No.

In the Supreme Court of the United States

October Term, 1979

JASPER F. WILLIAMS, M.D. AND EUGENE F. DIAMOND, M.D.,
Appellants,

and

ARTHUR F. QUERN, Director, Illinois Department of Public Aid,
Appellant,

and

THE UNITED STATES,
Appellant,

vs.

DAVID ZBARAZ, M.D., MARTIN MOTEW, M.D., on their own behalf and on behalf of all others similarly situated; CHICAGO WELFARE RIGHTS ORGANIZATION, an Illinois not-for-profit corporation, and JANE DOE, on her own behalf and on behalf of all others similarly situated,
Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants, Jasper F. Williams, M.D., and Eugene F. Diamond, M.D., Intervening Defendants in the District

Court (hereinafter, "Intervening Defendants"), bring this direct appeal from a Final Judgment and Order entered April 30, 1979 by the United States District Court for the Northern District of Illinois, Eastern Division, holding an Act of Congress [§210 of Pub. L. 95-480, 92 Stat. 1586 (1978), hereinafter the "Hyde Amendment"] unconstitutional under the Fifth Amendment to the Constitution of the United States, and holding an Illinois statute [P.A. 80-1091, ILL. REV. STAT. ch. 23, §§5-5, 6-1, 7-1 (1977 Supp.), hereinafter "P.A. 80-1091"] unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Further, Intervening Defendants bring this direct appeal from a Ruling and Mandate of the United States Court of Appeals for the Seventh Circuit, Civil Action Numbers 78-1669, 78-1709, 78-1787, 78-1890, 78-1891 and 78-2029 (February 13, 1979), holding that Illinois P.A. 80-1091 violated the objectives of the Medicaid Act, 42 U.S.C. § 1396a(a)(17) (1976), and the regulations promulgated pursuant thereto, 43 Fed. Reg. 57,253 (1978) (to be codified as 42 C.F.R. §440.230), as set forth in the Appendix attached to this Jurisdictional Statement (hereinafter "Intervening Defendants' Appendix") at App. 7. The Seventh Circuit Court of Appeals ruled that, although the Illinois statute P.A. 80-1091 violated the federal statute and regulations issued thereunder, the Hyde Amendment was itself intended as a substantive amendment to Title XIX of the Social Security Act and that, therefore, Illinois is required by Title XIX to fund all abortions reimbursed under the Hyde Amendment.

The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. §1252 (1976).

OPINIONS BELOW

The initial order was issued in this action by the United States District Court for the Northern District of Illinois, Eastern Division, on December 21, 1977 whereby the court abstained from consideration of the case is not officially reported. It and all subsequent District Court opinions, judgments, and orders are filed in the District Court at Civil Action Number 77 C 4522. The initial opinion and order rendered by the United States Court of Appeals for the Seventh Circuit on March 15, 1978, which reversed the District Court's abstention order is reported at 572 F.2d 582 (7th Cir. 1978).

The Circuit Court remanded to the District Court for consideration of the case. On May 15, 1978, the District Court entered a Final Judgment pursuant to an unreported Memorandum Opinion and Order of the same day and granted summary judgment to Plaintiffs.

Defendant Quern and the Intervening Defendants appealed from this Judgment and Order to the United States Court of Appeals for the Seventh Circuit. The Opinion and Order rendered by the Circuit Court on February 13, 1979 are not officially reported. They were filed in the Circuit Court at Civil Action Numbers 78-1669, 78-1709, 78-1787, 78-1890, 78-1891, and 78-2029 (7th Cir. 1979) and are set forth respectively in the Appendix of the Jurisdictional Statement of Arthur F. Quern (hereinafter "Quern Appendix") at A-1 *et seq.* Intervening Defendants now appeal from this decision.

The Circuit Court remanded to the District Court for consideration of the constitutional issues of the case. The Memorandum Opinion thereafter issued by the District Court on April 29, 1979 is not officially reported. The Opinion, Final Judgment and Order were filed in the United

States District Court for the Northern District of Illinois, Eastern Division, at Civil Action Number 77 C 4522. The Opinion is set forth in the Quern Appendix at A-21 *et seq.* The Final Judgment is set forth in the Quern Appendix at A-43 *et seq.* Intervening Defendants now appeal from said Decision, Final Judgment and Order.

JURISDICTION

This is a civil proceeding to which the United States is a party and in which an Act of Congress has been held unconstitutional. The Plaintiffs invoked jurisdiction in the District Court under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343 (1976).

The date of the judgment in the United States District Court for the Northern District of Illinois sought to be reviewed is April 30, 1979. The date of the judgment in the United States Court of Appeals for the Seventh Circuit sought to be reviewed is February 13, 1979.

Notice of Appeal to this Court was duly filed by the Intervening Defendants in the United States District Court for the Northern District of Illinois, Eastern Division on May 2, 1979, and is set forth in the Intervening Defendants' Appendix at App. 7.

The jurisdiction of this Court to hear this appeal rests on 28 U.S.C. §1252 (1976), which confers jurisdiction to review by direct appeal the decision of a district court which holds an Act of Congress unconstitutional in any civil action to which the United States is a party. The United States intervened as a party Defendant pursuant to Fed. R. Civ. P. 24 when the Seventh Circuit raised the question of the constitutionality of the Hyde Amendment and remanded to the District Court. *See* Quern Appendix at A-20.

This Court has jurisdiction over the "whole case" in an appeal pursuant to 28 U.S.C. §1252 (1976). *Fusari* v. *Steinberg,* 419 U.S. 379 (1975); *U. S.* v. *Raines,* 362 U.S. 17 (1960), *Northwestern Laundry* v. *Des Moines,* 239 U.S. 486 (1916). Thus, the February 13, 1979 decision of the Seventh Circuit Court of Appeals on statutory issues arising under the Social Security Act is also properly before this Court.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

THE CONSTITUTION

Article I, §9, cl. 7 of the Constitution of the United States in pertinent part:

> "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . ."

The Fifth Amendment to the Constitution of the United States in pertinent part:

> "No person shall be . . . deprived of life, liberty or property without due process of law . . .".

The Fourteenth Amendment to the Constitution of the United States, in pertinent part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

THE HYDE AMENDMENT

§210 of Pub. L. 95-480, 92 Stat. 1586 (1978):

> "None of the funds provided for in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the preg-

nancy were carried to term when so determined by two physicians."

THE ILLINOIS STATUTES

P.A. 80-1091, ILL. REV. STAT. ch. 23, §5-5 (1977 Supp.):

> "The Illinois Department, by rule, shall determine the quantity and quality of the medical assistance for which payment will be authorized, and the medical services to be provided, which may include all or part of the following: . . . but not including abortions, or induced miscarriages or premature births, unless, in the opinion of the physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child."

P.A. 80-1091, ILL. REV. STAT. ch. 23, §6-1 (1977 Supp.):

> "Nothing in this Article shall be construed to permit the granting of financial aid where the purpose of such aid is to obtain an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child."

P.A. 80-1091, ILL. REV. STAT. ch. 23, §7-1 (1977 Supp.):

> "Aid in meeting the costs of necessary medical, dental, hospital, boarding or nursing care, . . . except where such aid is for the purpose of obtaining an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a viable child and such procedure is necessary for the health of the mother or her unborn child."

ADDITIONAL STATUTORY AND REGULATORY PROVISIONS

Pertinent provisions of the Medicaid Title of the Social Security Act, 42 U.S.C. §§1396 and 1396a (1976), are set forth in the Intervenors Appendix at App. 1-3. Pertinent provisions of the implementing regulations 43 Fed. Reg. 57,253 (1978) (to be codified in 42 C.F.R. §440.230) are set forth in the Intervenors' Appendix at App. 7.

QUESTIONS PRESENTED

I. Whether the United States Congress acting under the Appropriation Power granted solely to it under Article I, section 9, clause 7 of the United States Constitution violates the Fifth Amendment to the Constitution by enacting the Hyde Amendment which limits the disbursement of federal funds for abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians?

II. Whether Congress acting under the legislative powers granted to it by the United States Constitution may protect its interests, particularly its strong interest in fetal life, by limiting, through enactment of the Hyde Amendment, disbursement of federal funds for abortions?

III. Whether the General Assembly of the State of Illinois may protect the interests of the state, particularly

the state's strong interest in fetal life, by enacting Public Act 80-1091 which limits the disbursement of public funds for abortions to those abortions necessary to preserve the life of the mother?

IV. Whether the State of Illinois is permitted under Title XIX (the Medicaid Title) of the Social Security Act to fund only those abortions necessary to preserve the life of the mother?

STATEMENT OF THE CASE

(1) On June 27, 1977, the Illinois General Assembly passed Public Act 80-1091 to amend §§5-5, 6-1 and 7-1 of the Illinois Public Aid Code, which was originally approved April 11, 1967. P.A. 80-1091 was vetoed September 13, 1977, but became law on November 17, 1977, upon a vote by two-thirds of the legislature to override the gubernatorial veto. It provided that public funds would not be expended for abortions unless the abortions were necessary to perserve maternal life.

(2) On December 6, 1977, Plaintiff-Appellees (hereinafter "Plaintiffs") filed a class action suit in the United States District Court for the Northern District of Illinois, Eastern Division, to enjoin enforcement of the statute, claiming jurisdiction under 28 U.S.C. §§1331, 1343(3) and (4) (1976), and seeking relief under 42 U.S.C. §1983 (1976), 28 U.S.C. §2201 (1976) and Fed.R.Civ.P. 57. They alleged that P.A. 80-1091 violated their rights under the Medical Assistance Title ("Medicaid") of the Social Security Act, 42 U.S.C. §1396 *et seq.* (1976), the Ninth Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. They filed a motion for a temporary restraining order or preliminary injunction.

(3) The Plaintiffs are David Zbaraz, M.D. and Martin Motew, M.D., physicians whose business includes performing abortions upon medicaid recipients; the Chicago Welfare Rights Organization which purports to represent the interests of medicaid recipients who desire to receive governmentally financed abortions whenever a physician considers them to be "medically necessary" but not necessary to preserve their lives, and who would not receive state funding for abortions under P.A. 80-1091; and Jane Doe, a member of the same class who at the time she joined the lawsuit alleged she was pregnant and desired to, but under P.A. 80-1091 would not, receive state funding for an abortion.

(4) The Defendant Appellants (hereinafter "Defendants") are Arthur F. Quern, Director of the Illinois Department of Public Aid, the state agency charged with administering the medical assistance programs and with enforcement of the Illinois statute in question; Jasper F. Williams, M.D., an Ob-Gyn physician-taxpayer and former President of the National Medical Association who on a regular and recurring basis treats women who carry their pregnancies to term, and Eugene F. Diamond, M.D., a physician-taxpayer and a practicing pediatrician and Professor of Pediatrics. Drs. Williams and Diamond intervened in their capacity as physician-taxpayers who support the state policy articulated by P.A. 80-1091, who conscientiously objected to abortion and participation in abortion through use of their taxes in violation of the Hippocratic Oath, and whose economic interests are at stake since the outcome of this litigation may result in a loss of patients, both mothers and the children they carry. The United States intervened when the Hyde Amendment, an Act of Congress, was brought into issue.

(5) On December 21, 1977, the District Court issued a Memorandum Opinion and Order denying the Plaintiffs' motions for a temporary restraining order or preliminary injunction and abstained pending state court adjudication. Plaintiffs' motion in the District Court for an injunction pending appeal was denied the same day. On December 22, 1977, they appealed to the Seventh Circuit Court of Appeals.

(6) On January 11, 1978, the Court of Appeals granted the Plaintiffs' motion for injunction pending appeal. On March 15, 1978, the Circuit Court reversed the opinion of the District Court on the abstention issue, vacated the injunction pending appeal, and remanded the case to the District Court. On March 16, 1978, the Plaintiffs moved in the District Court for a temporary restraining order which on March 28, 1978, was denied nunc pro tunc as of March 17, 1978.

(7) On May 15, 1978, District Court Judge Alfred Y. Kirkland issued a Memorandum Opinion and Order denying Defendant Quern's motions to dismiss for want of jurisdiction and for summary judgment, and granting Plaintiffs' motion for summary judgment after finding that the Illinois statute was in conflict with the objectives of the Social Security Act.

(8) On May 23, 1978, both Defendant Quern and Intervening Defendants Diamond and Williams moved in the District Court for a stay pending appeal which was denied on that date. On May 23, the Plaintiffs moved in the District Court for entry of Final Judgment and Order. On May 24, 1978, Defendant Quern filed a notice of appeal in the District Court and the next day moved in the Circuit Court for a stay pending appeal. On May 30, Intervening Defendants filed a notice of appeal and applied to the Circuit Court for a stay pending appeal.

(9) On June 13, 1978, Plaintiffs filed a notice of cross-appeal from that part of the District Court opinion and order which allowed Drs. Diamond and Williams to intervene as Defendants. Also on June 13, Judge Kirkland entered an amended Final Judgment and Order. On June 15, 1978, the Court of Appeals denied the Defendants' motions for stay pending appeal.

(10) On June 23, 1978, Intervening Defendants applied for a stay pending appeal to United States Supreme Court Justice John Paul Stevens who denied it on June 27. On June 29, the same application was made to Chief Justice Warren Burger who denied it on July 5. On July 13, 1978, the Intervening Defendants and Defendant Quern separately filed notices of appeal from the District Court's amended Final Judgment and Order.

(11) On February 13, 1979, the United States Court of Appeals for the Seventh Circuit reversed the District Court's decision. In a Memorandum Opinion, the court stated that the District Court was correct in finding that the Illinois statute was in conflict with the objectives of Title XIX of the Social Security Act, but held that the Hyde Amendment was itself a substantive amendment to the Social Security Act and not simply a limitation on the use of funds for abortion. The Seventh Circuit remanded the case to the District Court with instructions to consider the constitutionality of both the Illinois statute and the Hyde Amendment. *See* Quern Appendix at A-1 *et seq.*

(12) At this time, the United States intervened pursuant to Fed. R. Civ. P. 24 because the constitutionality of an Act of Congress, the Hyde Amendment, was under attack. *See* Quern Appendix at A-19 *et seq.*

(13) In its Memorandum Opinion of April 27, 1979, as set forth in Quern Appendix at A-21 *et seq.*, and in its Final Judgment, Order and Injunction of April 30, 1979, as set

forth in Quern Appendix at A-43 *et seq.*, the District Court by Judge John T. Grady held that both the Act of Congress (the Hyde Amendment) and the Illinois statute (P.A. 80-1091) were unconstitutional as applied to medically necessary abortions prior to the point of fetal viability.

(14) Motions for Stay of the District Court's Final Judgment, Order and Injunction of April 30, 1979 were denied by the District Court on April 30, 1979. *See* Quern Appendix at A-41. Notice of Appeal to this Court was filed by the Intervening Defendants on May 2, 1979, and is set forth in Intervening Defendants Appendix at App. 9. On the same day the Intervening Defendants filed an Application for Stay Pending Appeal of the mandate of the United States District Court for the Northern District of Illinois, Eastern Division. The stay was denied by Mr. Justice Stevens on May 24, 1979. A subsequent application for stay was made to Mr. Justice Rehnquist on May 24. It was referred to the Court and denied on June 4, 1979.

(15) This appeal is taken by Intervening Defendants Williams and Diamond with respect to both the Final Judgment and Order of the United States Court of Appeals for the Seventh Circuit entered February 13, 1979, and the Final Judgment, Order and Injunction of the United States District Court for the Northern District of Illinois, Eastern Division, entered April 30, 1979.

THE QUESTIONS ARE SUBSTANTIAL

I.

Whether the United States Congress acting under the Appropriation Power granted solely to it under Article I, section 9, clause 7 of the United States Constitution violates the Fifth Amendment to the Constitution by enacting the Hyde Amendment which limits the disbursement of federal funds for abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians?

The District Court held unconstitutional the Hyde Amendment which denies federal financial disbursement for abortions performed by physicians when they have deemed the fetus to be nonviable and the abortion to be "medically necessary." The District Court's holding was grounded in its "belief" that the Congress has "no legitimate interest in promoting the life of a nonviable fetus in a woman for whom abortion is medically necessary." Quern Appendix at A-21. This ruling was handed down even though the Plaintiffs had not attacked the constitutionality of the Hyde Amendment at any stage of the proceedings.

Whether funds shall be "drawn from the Treasury" is a matter within the sole discretion of the Congress. Article I, section 9, clause 7, United States Constitution; *State of Ohio* v. *U.S. Civil Service Commission,* 65 F.Supp. 776, 780 (S.C. Ohio 1946); *Cincinnati Soap Co.* v. *U.S.,* 301 U.S. 308, 321 (1937). Should a judicial order issue pursuant to the District Court decision requiring the federal government to expend funds to reimburse the states for abortions deemed "medically necessary," a most acute legislative-judicial conflict would be created. Even if an injunctive order does not issue, such a conflict would result since our system of federalism contemplates the deference of federal officials to a judicial declaration of unconstitutionality.

Article I of the Constitution, however, forbids disbursement of federal funds without explicit Congressional approval; the Hyde Amendment forbids use of public money for the purpose for which the District Court claims they must be allocated under the Fifth Amendment. Thus, the District Court decision portents and produces direct confrontation between the federal judiciary and the Congress over control of federal expenditures. Whether the District Court erred in declaring the Hyde Amendment unconstitutional, in view of the exclusive constitutional authority of the Congress to appropriate public funds from the Treasury, is clearly a substantial federal question which warrants plenary review.

II.

Whether Congress acting under the legislative powers granted to it by the United States Constitution may protect its interests, particularly its strong interest in fetal life, by limiting, through enactment of the Hyde Amendment, disbursement of federal funds for abortions?

III.

Whether the General Assembly of the State of Illinois may protect the interests of the state, particularly the state's strong interest in fetal life, by enacting Public Act 80-1091 which limits the disbursement of public funds for abortions to those abortions necessary to preserve the life of the mother?

The United States Court of Appeals for the Seventh Circuit construed the Hyde Amendment to effect substantive changes in the Medicaid Act (*See* Quern Appendix at A-8) and the District Court ruled on the Hyde Amendment as construed by the Seventh Circuit. If it were the intention of Congress to effect substantive changes in Medicaid coverage, such changes would be a constitutional exercise of congressional legislative power.

The Illinois provision does substantively amend the Illinois public aid program. This amendment is a constitutional exercise of state lawmaking power.

Nonetheless, the District Court held unconstitutional the Hyde Amendment which had been enacted by Congress pursuant to the legislative power granted to Congress under the Constitution of the United States, and held unconstitutional a statute of the State of Illinois (P.A. 80-

1091) which limits funds to physicians who perform abortions except when necessary to preserve the life of the mother. The basis for this decision was the District Court's belief that the valid governmental interest in protection of the fetus expressed in social and economic programs must yield before the desire of a woman for an abortion coupled with a physician's conclusion that the abortion is "medically necessary."

The decision of the District Court is contrary to this Court's decision that the extent to which public funds shall be employed for abortion is a matter for democratic consensus expressed through elected officials. *Maher* v. *Roe,* 432 U.S. 464 (1977). The decision also contradicts *Poelker* v. *Doe,* 432 U.S. 519 (1977), wherein the Court said that the principle of democratic consensus applied to a policy promulgated by the mayor of St. Louis, which forbade abortion in the city's public hospital unless there existed "a threat of grave physiological injury or death." *Poelker* v. *Doe,* 432 U.S. at 520-521.

There is no constitutionally significant difference between the issue presently before this Court and the questions resolved in *Maher* and *Poelker.* Accord, *Woe* v. *Califano,* 460 F.Supp. 234 (S.D. Ohio 1978) (upholding the Hyde Amendment under the Constitution); *Freiman* v. *Walsh,* No. 77-4171-CV-C (W.D. Mo., filed Jan. 26, 1979); *D—R—* v. *Mitchell,* 456 F.Supp. 609 (D. Utah 1978); *Doe* v. *Mundy,* 441 F.Supp. 447 (E.D. Wis. 1977).

The principle of democratic consensus which was applied in *Maher* and *Poelker* is applicable therefore in consideration of the Hyde Amendment and Illinois P.A. 80-1091. The actions which Congress and the Illinois General Assembly have taken in enacting the Hyde Amendment and the Illinois statute were clearly within the scope of their legislative authority.

The legislatures acted pursuant to the right and duty to protect important government interests. In the present context, legislatures may rationally conclude that both the short-term and long-term costs of childbirth are less than similar costs for abortion. A detailed and heavily documented study [Hardy, *Privacy and Public Funding: Maher* v. *Roe as the Interaction of Roe* v. *Wade and Dandridge* v. *Williams,* 18 Ariz. L. Rev. 903 (1976)] presents substantial evidence that availability of free abortion tends to decrease contraceptive use and increase pregnancies. This results in a shift of over-all costs which is not reflected by merely comparing the cost to government of a single abortion to that of a single birth.

More importantly, Congress and the State of Illinois have articulated a strong interest in the protection of fetal life and the encouragement of childbirth. Congress has chosen to implement this interest by an explicit statement of Congressional policy as expressed in the language of the Hyde Amendment limiting the types of abortions for which federal funds are available.

The interest in the protection of fetal life in federal social and economic programs has been the subject of protracted and heated Congressional debate for three years. The controversy over the present policy of the federal government with regard to funding medicaid abortions con-

sumes at least 513 pages of the Congressional Record.[1] Clearly, the funding priorities articulated through the Hyde Amendment were established with great forethought and serious deliberation by the Members of Congress. The Illinois policy in this regard was approved by over two-thirds of its General Assembly.

This Court has consistently recognized that it is within the competence of legislatures and not of courts to make decisions with respect to raising and disposition of public revenues. *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973). The Constitution does not empower the judiciary to second-guess the funding priorities established by legislatures. *Steward Machine Company* v. *Davis*, 301 U.S. 548, 595 (1937).

Even when funding decisions involve "the most basic economic needs," this Court has declined to disturb legislative funding priorities in social and economic programs. *Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970). As was

[1] 122 CONG. REC. S19437-46 (daily ed. Dec. 7, 1977), H12827-48 (Dec. 7, 1977), H12768-76 (Dec. 7), S19396-98 (Dec. 6), H12648-59 (Dec. 6), H12315 (Dec. 5), S19234-40 (Nov. 29), H12449-513 (Nov. 29), S19166-67 (Nov. 22), H12435 (Nov. 22), S18788-92 (Nov. 4), H12273-77 (Nov. 4), S18574-622 (Nov. 3), H12167-80 (Nov. 3), S18566 (Nov. 2), H12065-99 (Nov. 2), H12012 (Nov. 1), H11877 (Oct. 31), S17900-03 (Oct. 27), S17186 (Oct. 17), H11025 (Oct. 14), S17159-60 (Oct. 13), H10881-972 (Oct. 13), S17048-52 (Oct. 12), H10829-61 (Oct. 12), S16739-41 (Oct. 7), H10501 (Oct. 3), H10128-34 (Sept. 27), H10094-95 (Sept. 26), H9061 (Sept. 9), S13641-79 (Aug. 4), H8329-54 (Aug. 2), S13225 (Aug. 1), S11030-57 (June 29), S10919-22 (June 21), S10369 (June 21), S10177-78 (June 20), H6218 (June 20), H6082-99 (June 17), H6054 (June 16), S5669-896 (June 14), H5245-46 (June 1, 1977).

observed by the authority this Court cited in support of its decision in *Maher*:

> . . . [W]hen extended sufficiently, judicial reduction of economic disparities reduces politics almost to a nullity. It is difficult to see how one's vote means anything if it is not a broad entrustment to legislatures of the power to raise and disburse, according to the wisdom of their priorities, the public funds.

Wilkinson, *The Supreme Court, the Equal Protection Clause and the Three Faces of Constitutional Equality,* 61 Va. L. Rev. 945, 1010-1011 (1975). See *Maher* v. *Roe,* 432 U.S. at 479 n. 12.

The District Court held the legislative funding policy unconstitutional. The holding was based on a finding that the interest in the fetus expressed by several Congresses and the overwhelming majority of Illinois legislators was illegitimate because the legislative balance of priorities was "cruel." Quern Appendix at A-38.[2] The District Court found that the state interest became illegitimate even though this Court has stated that the valid state interest in the protection of the fetus exists throughout pregnancy. *Maher* v. *Roe,* 432 U.S. at 478.

[2] The District Court cites *Memorial Hospital* v. *Maricopa County,* 415 U.S. 250, 260-261 (1974) to support its belief that denial of physician reimbursement for abortions they deem necessary is "cruel." But this Court's judgment of the facts which attended *Maricopa County* depended upon the circumstances that *all* "serious illness [of the indigent traveler] would go *untreated.*" *Id.* (Emphasis added.) In the instant case, it is an undisputed fact that forms of medical treatment other than abortion exist to treat health problems in pregnancy and that the state and federal programs will reimburse physicians who employ them.

The District Court's finding that the legislative balance was "cruel" was based upon the court's theory that the state's interest in protecting fetal life became illegitimate[3] when continued pregnancy presented increased risks of maternal morbidity or mortality. Such a theory followed to its natural conclusion by some physicians would require funding of *all* abortions in the first trimester since some physicians believe childbirth poses a greater risk to maternal life and health than does abortion at that time. This would be contrary to the decision in *Maher* which did not require funding of all abortions.

Moreover, it is simply incorrect to assume that a withholding of funds for abortions will have the effect of increasing maternal morbidity and mortality; the evidence is to the contrary. Center for Disease Control, *Morbidity and Mortality Weekly Report,* Vol. 28, No. 4 (Feb. 2, 1979). This report was submitted by Intervening Defendants to the District Court.

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[3] The District Court's use of the concept of "legitimate state interest" is worthy of note. That court uses the concept of a "legitimate interest" in a conclusary sense, suggesting that a state interest is "legitimate" if it withstands constitutional scrutiny, whereas this Court has traditionally used the concept of the legitimate state interest as a departure point from constitutional analysis. See *e.g., Roe* v. *Wade,* 410 U.S. 113, 162-164 (1973); *Maher* v. *Roe,* 432 U.S. at 478-479. According to the traditional use of the concept by this Court, a statute which protects a "legitimate state interest" may be unconstitutional if the *means* employed to protect this interest are not rational. But the legitimate interest does not cease to be legitimate even if the means of protecting it are not rational. Misuse of this concept resulted in the District Court's functioning more like a legislature than a court, for the District Court decided what funding priorities legislatures ought to have under the guise of determining whether state interests were legitimate or not.

When the District Court asserted that all abortions which physicians certify are "medically necessary" must be funded when the fetus is believed nonviable, it imposed a standard which was so hopelessly elastic that the state interest in the protection of the fetus might never be recognized. The "medically necessary" standard, which had been proposed by members of the Senate during the Hyde Amendment debates, was explicitly rejected by the full Congress as the practical equivalent of abortion on demand. As Rep. Silvio Conte, House Member of the Joint Committee which resolved the House-Senate conflict on the Hyde Amendment explained:

> [A]n abortion could be performed as a matter of convenience as long as a doctor authorized it as a medical necessity. Physicians have already indicated that their interpretation of "medically necessary" means "an abortion that was requested by a woman." . . . Indications are that if this "medical necessity" loophole is allowed to stand, elective abortions will be performed under the guise of mental health. For example, when California liberalized its abortion law in 1968, 92 percent of the abortions done in the first year were for mental health reasons. In short, adopting this language would mean abortion upon demand.

123 CONG. REC. H10130 (daily ed. Sept. 27, 1977).

This Court has recently held in dealing with a similar standard:

> "The very breadth of the potential reach . . . argues against the inference that Congress intended to require participating states to extend aid . . . A literal application . . . would create an entirely openended program, not susceptible of meaningful fiscal and programatic control by the states."

Quern v. *Mandley,* 436 U.S. 725, 745-746 (1978).

The District Court found the funding priority favoring childbirth over abortion unconstitutional even though this Court has already clearly stated that a state does have a legitimate interest in, and the power to encourage childbirth:

> [*Roe* v. *Wade*] implies *no* limitation on the authority of the State to make a value judgment favoring childbirth over abortion and to implement that judgment by allocating of public funds.

Maher v. *Roe,* 432 U.S. at 474. (Emphasis added.)

In fact, the District Court has simply substituted its own judgment for that of the legislature in deciding that one interest of the state is more important than another. Some may believe that the well-being of the pregnant women should be preferred to the life of the human fetus growing within her in every case. Others believe that such a policy is unconscionably "cruel" to the unborn child. Our system contemplates that decisions of this nature be made through the democratic process. The extent to which public funds should be used to implement one or the other opinion is a legislative question properly resolved by the elected representatives of the people, not by the courts. The judiciary is not to strike down legislation simply because the judiciary believes it to be "unwise, improvident, or out of harmony with a particular school of thought." *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488 (1955). *See also* Justice Holmes' now vindicated dissent in *Lochner* v. *New York,* 198 U.S. 45, 76 (1905), cited by Mr. Justice Blackmun in the decision of *Roe* v. *Wade,* 410 U.S. at 117.

Valid and legitimate state interests do not become illegitimate and invalid simply because governments deny funds

to facilitate other, judicially preferred state interests. Otherwise, there is no obstacle to judicial control over all funding decisions. Under the District Court's theory of law, a court might properly overturn a congressional decision to build roads but not hospitals—should the judiciary deem more hospitals "necessary"—by simply declaring the federal interest in efficient transportation "illegitimate" in that employing limited public funds to encourage such efficiency deprives the population of "necessary" health care facilities. As this Court has held, however, government "decisions to spend money to improve the general welfare in one way and not another are 'not confided to the courts.'" *Mathews* v. *De Castro,* 429 U.S. 181, 185 (1976), quoting *Helvering* v. *Davis,* 301 U.S. 619, 640 (1937).

The District Court's decision has raised serious state-federal and legislative-judicial conflicts. It evidences not only opposition to the findings of Congress but also to the holdings and logic of this Court's prior abortion decisions. These substantial federal questions warrant plenary review.

IV.

Whether the state of Illinois is permitted under Title XIX (the Medicaid Title) of the Social Security Act to fund only those abortions necessary to preserve the life of the mother?

The Medicaid Title (Title XIX) of the Social Security Act was intended simply to *enable* the several states to pay for some of the medical services to be supplied to the indigent. 42 U.S.C. §1396 (1976); it was not designed to require the states to reimburse physicians for anything physicians might deem "medically necessary," especially

where the funding of the medical procedure would destroy other valid state interests. Moreover, Title XIX empowers the states to establish "reasonable standards . . . for determining . . . the extent of medical assistance . . . which . . . are consistent with the objectives of this [Title]." 42 U.S.C. §1396a(a)(17) (1976). Nevertheless, the Circuit Court in the instant case held that Title XIX and regulations issued pursuant to it required the states to fund abortions to an extent greater than Illinois had deemed reasonable. The Illinois statute, P.A. 80-1091, would fund only those abortions necessary to preserve maternal life.

The District Court found Illinois' funding policy was unreasonable despite Illinois' manifest interest in fiscal integrity and protection of fetal life and though the people of the State of Illinois did not wish their taxes employed for what many regard as an immoral purpose. In *Beal* v. *Doe*, however, this Court emphasized that in setting the standards for the extent of funding under Title XIX it was reasonable for the state to take into account its "significant state interest [in protecting the potentiality of human life] existing throughout the course of the woman's pregnancy," *Beal* v. *Doe*, 432 U.S. 438, 446 (1977). The same principle justifies the Illinois law here challenged.

When Title XIX became law in 1965, 46 of the 50 states, including Illinois, permitted only those abortions necessary to preserve maternal life. George, *Current Abortion Laws: Proposal and Movements for Reform*, 17 West. Reserve L. Rev. 371, 375-379 nn. 21-24, 31, 43, 44, 45 (1965). It is therefore clear that Congress could not have intended at the time of passage to *require all* states to fund abortions beyond the extent that they were necessary to preserve maternal life.

Title XIX, like all statutes, must "be construed with reference to the circumstances existing at the time of the passage." *United States* v. *Wise*, 370 U.S. 405, 411 (1962). In *Beal*, 432 U.S. at 447, this Court observed that "when Congress passed Title XIX in 1965, nontherapeutic abortions were unlawful in most states," and concluded, "In view of the then-prevailing state law, the contention that Congress intended to *require*—rather than permit—participating States to fund nontherapeutic abortions requires far more convincing proof than respondents have offered." (Emphasis in original.)

Congress did not require that a state fund to the full extent any medical service which was legal within the state. In fact, Congress established no requirements as to what medical services the states must fund except the requirement that the state standards be reasonable.

Certainly, the Medicaid Title nowhere requires that all services any physician calls "medically necessary" be funded. The only two references to medical necessity therein, 42 U.S.C. §1396a (a) (10) (c) (i) (1976) and 42 U.S.C. §1396 (1976) (the Preamble) deal with conditions for eligibility, not mandates for services. *Roe* v. *Norton*, 522 F.2d 928, 933 (2d Cir. 1975); *Coe* v. *Hooker*, 406 F. Supp. 1072, 1081 (D.N.H. 1976). Even the Federal regulations issued pursuant to Title XIX allow the states to "place appropriate limits on a service . . . ." 43 Fed. Reg. 57,253 (1978) (to be codified as 42 C.F.R. §440.230).

It is certainly within the power of the state under Title XIX to protect its valid state interests by allocating public funds to some and not to other medical services. To require the state to fund so-called "medically necessary" abortions is to force the state to encourage through economic support what subverts the very interest the state wishes to protect.

CONCLUSION

Accordingly, Appellants respectfully urge this Honorable Court to note jurisdiction in this case and summarily reverse the decisions below or set this case for plenary review with briefs and oral arguments on the merits.

Respectfully submitted,

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APPENDIX

42 U.S.C.A. § 1396:

SUBCHAPTER XIX—GRANTS TO STATES FOR MEDICAL ASSISTANCE PROGRAMS

§ 1396. *Authorization of appropriations*

For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary of Health, Education, and Welfare, State plans for medical assistance.

Aug. 14, 1935, c. 531, Title XIX, § 1901, as added July 30, 1965, Pub. L. 89-97, Title I, §121(a), 79 Stat. 343, and amended Dec. 31, 1973, Pub.L. 93-233, § 13(a)(1), 87 Stat. 960.

Pertinent Provisions of 42 U.S.C.A. §1396a:

§ 1396a (a)(10)

§ 1396a. *State plans for medical assistance—Contents*

(a) A State plan for medical assistance must—

(10) Provide—

(A) for making medical assistance available to all individuals receiving aid or assistance under any plan

of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, or with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter;

(B) that the medical assistance made available to any individual described in clause (A)—

(i) shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual, and

(ii) shall not be less in amount, duration, or scope than the medical assistance made available to individuals not described in clause A; and

(C) if medical assistance is included for any group of individuals who are not described in clause (A) and who do not meet the income and resources requirements of the appropriate State plan, or the supplemental security income program under subchapter XVI of this chapter, as the case may be, as determined in accordance with standards prescribed by the Secretary—

(i) for making medical assistance available to all individuals who would, except for income and resources, be eligible for aid or assistance under any such State plan or to have paid with respect to them supplemental security income benefits under subchapter XVI of this chapter, and who have insufficient (as determined in accordance with comparable standards) income and resources to meet the costs of necessary medical and remedial care and services, and

(ii) that the medical assistance made available to all individuals not described in clause (A) shall be equal in amount, duration, and scope;

except that (I) the making available of the services described in paragraph (4), (14), or (16) of section 1396d (a) of this title to individuals meeting the age requirements prescribed therein shall not, by reason of this paragraph (10), require the making available of any such services, or the making available of such services of the same amount, duration, and scope, to individuals of any other ages, (II) the making available of supplementary medical insurance benefits under part B of subchapter XVIII of this chapter to individuals eligible therefor (either pursuant to an agreement entered into under section 1395v of this title or by reason of the payment of premiums under such subchapter by the State agency on behalf of such individuals), or provision for meeting part or all of the cost of deductibles, cost sharing, or similar charges under part B of subchapter XVIII of this chapter for individuals eligible for benefits under such part, shall not, by reason of this paragraph (10), require the making available of any such benefits, or the making available of services of the same amount, duration, and scope, to any other individuals, and (III) the making available of medical assistance equal in amount, duration, and scope to the medical assistance made available to individuals described in clause (A) to any classification of individuals approved by the Secretary, with respect to whom there is being paid, or who are eligible, or would be eligible if they were not in a medical institution, to have paid with respect to them, a State supplementary payment shall not, by reason of this paragraph (10), require the making available of any such assistance, or the making available of such assistance of the same amount, duration, and scope, to any other individuals not described in clause (A);

42 U.S.C.A. § 1396a(a)(13):

(13) provide—

(A) (i) for the inclusion of some institutional and some noninstitutional care and services, and

(ii) for the inclusion of home health services for any individual who, under the State plan, is entitled to skilled nursing facility services, and

(B) in the case of individuals receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, or with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter, for the inclusion of at least the care and services listed in clauses (1) through (5) of section 1396d(a) of this title, and

(C) in the case of individuals not included under subparagraph (B) for the inclusion of at least—

(i) the care and services listed in clauses (1) through (5) of section 1396d(a) of this title or

(ii) (I) the care and services listed in any 7 of the clauses numbered (1) through (16) of such section and (II) in the event the care and services provided under the State plan include hospital or skilled nursing facility services, physicians' services to an individual in a hospital or skilled nursing facility during any period he is receiving hospital services from such hospital or skilled nursing facility services from such facility, and

(D) for payment of the reasonable cost of inpatient hospital services provided under the plan, as determined in accordance with methods and standards, consistent with section 1320a—1 of this title, which shall be developed by the State and reviewed and approved by the Secretary and (after notice of approval by the Secretary) included in the plan, except that the reasonable cost of any such services as determined under such methods and standards shall not exceed the amount which would be determined under section 1395x(v) of this title as the reasonable cost of such service for purposes of subchapter XVIII of this chapter; and

(E) effective July 1, 1976, for payment of the skilled nursing facility and intermediate care facility services provided under the plan on a reasonable cost related basis, as determined in accordance with methods and standards which shall be developed by the State on the basis of cost-finding methods approved and verified by the Secretary;

42 U.S.C.A. § 1396a(a)(17):

(17) include reasonable standards (which shall be comparable for all groups and may, in accordance with standards prescribed by the Secretary, differ with respect to income levels, but only in the case of applicants or recipients of assistance under the plan who are not receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, XVI, part A of subchapter IV of this chapter, and with respect to whom supplemental security income benefits are not being paid under subchapter XVI of this chapter based on the variations between shelter costs in urban areas and in rural areas) for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, (B) provide for taking into account only such income and resources as are, as deter-

mined in accordance with standards prescribed by the Secretary, available to the applicant or recipient and (in the case of any applicant or recipient who would, except for income and resources, be eligible for aid or assistance in the form of money payments under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV, or to have paid with respect to him supplemental security income benefits under subchapter XVI of this chapter as would not be disregarded (or set aside for future needs) in determining his eligibility for such aid, assistance, or benefits, (C) provide for reasonable evaluation of any such income or resources, and (D) do not take into account the financial responsibility of any individual for any applicant or recipient of assistance under the plan unless such applicant or recipient is such individual's spouse or such individual's child who is under age 21 or (with respect to States eligible to participate in the State program established under subchapter XVI of this chapter), is blind or permanently and totally disabled, or is blind or disabled as defined in section 1382c of this title (with respect to States which are not eligible to participate in such program); and provide for flexibility in the application of such standards with respect to income by taking into account, except to the extent prescribed by the Secretary, the costs (whether in the form of insurance premiums or otherwise) incurred for medical care or for any other type of remedial care recognized under State law;

42 U.S.C.A. § 1396 a(a)(19):

(19) provide such safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined, and such care and services will be provided in a manner consistent with simplicity of administration and the best interest of the recipients;

42 U.S.C.A. § 1396 a(a)(22):

(22) include descriptions of (A) the kinds and numbers of professional medical personnel and supporting staff that will be used in the administration of the plan and of the responsibilities they will have, (B) the standards, for private or public institutions in which recipients of medical assistance under the plan may receive care or services, that will be utilized by the State authority or authorities responsible for establishing and maintaining such standards, (C) the cooperative arrangements with State health agencies and State vocational rehabilitation agencies entered into with a view to maximum utilization of and coordination of the provision of medical assistance with the services administered or supervised by such agencies, and (D) other standards and methods that the State will use to assure that medical or remedial care and services provided to recipients of medical assistance are of high quality;

43 Fed.Reg. 57,253 (Dec. 7, 1978) (to be codified in 42 C.F.R. 440.230):

TEXT OF REGULATION

Title 42, Part 440, of the Code of Federal Regulations is amended by reinserting the words "arbitrarily" and "such criteria as" in § 440.230, revising that section to read as follows:

§ 440.230 *Sufficiency of amount, duration, and scope.*

(a) The plan must specify the amount and duration of each service that it provides.

(b) Each service must be sufficient in amount, duration, and scope to reasonably achieve its purpose.

(c)(1) The medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required

service under §§ 440.210 and 440.220 to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.

(2) The agency may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.

(Sec. 1102 of the Social Security Act (42 U.S.C. 1302).)

Dated: November 28, 1978.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID ZBARAZ, M.D., MARTIN MOTEW, M.D., on their own behalf and on behalf of all others similarly situated; CHICAGO WELFARE RIGHTS ORGANIZATION, an Illinois not-for-profit corporation, and JANE DOE, on her own behalf and on behalf of all others similarly situated,
Plaintiffs,

v.

No. 77 C 4522

ARTHUR F. QUERN, Director, Illinois Department of Public Aid,
Defendant,

and

JASPER F. WILLIAMS, M.D. and EUGENE F. DIAMOND, M.D.,
Intervening Defendants,

and

THE UNITED STATES,
Intervening Defendant.

NOTICE OF APPEAL

Notice is hereby given that Intervening Defendants Jasper F. Williams, M.D. and Eugene F. Diamond, M.D. appeal to the United States Supreme Court pursuant to 28 U.S.C. §1252 from the following judgments, holdings, orders and decrees of this named action:

1. Appeal is taken from the Final Judgment and Order of this court entered in this action by Judge John F. Grady

dated April 30, 1979 whereby this court adjudged an Act of Congress and certain Illinois statutes partially unconstitutional, enjoining the Illinois statutes in part. The laws so adjudged and enjoined state:

> "The Illinois Department, by rule, shall determine the quantity and quality of the medical assistance for which payment will be authorized, and the medical services to be provided, which may include all or part of the following: . . . but not including abortions, or induced miscarriages or premature births, unless, in the opinion of the physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child." P.A. 80-1091; Ill. Rev. Stat. ch. 23, §5-5 (1977 Supp.).
>
> "Nothing in this Article shall be construed to permit the granting of financial aid where the purpose of such aid is to obtain an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child." P.A. 80-1091; Ill. Rev. Stat. ch. 23, §6-1 (1977 Supp.).
>
> "Aid in meeting the costs of necessary medical, dental, hospital, boarding or nursing care, . . . except where such aid is for the purpose of obtaining an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are

> necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a viable child and such procedure is necessary for the health of the mother or her unborn child." P.A. 80-1091; Ill. Rev. Stat. ch. 23, §7-1 (1977 Supp.).
>
> "None of the funds provided for in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two Physicians." §210 of Pub. L. 95-480, 92 Stat. 1586, Oct. 18, 1978, the "Hyde Amendment," an Act of Congress.

The Final Judgment and Order of this court herein appealed were fashioned pursuant to the Memorandum Opinion of this court in this named action by Judge John F. Grady of April 27, 1979, holding the "Hyde Amendment and P.A. 80-1091 are unconstitutional as applied to medically necessary abortions prior to the point of viability". Memorandum Opinion, at 13.

2. Appeal is also taken from the Judgment and Order of the United States Court of Appeals for the Seventh Circuit, dated February 13, 1979, in *Zbaraz et al.* v. *Quern et al.*, Nos. 78-1669, 78-1709, 78-1787, 78-1890, 78-1891, 78-2029, fashioned pursuant to the Opinion of the Seventh Circuit (dated and titled in the same manner as the Final Judgment and Order), where the Seventh Circuit held P.A.

80-1091 inconsistent with Title XIX of the Social Security Act (Medicaid), 42 U.S.C. §1396 *et seq.,* insofar as P.A. 80-1091 failed to provide state funds for abortion to the extent 201 of Public Law 95-480 amended Title XIX.

3. Appeal is also taken from the Injunction issued by this court by Judge Alfred Y. Kirkland, in this named action, dated February 13, 1979, fashioned pursuant to the Mandate, Final Judgment, Order, and Decision of *Zbaraz et al.* v. *Quern et al.,* Nos. 78-1669, 78-1709, 78-1787, 78-1890, 78-1891, 78-2029 (7th Cir., Feb. 13, 1979), enjoining P.A. 80-1091 in the following manner:

> "Pursuant to the mandate of the Court of Appeals for the Seventh Circuit contained in its Judgment and Opinion of February 13, 1979, this Court hereby modifies its permanent injunction entered on May 15, 1978 to provide:
>
> This Court hereby orders that defendant be permanently enjoined from:
>
> (1) enforcing Ill. Rev. Stat. Supp. (1977) ch. 23, §§5-5, 6-1, 7-1 to deny payments under the Illinois medical assistance programs to plaintiffs Zbaraz, Motew, and any other recognized and legal medical providers, for the rendition of medical services to indigent pregnant women for: (a) abortions when the life of the mother would be endangered if the fetus were carried to term; (b) such medical procedures necessary for the victims of rape or incest, when such rape or incest have been reported promptly to a law enforcement agency or public health service; and (c) abortions in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians, or to deny such payments on behalf of any such indigent pregnant women for such abortions; (2) directing notice to any recognized and legal medical providers, or to persons receiving assistance under the Illinois medical assistance programs, that the abortions and medical procedures described in para. (1) are not, or will not be, a covered (reimbursable) service under the Illinois medical assistance programs.

The remainder of the permanent injunction of May 15, 1978 and the definitions contained therein remain in full force and effect with the exception of para. (d) [containing the definition of "therapeutic"] which is hereby deleted."

Respectfully submitted,

JASPER F. WILLIAMS, M.D.
EUGENE F. DIAMOND, M.D.

Intervening Defendants

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