, *Shapiro* v. *Thompson,* 394 U.S. 618 (1969); the right to vote, *Terry* v. *Adams,* 345 U.S. 461 (1953).

Implicit in the recognition of 'zones' or penumbras of privacy is an understanding of the distinction between law, which dominates public activity, and personal morality which ought to determine private decisions and activities. What may be sufficient at law would not always be so according to private moral or religious standards. Yet to allow that a woman may demand that a public hospital, at public expense, implement her private decision to abort, made without reference to what public interests her decision would in fact serve, would entangle the city in the

facilitation of her purely ethical decisions. Given the differences among members of the public on the moral content of an abortional act, the city has an obvious interest in avoiding the imposition upon the public at large of the obligation to implement purely elective or non-medically indicated abortion and the entanglement of public policy in personal and private moral decisions which such a policy would entail.

If the abortion decision is so private in the first trimester as to preclude any governmental regulation or restriction beyond requiring it be performed by a licensed physician, it follows that government should not itself be compelled to respond to the demand of the exercise of that private right, unless this Court in *Roe* v. *Wade* intended to institute an affirmative right to an abortion—abortion on demand—of the woman alone unsupported by valid medical indications. Clearly, this Honorable Court did not intend to create an affirmative right to abort but rather intended to acknowledge a right to privacy which includes the abortion decision. It is a private and personal right which in no way mandates public support or public funding. The fact that a woman has a right to abort does not create a correlative right to have that abortion publicly financed. Yet the appellee here demands that the city finance, facilitate and supply a compliant physician and its hospital to implement her private decision. She demands, in other words, the city foster what it cannot in any way restrict or require. We cannot believe the Constitution requires this result.

The appellee would have this Court hold, through strict application of the Equal Protection Clause, that the city may not constitutionally distinguish medically and non-medically indicated abortion. Such a decision would baldly contradict this Honorable Court's readings in *Roe* and

Doe where the distinction between compelling and non-compelling state interests at stake in the various stages of pregnancy formed the very basis of the woman's right to abort in the first trimester free from state restriction or regulation. If that distinction serves to exclude state criminal sanctions upon the abortion decision and its effectuation, it should logically serve to permit governmental bodies to exclude non-medically indicated abortion services from their social and economic programs as well.

In addition, appellee misconstrues the classification at issue in this case. The distinction made by the city of St. Louis is not between abortion and childbirth, as appellee argues, but rather between medically indicated abortions and abortions which are not medically indicated. The classification does not divide the groups into those who desire childbirth and those who desire abortions but rather between those who need medically indicated abortions (which St. Louis provides) and those who do not. Properly seen in this manner, the classification is neither suspect nor unconstitutional.

Upon the principles of equal protection the appellee presently urges upon this Court, if parents were for some reason incapable of effectuating their private fundamental right to educate their children in a particular foreign language, *Meyer* v. *Nebraska,* 262 U.S. 390, 399 (1923), the state would apparently be required by the Constitution to finance and facilitate that decision if it provided education in foreign languages through its public schools at all. We doubt that this Court would subject public schools to such private parental decisions made without reference to the availability of scarce resources, much less to what public interests public schools in fact propose to serve. Neither should public hospitals be required under the Con-

stitution to provide for every alternative incident to the exercise of private rights. It is clearly the prerogative of public governmental bodies to decide what public interests its programs should serve, limited only where its policies are patently irrational or unrelated to its valid interests.

Again, under principals urged by the appellee, would this Court hold that the private fundamental right to possess and peruse obscene literature, *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969), requires public libraries which exclude pornography, as they commonly do, to then purchase it, supply shelf space and even employ staff "experts" in the field with no moral and religious objections to it, in order to implement the exercise of this private fundamental right? We think not. In fact this Court has found that obscene literature may be properly excluded from the mails, *U.S.* v. *Reidel,* 402 U.S. 351 (1971), excluded in places of public accommodation, *Paris Adult Theater* v. *Slaton,* 413 U.S. 49 (1973), and excluded from intra-state commerce even if transported in a private vehicle and to be employed for private purposes, *U.S.* v. *Orito,* 413 U.S. 139 (1973); *Cf. U.S.* v. *12 200-ft. Reels,* 413 U.S. 123 (1973). This is so because obscenity, like the abortional act, enjoys no constitutional protection *in itself.* Rather, the Constitution protects a zone within which activity may be effectuated without state interference. In *Stanley,* that zone was decided to include the home; in *Roe,* the woman in consultation with her physician—not the woman alone demanding of her physician.

A "right of privacy" necessarily denotes a barrier or wall of separation between public and private domains where, on one side, the public interest expressed in social and economic policy is determinative and, upon the other, private, ethical interests are dominant. Private desire and public will may at times intersect. But what the appellee

demands is a "one-way" street where her private interest in an abortion expressed in the public domain will be satisfied without reference to extant public policy rationally related to public interests. The burden should be upon the appellee to show that her interests and those of the public expressed gratuitously through its public hospitals coincide, not upon the hospitals to show they do not.

If, indeed, the city maintained a monopoly upon abortional services—analogous to marriage and divorce, *Bodie* v. *Connecticut,* 401 U.S. 371 (1971); or the judicial process, *Griffin* v. *Illinois,* 351 U.S. 12 (1956)—the appellee might justly claim that the exercise of her private right had been in fact "infringed" by a denial of equal protection on account of her indigency were no non-therepeutic abortions then provided. But the city has formed no monopoly upon medical, much less abortional, services and would be presumably forbidden by the Constitution to do so. Since this Court has never held that citizens have an independent right under the Constitution to public welfare, in the form of medical care or not, the argument that the appellee presents that the public must supply her with an elective abortion because she cannot afford one or deny her equal protection clearly fails. The logic the appellee follows would oblige governmental entities to indulge desires, even whims of indigent clients without reference to its own valid interests. In his lecture "A Constitutional Faith," published in 1968, Justice Hugo Black stated, "Nor does a grant to the people of the right to assemble to speak or to write carry any inference that the government must provide streets, buildings, or places to do the speaking, writing or assembling." (Page 58).

The disparate treatment afforded at the city's hospitals of non-medically indicated abortions does not constitute invidious discrimination, nor is it patently arbitrary. It

reflects a discretionary allocation of scarce medical resources to satisfy the purpose public hospitals are instituted to serve: necessary medical treatment. Public hospitals are not "forums" for the exercise of private rights, but public institutions meant to serve public interests. It follows that a woman who has made an independent decision to abort ought to demonstrate medical need, as all patients must, before the resources of the hospital are put at her disposal.

Although the pregnant woman may make *her* decision on the basis of non-medical criterion or the "detriments" which accrue to pregnancy, 410 U.S. at 153, physicians are to exercise their "medical judgment," as their training equips them to do. The appellee argues in substance that the physicians medical judgment must *ipso facto* conform to the private interests, whether specifically medical or not, upon which a woman desiring an abortion bases her decision. If, in other words, she reaches her decision to abort, some person or agency somewhere then is obliged to conform their judgment to her own. Since she claims indigency, then the city, through its hospital and its agents, must conform. This, we assert, is not only absurd but would constitute abortion on demand. The appellee has no more "right" to demand the city conform to her interests and supply her with a public abortionist than a wealthy patient could coerce any private physician to conform his conscience or judgment to her own. The policy of the city hospitals asks that physicians in its employment in fact exercise *medical* judgment before its facilities be employed for abortion which this Court has in any case presumed they would in fact do.

The Court below notes that no abortions had been performed at the city hospitals since January 1973 to the date of the opinion. This should surprise no one. It merely reflects the fact that abortion is not that often medically in-

dicated. In addition, hospitals are not the usual forum for first trimester abortions when the vast majority are performed in clinics. The city rightfully allocates its scarce medical resources to meet only genuine medical needs. This Court should not compel otherwise. Nor should this Court compel any public hospital to hire technicians to perform non-medically indicated abortions on demand.

Further, as before noted, the city has an interest in preventing the entanglement of public policy and monies in purely private decisions of a sensitive ethical or moral nature. Where no medical indication exists to warrant abortion, the city should not be compelled to facilitate through its medical facilities decisions opposed to its valid and important interests.

CONCLUSION

The application of the traditional test of Equal Protection, clearly appropriate in this case, demonstrates that the Equal Protection Clause of the United States Constitution does not require abortion on demand nor does it require public hospitals to perform abortions which are not medically indicated. Thus the policy of the City of St. Louis challenged in this case must be upheld as rationally related to the valid interests involved.

Respectfully submitted,

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Law student Thomas J. Marzen assisted in the preparation of this Brief.

STATE OF ILLINOIS)
) ss.
CITY OF CHICAGO)

CERTIFICATE OF SERVICE

I, Victor Rosenblum, one of the attorneys for Amici Curiae, being a member of the Bar of the Supreme Court of the United States, due hereby certify I have caused a true and correct copy of the foregoing motion, to be served upon Petitioners and Respondents they being all the parties of record by depositing such motion in a United States Post Office mailbox, with first-class postage prepaid addressed to Frank Susman, Esq., at his office of record, Pierre Laclede Center, 7733 Forsyth Blvd., Suite 1100, St. Louis County, Missouri 63105, Attorney for Respondents; Jack L. Koehr, City Counselor of the City of St. Louis, State of Missouri, and Eugene P. Freeman, Deputy City Counselor of the City of St. Louis, State of Missouri, Room 314, City Hall, 1200 Market Street, St. Louis, Missouri 63103, Attorneys for Petitioners, this 20th day of August, 1976.

.....

Victor G. Rosenblum