No. 79-4

In the Supreme Court of the United States

October Term, 1979

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

Appellants,

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.

REPLY BRIEF OF INTERVENING DEFENDANTS-APPELLANTS

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INDEX

Table of Authorities

Cases

Statutes and Regulations

MISCELLANEOUS AUTHORITIES

PAGE

PAGE

PAGE

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ARGUMENT

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Congress and the State of Illinois have chosen to fund abortions in circumstances when the life of the mother would be endangered if the fetus were carried to term, not to fund other abortions, and to fund all alternative means of treating complications of pregnancy. This legislative decision is the product of a rational integration of the State's equally legitimate interests in the life of the fetus and in maternal health. *See* Brief of Intervening Defendants-Appellants at 83, 91.*

Intervenors deny the medical claim advanced by Plaintiffs and Amici supporting them that abortions not funded under the congressional and state limitations before this Court are needed for health reasons, and demonstrate that there is no real dispute among the parties about availability of treatment alternative to abortion or the general effectiveness of such treatment. The primary dispute between the parties concerns the consequences of a given patient's unwillingness to cooperate with alternative treatment. Plaintiffs maintain that in such a circumstance an abortion is "medically necessary," while Intervenors argue that from a medical standpoint no such "necessity" exists.

In their constitutional arguments, Plaintiffs appear to concede that if there is no impingement on a fundamental right this matter ought to be resolved under a rational rela-

* The Hyde Amendment, of course, permits funding in rape and incest cases, as well as when the continuation of the pregnancy endangers the life of the pregnant woman. Since Plaintiffs have not raised issues involving rape or incest, no comment is made in this Reply Brief on such issues.

tionship test. If that test applies, *Maher* v. *Roe,* 432 U.S. 464 (1977), disposes of the central issue before this Court. But, as the arguments have developed through the appeal process, it has become apparent that Plaintiffs' chief present contention is that, in the light of what they contend to be an otherwise comprehensive entitlement to the funding of medically necessary items, failure to fund "medically necessary" abortions impinges on a fundamental right under a theory of "unconstitutional conditions" or "penalty analysis." This Brief will demonstrate that Plaintiffs' constitutional arguments must fail, unless the Court is willing to conclude that the State may not in any way "influence" a consitutionally protected decision-making process without impinging on a fundamental right.

Neither the Plaintiffs nor their Amici make a convincing statutory claim. Their argument that the Medicaid Title requires funding of all "medically necessary" items within five mandated categories would require a reversal of *Beal* v. *Doe,* 432 U.S. 438 (1977), and either evades or misinterprets relevant statutory provisions. In fact, the States are accorded reasonable discretion under the Medicaid Title and the Plaintiffs have been unable to mount any effective attack on the reasonableness of the abortion funding limitations before this Court.

II. Plaintiffs' Constitutional Arguments Are Without Merit

A. The Abortion Funding Provisions—Though They May "Influence the Abortion Decision"—Do Not Impinge on Any Constitutional Right

Plaintiffs admit that there exists no constitutional right to a publicly funded "medically necessary" abortion. Indeed, Plaintiffs state they "have never claimed any such fundamental right." Brief of Plaintiffs-Appellees at 42.

Nevertheless, they claim that failure of the government to pay for abortions, when other "medically necessary" medical procedures are funded, "seriously impinges upon the individual's decision-making with regard to fundamental rights" (Brief of Plaintiffs-Appellees at 43) because. Plaintiffs claim, the Illinois law and the Hyde Amendment constitute a "penalty" or "condition" on the exercise of a fundamental right. This, they assert, implicates a substantive due process right and therefore warrants strict judicial scrutiny. Brief of Plaintiffs-Appellees at 43, 50.

In support of their argument, Plaintiffs paraphrase this Court's language in *Maher* concerning equal protection analysis:

> Once a state undertakes a program of public spending, however, the general contours of which cover all medically necessary care, it cannot in implementing that program discriminate against exercise of fundamental rights.

Brief of Plaintiffs-Appellees at 42-43.

Thus, Plaintiffs attempt to salvage their case through a strained effort to create a substantive due process issue out of an equal protection argument that was rejected by this Court in *Maher*.

This case, in their view, is distinguishable from *Maher* because here the State "generally" funds "medically necessary" care yet fails to fund "medically necessary" abortion. In *Maher* they assert that:

> The plaintiffs . . . sought medical assistance funding for elective abortions. But there were no programs of coverage for elective care. . . . In the absence of a relevant discrimination, the plaintiffs in *Poelker* and *Maher* had no more claim to state funds for elective abortion than to funds to get them to the polls on election day.

Brief of Plaintiffs-Appellees at 44-45.

Plaintiffs' constitutional argument is therefore premised on the notion that the laws before this Court "discriminate" between the decision to abort and the decision to carry a fetus to term, thus penalizing or placing an unconstitutional condition on the abortion decision.*

Their theory is in direct conflict with this Court's holdings in *Maher*.

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

Maher v. *Roe*, 432 U.S. at 474.

> We conclude that the Connecticut regulation does not impinge upon the fundamental right recognized in *Roe*.

Maher v. *Roe*, 432 U.S. at 474.

> There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.

Maher v. *Roe*, 432 U.S. at 475.

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* There *was*, however, "discrimination" between forms of "elective" care at issue in *Maher*. Connecticut financed all pre- and postnatal medical care of indigent women without regard to "medical necessity" *except* for abortions. *Roe* v. *Norton*, 408 F.Supp. 660, 663 (D.Conn. 1975), *rev'd on other grounds sub nom. Maher* v. *Roe*. If Connecticut had not treated "elective" abortion differently from all other forms of medical care for the pregnant woman, there would have been no occasion for the careful equal protection analysis this Court undertook in *Maher*: no equal protection issue would have even arisen if "elective" abortion had not been treated differently from other "elective" medical treatment in pregnancy. Therefore, there is no basis for the Plaintiffs' claim that this case may be distinguished from *Maher* on equal protection grounds on the theory that the State treated abortion differently from other forms of medical treatment in this case in a way it did not in *Maher*.

Yet Plaintiffs do not ask this Court to overrule *Maher,* which is logically and jurisprudentially necessary if their claims are to prevail here. Rather, they appear to ask this Court to act as though *Maher* does not exist—or at least to ignore it—and to hold that any state program which encourages one alternate form of conduct, and thus influences the outcome of a decision made within a constitutionally protected sphere of privacy, is constitutionally invalid. In order to distinguish their "unconstitutionally invalid. tions" argument from the one this Court has rejected in *Maher* (432 U.S. at 474 n.8), the Plaintiffs now contend that the right recognized in *Roe* is not an interest in being free from state interference in seeking an abortion, but only an interest in deciding whether or not to seek an abortion in the first place. Brief of Plaintiffs-Appellees at 42. Their basis for invalidating the laws before this Court is not that they may prevent some women from effectuating their decisions to seek abortions, but merely that they "influence" some women's decisions whether or not to abort.

Since *Roe* v. *Wade* vests the abortion decision directly in the woman, any attempt at all by the State to protect its interest in the fetus necessarily involves a potential "influencing" of the pregnant woman's decision. This would be true even if the State sought to further its interest in the fetus by creating a better environment for carrying children to term as, for example, by improving prenatal care and by satisfying more fully the subsistence needs of the poor. If any such influence were held to impinge on the fundamental privacy right, the result would be that the government would have an important and legitimate interest (in the fetus) which it was utterly without legal authority to promote. This is as absurd as the notion of a legal right without a remedy.

The soundness of the principles underlying this Court's decision in *Maher* can be illustrated by examining the application of its principles in contexts other than abortion. Discussions of *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972), and *Stanley* v. *Georgia,* 394 U.S. 557, 564 (1969), are helpful in this regard.

The question is this: can the government ever constitutionally act to influence people toward one course of action when it has a legitimate interest in furthering that course of action, but when that interest is not sufficiently compelling to justify criminal prohibition of the alternative to that course of action?

In *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972), this Court held that the Amish have a Free Exercise right not to be compelled by the State to have their children attend high schools. The basis for the Amish religious objection to attendance at such schools is that it is "an impermissible exposure of their children to a 'worldly' influence in conflict with their beliefs. The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success and social life with other students." *Id.* at 211. Because they believe in a life of simplicity and closeness to nature, the Amish reject "telephones, automobiles, radios, and television." *Id.* at 217. Although the Court regarded the State's "program of compulsory education" to be grounded in a "legitimate social conclusion," *id.* at 235, it held this legitimate interest was not "so compelling that . . . the established religious practices of the Amish must give way." *Id.* at 221. (The situation was thus very similar to that considered in *Roe* v. *Wade,* 410 U.S. 113, 162-163, [1973], where the Court regarded the "State's . . . interest in potential life" to be "important and legitimate," but not "compelling" enough to "override the rights of the preg-

nant woman.'') If the State, in view of its legitimate interests, decides to fund public education, but does not fund the agricultural vocational education which is in accord with the Amish religion, *Wisconsin* v. *Yoder,* 406 U.S. at 211, it certainly creates an incentive to attend public school. Indeed, it could be argued that the inevitable tendency of such a system is to lead the Amish into compromising their true beliefs. But in *Norwood* v. *Harrison,* 413 U.S. 455, 462 (1973), this Court held, ''It is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid.''

The irrationality of Plaintiffs' position is still clearer if one considers what it would mean to declare unconstitutional any state benefits scheme which, by funding things which the Amish consider religiously repugnant while not funding what they consider appropriate, influences the Amish to abandon principles of their beliefs—beliefs which are protected by the First Amendment.

Under such a theory, the State could not fund the development of improvements in agricultural technology (as, for example, by giving tax breaks or funding to farmers who employ advanced and efficient agricultural techniques), without providing similar financial incentives for those who use the comparatively primitive agricultural techniques and implements required by the Amish religion. The State could not offer grants or awards for ''intellectual and scientific accomplishments'' (an emphasis on which is ''sinful worldliness'' to the Amish) without providing equivalent rewards for the ''life of 'goodness,' rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition,'' which are lifestyles valued by Amish beliefs. *Wisconsin* v. *Yoder,* 406 U.S. at 211. Indeed, since the Amish can be said to reject ''progress in human knowledge gen-

erally,'' *id.* at 216, it could be argued that *any* State benefits proferred to inculcate such progress thrust upon the Amish, as an ''unconstitutional condition'' of receiving such benefits, a required abandonment of their religion.

Any such chain of logic is clearly untenable. Yet it flows inescapably from the proposition that any scheme of state benefits which, in advancing a legitimate state interest, tends by omission to create an influence contrary to one possible outcome of a constitutionally protected value choice amounts to placing an ''unconstitutional condition'' on the receipt of public benefits.

Similarly, in *Stanley* v. *Georgia,* 394 U.S. 557, 564 (1969), this Court held that the individual possesses the ''right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home.'' Although the Court held that the State has an important interest in control of the distribution of obscene materials, this interest was not deemed sufficient to warrant infringing on the right to privacy which encompasses the possession and use of such materials in the home. (Again, the situation was similar to that in *Roe* v. *Wade,* 410 U.S. at 162-163, where the Court regarded the State's interest in the fetus as ''important and legitimate,'' but not ''compelling'' enough to override the rights of the pregnant woman.)

When public libraries purchase all forms of literary materials for the private use of the public, except obscene materials, they certainly fail to provide the individual who wishes to exercise the ''right to satisfy his intellectual and emotional needs'' through use of obscene materials the public means with which to do so. Thus, they create an incentive to read other kinds of literature—analogous to the manner in which the Hyde Amendment and Illinois law fail to provide the woman with funds to procure a ''needed'' abortion, and provide incentives to pursue other forms of medical care.

But clearly this Court would not require all public libraries to purchase obscene materials on the grounds that, otherwise, an individual's decision whether or not to peruse them might be adversely "influenced," or even rendered incapable of fruition. *See* the opinions of Mr. Justice White writing for this Court in *United States* v. *Reidel,* 402 U.S. 351, 355-356 (1971), and in *United States* v. *Thirty-Seven Photographs,* 402 U.S. 363 (1971), and the opinions of Chief Justice Burger writing for this Court in *Paris Adult Theatre* v. *Slaton,* 413 U.S. 49 (1973), *United States* v. *12 200-ft. Reels,* 413 U.S. 123 (1973), and *United States* v. *Orito,* 413 U.S. 139 (1973). Similarly, this Court should not hold that the mere influence the Illinois law and the Hyde Amendment might have on a woman's decision whether or not to abort renders them constitutionally invalid.*

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* If one applies Plaintiffs' argument to still other contexts, its unsoundness becomes yet more evident. For example, one may have a First Amendment right to form and hold an adverse opinion about handicapped people and their ability to be integrated fully into society. Although the State's legitimate interest in promoting integration of the handicapped into society would not be sufficiently compelling to punish expression of a belief that the handicapped are inferior, this does not mean that it is unconstitutional for the government to wage a television advertising campaign to influence the public to accept the handicapped as equal. This is so despite the fact that the governmental activity is designed to induce one to abandon one's constitutionally protected beliefs about the handicapped.

It is to be noted that this analogy, as well as the analogies to *Wisconsin* v. *Yoder* and to *Stanley* v. *Georgia,* involve important aspects of the First Amendment. Since First Amendment rights are not merely "personal" rights, but are particularly vital to the proper functioning of our governmental system, these rights have been given the utmost protection by this Court. Nonetheless, as these analogies show, governmental influence in furtherance of legitimate interests of State is constitutionally permissible. *A fortiori,* governmental actions that may influence the abortion decision (which is not directly protected under the First Amendment, but only as an aspect of the right to privacy) are constitutionally valid.

To advance their unconstitutional conditions argument Plaintiffs offer two analogies which, they claim, parallel the issues in this case:

> If Illinois had a scholarship program for study of any foreign language but made German ineligible, or subsidized chemistry training at all private schools, except Catholic ones, the actions would be analogous to what the state has done here. And those actions would also clearly constitute unconstitutional penalties.

Brief of Plaintiffs-Appellees at 49-50.

In a footnote they offer a third analogy, claiming that "if Illinois provided transportation to the polls for any voter except those wishing to vote for a particular candidate," such a situation would closely parallel the circumstances of this case. Brief of Plaintiffs-Appellees at 50 n.

In order to claim that the failure to fund abortions when other procedures are generally subsidized places an unconstitutional condition on the right to privacy that includes abortion, Plaintiffs suggest that the failure to subsidize chemistry training in Catholic schools when such subsidies are generally provided to private schools would penalize the right recognized in *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925). Plaintiffs' analogy is not applicable here. Even if it were, the situation they hypothesize would not trigger trict scrutiny.

First, the abortion funding limitations do not provide funding of an item for some, but not for others (as to all but Catholics, to follow Plaintiffs' analogy). Were this the case, an equal protection and not a due process issue would be raised. Even under equal protection analysis, the state action in Plaintiffs' suggested analogy would not be unconstitutional. In it, there is no impingement or burden on a fundamental right, as Plaintiffs apparently claim there is. Under Plaintiffs' hypothetical fact situation, al-

though the decision to go to a non-Catholic private school to study chemistry may have been made "a more attractive alternative, thereby influencing the . . . decision, [the State] has imposed no restriction on [access to chemistry study] that was not already there," to paraphrase *Maher* v. *Roe,* 432 U.S. at 474. As the *Maher* Court concluded, "[T]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." 432 U.S. at 475. Thus, so long as there were a rational basis for the distinction (for example, that the State wished to avoid furthering an Establishment of Religion to any degree), subsidizing chemistry training at all non-private schools except Catholic ones would be constitutional.*

The same analysis is applicable to Plaintiffs' analogy concerning the exclusion of instruction in German from a scholarship program of study of foreign languages. Moreover, unlike Catholics or non-Catholics who as "persons" have constitutional rights which would subject their exclusion to equal protection scrutiny, the subject of "German," which is not a "person" under the Fourteenth Amendment, has no constitutional right which would be infringed by its exclusion.

Indeed, Plaintiffs' claim that for the State to provide funds for all languages except German would place an unconstitutional condition or penalty on the right recognized in *Meyer* v. *Nebraska,* 262 U.S. 390 (1923), is directly contrary to this Court's holdings in *Meyer* and *Maher.*

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* If there existed other equally religious schools which were subsidized, the distinction might be unconstitutional in the absence of another relevant logical distinction between Catholic and other religious schools—but if so, it would be unconstitutional under the rational basis test, not because there was any fundamental right impinged.

The power of the State to "prescribe a curriculum" in its educational programs which might exclude German language instruction "is not questioned." *Meyer* v. *Nebraska,* 262 U.S. at 402; *Maher* v. *Roe,* 432 U.S. at 464.

The Plaintiffs' analogy of a governmental program which provides funds for transportation to the polls for all except those who wish to vote for a particular candidate is similarly defective. Those who wish to abort are not excluded from the medicaid program or any part of it; the State merely fails to fund a certain *type* of medical assistance under the laws before this Court. In other words, with respect to assistance provided under medicaid, every eligible person is treated equally. Following the Plaintiffs' analogy, under the laws before this Court it is as though the State had a program to subsidize the bus fares of all who wished to vote, but failed to pay for taxi fares—a policy which would certainly not impinge a fundamental right and which, so long as supported by a rational basis (*e.g.,* fiscal constraints), would be constitutional.

Thus, neither the laws before this Court nor the analogies suggested by the Plaintiffs involve a burden or an impingement on a fundamental right. Unless this Court is willing to hold that mere "influence" triggers strict judicial scrutiny, all would have to be reviewed under the rational basis test.

Plaintiffs' claim that the Hyde Amendment and the Illinois law impinge the substantive due process rights of women who wish to abort finds no support in logic or in the prior decisions of this Court. It must be rejected.

B. A Belief of Some Legislators That the Fetus Is "Actual" Rather Than "Potential" Human Life Cannot Invalidate the Enactments

Plaintiffs frequently suggest to this Court that the Hyde Amendment and its Illinois counterpart are invalid because the proponents of the statutes believed that the human fetus is "actual human life" as opposed to "potential human life." Plaintiffs even suggest that if the State of Illinois knew that the fetus was only "potential life," rather than "actual fully developed human life, a misconception which alone explains the irrationality and cruelty of the Illinois Statute" (Brief of Plaintiffs-Appellees at 50, 51), the statute would not have been enacted. Yet this Court in *Maher,* as well as in every other abortion case which has come before this Court, has acknowledged the State's important and legitimate interest in "potential human life." *See Colautti* v. *Franklin,* 439 U.S. 379 (1979); *Beal* v. *Doe,* 432 U.S. 438, 446 (1977); *Maher* v. *Roe,* 432 U.S 464, 472 (1977); *Planned Parenthood of Central Missouri* v. *Danforth,* 423 U.S. 52, 61 (1975); and *Roe* v. *Wade,* 410 U.S. 113, 162 (1973).

It would be absurd to declare an otherwise constitutional statute unconstitutional because some, or even a majority, of those who supported the legislation believed that abortion funding limitations protected an "actual" human life rather than a "potential" one. In effect, Plaintiffs argue that, had the legislature "correctly" viewed the product of human conception as "potential human life," the statute would be valid—or at least not subject to strict judicial scrutiny—but that this mere "misconception" transforms the issue in such a fashion that strict scrutiny must be involved. The principle of law which Plaintiffs ask this Court to adopt is that, even if legislative action was directed to a legitimate state interest and rationally furthers that

interest, it must nonetheless be invalidated if the legislators used what a court considers "poor reasoning" or "misconceptions" in enacting the law.

The irony of Plaintiffs' argument in the context of an abortion case is that they thereby ask this Court to adopt one of several theories of life, while this Court in *Roe* v. *Wade* has clearly recognized "the wide divergence of thinking on this sensitive and difficult question [of when life begins]." *Roe* v. *Wade,* 410 U.S. at 159, 160. Just as Texas could not "by adopting one theory of life . . . override the rights of the woman at stake," *Roe* v. *Wade,* 410 U.S. at 162, the judiciary should not "by adopting [a different] theory of life . . . override the [important and legitimate interests of the federal government and the State of Illinois]." *

The Plaintiffs' claim that the Hyde Amendment and the Illinois law should be stricken because some legislators may view the fetus** as "actual" human life finds no basis in law or in reason and must be rejected.

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* There is a further irony in Plaintiffs' argument. On the one hand, they claim that the Hyde Amendment and its Illinois counterpart are invalid because they influence and thus "penalize" the thought and decision-making process of pregnant women facing an abortion decision. On the other hand, they ask this Court to penalize the expression of beliefs of legislators and citizens by invalidating otherwise valid enactments solely because the Plaintiffs disagree with the views expressed by some of those enacting it.

It must be noted that the Plaintiffs' claims against Illinois in this regard, as well as in relation to the Medicaid Title, raise serious questions under the Tenth Amendment. *National League of Cities* v. *Usery,* 426 U.S. 833 (1976).

** This Court has held that the State has a "direct interest in the protection of the fetus" (*Maher* v. *Roe,* 432 U.S. at 478 n.11), regardless of how the fetus is characterized. In any case, Intervenors

(footnote continued)

III. Plaintiffs' Statutory Arguments Are Without Merit

Just as the Plaintiffs apparently hope that this Court will ignore the constitutional principles set forth in *Maher,* they also apparently hope it will ignore the basic statutory standard set forth in *Beal* v. *Doe,* 432 U.S. 438, 444 (1977), that state coverage determinations under the Medicaid Act "be 'reasonable' and 'consistent with the objective of the [Title].' "

They do so both by arguing that 42 U.S.C. § 1396a(a)(17) (1976), which contains the language on which *Beal* relied, does not apply, and by maintaining that other sections of the Act impose an obligation on the States to fund all "medically necessary" items within five mandated categories. They are wrong on both counts.

A. 42 U.S.C. § 1396a(a)(17) (1976) Establishes That Participating States May Specify What They Cover Within the Five Mandated Categories So Long as These Specifications Are "Reasonable" and "Consistent With the Objectives" of the Title.

In order to avoid the plain language of 42 U.S.C. § 1396a(a)(17) (1976) ("A State plan for medical assistance must . . . include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which . . . are consistent with the objectives of this [Title]"), Plaintiffs resort to legislative history in an attempt to argue that the section applies to "eligibility" rather than to the "extent of medical assistance." Brief of Plaintiffs-Appellees at 75.

(footnote continued)
point out to this Court that considerable scientific evidence is available upon which citizens and legislative representatives could conclude rationally that the product of human conception is both "human" and "living." *See, e.g.,* C. Corliss, *Patten's Human Embryology,* 30 (1st Ed. 1976); L. Arvey, *Developmental Anatomy,* ch. 2, 6 (6th Ed. 1954); L. Shettles, *Ovum Humanum,* 60 (1st Ed. 1960).

It is true that the bulk of the comments in the committee reports on this section relate to eligibility standards. But the reason for this is that the rest of the language in § 1396 a(a)(17) relates in some detail to eligibility, and that this additional "eligibility" language was the portion of the section which was new in the 1965 law. As the Senate Finance Committee put it, "The committee bill would make more explicit a provision now in the law that in determining eligibility for and the extent of aid under the plan, States must use reasonable standards consistent with the objectives of the titles." Sen. Rept. No. 404, *reprinted in* 1965 U.S. Code Cong. & Ad. News 1943, 2018. What the bill was expanding upon was the eligibility aspect—*not* the extent of assistance aspect—of the then current language. Naturally, the report's language concentrated on what was being changed. The comparative silence of the Committee about the *extent* of assistance aspect supports the inference that it was satisfied with that language and the construction given to it as it existed in the then-current law, enacted in 1960. 74 Stat. 924. At the time of its passage, the Senate Finance Committee commented, "Each State may determine *for itself* the scope of medical services to be provided in its program." Sen. Rept. No. 1856, *reprinted in* 1960 U.S. Code Cong. & Ad. News 3610-3614 (emphasis added).

Indeed, Plaintiffs' next argument that the section "governs the terms under which optional services are to be provided (Brief of Plaintiffs-Appellees at 77) is inconsistent with their claim that the section applies only to eligibility standards.*

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* Neither the United States (which generally argues on behalf of Plaintiffs' statutory position) nor the Amici supporting Plaintiffs' position agree that the provision applies only to eligibility. Brief for United States at 144; Amicus Brief of Roe *et al.* at 17; Amicus Brief of Physicians' National Housestaff Association *et al.* at 33-36. Indeed, the latter brief specifically attacks such a construction, pointing out that §1396a(a)(17) constitutes the statutory basis for regulations governing the extent of assistance. *Id.* at 35.

Plaintiffs' position that the authority granted to the States to make decisions about the extent of coverage so long as they are reasonable and consistent with the objectives of the Title applies only to optional and not to mandatory categories is demonstrably wrong.

Mandatory categories apply with regard to "individuals receiving aid or assistance under any plan 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," as the Title defines the "categorically needy." 42 U.S.C. §1396a(a)(13)(B) (1976). Coverage is optional with regard to "individuals not included" in this description (those who are "medically needy"). 42 U.S.C. § 1396a(a)(13)(C) (1976).

In 42 U.S.C. § 1396a(a)(17) (1976), the full text of which is reprinted below,* the "reasonable standards"

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* A State plan for medical assistance must:

(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, or XVI, or 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 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 determined in accordance with standards prescribed by the Secretary, available to the appli-

(footnote continued)

and "consistent with the objectives" language is stated in terms generally applicable to the whole Title without any limitation to optional categories. It is significant that *in the same sentence* there are two parenthetical clauses which, with reference to particular specifics, qualify the general "reasonable standard" requirement to apply *only* to the medically needy (using the precise statutory description of that class), and that there is a subsection (D) which imposes specifics applying *only* to a subclass of the categorically needy (the "blind or permanently totally disabled" under Title XVI). This illustrates the particularity with which §1396a(a)(17), like the rest of

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(footnote continued)

cant or recepient 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 recepient 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 of (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 [*sic*]. 42 U.S.C. § 1396a(a)(17) (1976) emphasis added).

the Title, is drafted. Indeed, the entire Social Security Act is a highly technical statute drafted with careful precision. When Congress means that a particular provision applies only in certain instances, it explicitly so provides. The "reasonable standards" provisions, lacking such a qualification, applies to mandatory as well as to optional categories of assistance.

B. The Statute Does Not Support the Claim That States Must Fund All "Medically Necessary" Items

The Brief for the United States at 44, and Amici Roe *et al.,* Brief at 16, cite the Medicaid Title's Preamble for the proposition that the Title requires funding of all "medically necessary" items, and Plaintiffs appear to rely on the same assumption. Brief of Plaintiffs-Appellees at 79 n., 84. To the extent Plaintiffs do so, their position is inconsistent with their Brief's statement that, "[T]he preamble . . . language in the public assistance titles of the Social Security Act has never acted as either a sword for recipients or a shield for the states; it modifies neither minimum eligibility nor minimum assistance provisions." Brief of Plaintiffs-Appellees at 77-78. We could not have said it better ourselves.

Even if the Preamble language had substantive impact in preference to the specific substantive provisions of the Title, it would not support such a requirement, since the term "necessary medical services" refers only to a description of those eligible ("individuals, whose income and resources are insufficient to meet the costs of necessary medical services," 42 U.S.C. §1396 [1976]), not to the *extent* of the "medical assistance" it is the intent of the Title "to furnish." *Id. See generally,* Brief of Intervening Defendants-Appellees, *Harris* v. *McRae,* No. 79-1268, at 69-71.

Plaintiffs' principal reliance is on the requirement of §1396a(a)(13)(B) (1976) that State must provide, with regard to the categorically needy, for the "inclusion of at least the care and services" listed in §§1396d(a)(1)-(5). Brief of Plaintiffs-Appellees at 73. Certainly this language justifies the conclusion that the States must include the five specified categories, but, as this Court held in *Beal,* it "does not require States to provide funding for all medical treatment falling within the five general categories." *Beal* v. *Doe,* 432 U.S. at 441. The Senate Finance Committee report indicates that it was intended that the States cover "some," not necessarily all, care in a general mandated category. *See* Brief of Intervening Defendants-Appellees in *Harris* v. *McRae,* at 76; *see generally, id.* at 72-76.

Plaintiffs apparently recognize that their reading would render superfluous the requirement of 42 U.S.C. §1396a (a)(13)(A)(i) (1976) that each State plan "provide . . . for the inclusion of some institutional and some noninstitutional care and services," and so they refer to H.R. Rep. No. 213, 89th Cong. 1st Sess. 9-10, 70 (1965), which states, "Under existing laws the State must provide 'some institutional and some noninstitutional care' . . . . The bill would require that by July 1, 1967 [the States cover the mandatory services listed in 42 U.S.C. §§1396d(a)(1)-(5)]. . . . [U]ntil then, the State plan must include . . . some institutional and some noninstitutional services." But in 1968 Congress repealed other transitional language in §1396a (a)(13), and left the "some institutional and some noninstitutional" requirement intact. Pub. L. 90-248, § 224(a), 81 Stat. 902 (1968). This 1968 decision may have something to do with the increasing sense that the movement toward comprehensiveness of coverage originally contemplated to be complete by 1975 (Brief of Defendant-Appel-

lant Miller at 46-47 n. 25) was seen to be "wreaking such fiscal havoc on" the States (Amicus Brief of Physicians' National Housestaff Association *et al.* at 22) that such a goal was less likely to be reached. In the next year, 1969, the comprehensive deadline was extended for two years, *id.* at 22 n. 29, and by 1972 the goal was repealed entirely. *See* Brief of Defendant-Appellant Miller at 47 n.25. In this context, Congress may well have felt it important to ensure that the States maintain the minimum of some institutional and some noninstitutional care in each mandated category. In any case, the provision which ensures that some minimum institutional and noninstitutional care be provided was clearly not regarded as superfluous after 1967—as, under Plaintiffs' theory, it necessarily would be since a requirement that all "medically necessary" items be funded would subsume *all* institutional and *all* noninstitutional care.

The Brief for the United States at 44, joined by the Plaintiffs, Brief of Plaintiffs-Appellees at 85, 88, argues that Illinois violates the regulatory provision, "The Medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service . . . solely because of the diagnosis, type of illness, or condition," 42 C.F.R. §440.230(c)(1) (1979). Excluding abortions not necessary to preserve maternal life, the United States argues, "would constitute a denial of payments based solely on diagnosis (*i.e.,* that an abortion is medically necessary) and condition (*i.e.,* pregnancy)." Brief for the United States at 44.

But the United States utterly ignores its own regulatory definition of diagnosis as a procedure "to identify the existence, nature or extent of illness, injury, or other health deviation. . . ." 42 C.F.R. §440.130(a) (1979). A "diagnosis," therefore, identifies the health problem. *It does*

not define the manner of treatment. "So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States . . . is bound to respect and enforce it." *United States* v. *Nixon,* 418 U.S. 683, 695 (1974).

Plaintiffs also argue that "refusal to meet particular needs of particular individuals comes only through exclusion of services to treat those needs." Brief of Plaintiffs-Appellees at 88. But this assumes that the State does not fund alternative treatments which meet those needs. Failure to fund abortion, when effective alternatives are available and funded, does not discriminate on the basis of the "condition" of pregnancy—or on the basis of the diagnosis of a pregnancy complication. Plaintiffs suggest that such alternative treatment may fail to be funded, since some elements of it (*e.g.,* drugs) are in optional service categories. But Illinois covers the relevant optional categories. Brief of Plaintiffs-Appellees at 72. Only if Illinois altered this practice and ceased to fund treatments for pregnancy complications alternative to abortion would Plaintiffs' point be relevant to whether a violation of the regulation is involved in abortion funding limitations. Amici Physicians' National Housestaff Association, *et al.,* admit, "A state could properly . . . provide podiatrist's care for certain services because it is cost-efficient while restricting its availability for others, provided that medically necessary care is available from either a physician or a podiatrist." Brief at 36, citing *District of Columbia Podiatry Society* v. *District of Columbia,* 407 F.Supp. 1259, 1265 n.27, 1268 n.43 (D.D.C. 1975). Except that Illinois' primary interest here is its valid concern for the fetus rather than short term fiscal frugality (although long term fiscal interests play a part; *see* Brief of Intervening Defendants-Appellants at 57-59;

Amicus Brief for the National Right to Life Committee at 19-21), this is precisely what it has done here—it has made "medically necessary care" available for all pregnancy complications, while restricting the funding of an alternative form of treatment which violates important state interests.

Plaintiffs argue that Illinois cannot prefer some treatments over others, relying on 42 U.S.C. §1320c-5(b)(i)'s requirement that Professional Service Review Organizations (PSROs), in developing norms for their evaluation and review, take "into account differing, but acceptable, modes of treatment." Even if this were relevant (here, of course, Illinois does not regard abortion as "acceptable"), it relates to PSROs and imposes no limitations on the very different role of States. 42 C.F.R. §463.27(c)(3) (1979) provides, "PSRO determinations under the provisions of Title XIX of the Act with regard to issues that are not subject to PSRO determination." In enacting the regulation HEW explained:

> Section . . . 463.27(c) make[s] clear that . . . the States under Title XIX may establish the services that are covered on a uniform basis (scope of benefits). However, to the extent *individual* medical judgments are required to *implement these coverage rules*, it is the PSRO's responsibility and authority to make these medical judgments which must be followed by the . . . State Medicaid agencies.

43 F.R. 7406 (February 22, 1978) (emphasis added).

With regard to Plaintiffs' other claims concerning PSROs, *see* Brief of Intervening Defendants-Appellees, *Harris* v. *McRae*, No. 79-1268, at 77-84.

Finally, Plaintiffs seek to escape the force of the illegality of most "medically necessary" abortions at the time the Act was passed through the use of two arguments.

First, they equate the *illegality* of abortion with the *unavailability* of subsequently developed drugs and other means of medical treatment. Of course, it was the intent of Congress to fund methods of treatment developed by medical science in the years since the passage of the Medicaid Act. But abortion is not a new procedure developed since 1965—it was well known at the time. It was precisely because it was known at the time that there were laws in force prohibiting it. And it is precisely because it was known at the time that congressional attitudes toward abortion and congressional intentions concerning the funding of abortion can be so easily ascertained. *See generally,* Brief of Intervening Defendants-Appellees, *Harris* v. *McRae,* No. 79-1268, at 101-103.

Second, Plaintiffs' make reference to 42 C.F.R. §440.50(a) (1979), which defines "physicians' services" as those "within the scope of practice of medicine or osteopathy under state laws." But this regulation relates, as is clear in the context, to the legally regulated demarcations among the various professionals: *e.g.*, what a podiatrist is permitted to do vis-a-vis an osteopath, or a dentist vis-a-vis a physician. In any case, it surely cannot be held to *require,* as opposed to *allow,* the State to fund every medical practice not prohibited by law, since this would mandate the provision of such things as preventive services and other "medically unnecessary" services.

In sum, the Plaintiffs' claim that the Medicaid Title requires the States to fund all "medically necessary" abortions is erroneous. It must be rejected.

C. The Abortion Funding Limitations Are Fully In Accord With the State's Valid Interest In Maternal Health As Well As the Purposes of the Medicaid Title.

From a constitutional perspective, it has been clearly demonstrated that abortion funding limitations entail no impingement whatever on any constitutional rights. Therefore, the question of whether the State ought to pursue its important and legitimate interests in maternal health or its important and legitimate interests in fetal life is a matter t obe resolved according to the normal democratic process.* From a statutory perspective, Intervenors recognize that the purpose of the Medicaid program is to promote the State's interest in the health of its citizens. Plaintiffs' claim that the abortion funding limitations are incompatible with this purpose of the Medicaid program. Although, as Intervenors have shown, the Medicaid program is not so inflexible that it would not permit the States latitude to protect other important interests of the State, even if

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* Even assuming for the sake of argument that an increase in the incidence of maternal mortality could be predicted because of the abortion funding limitations, this would not, from a constitutional perspective, preclude the State from promoting its important and legitimate interest in the fetus any more than the statistical certainty that human life will be lost in automobile accidents would preclude the government from commencing the Federal Interstate Highway Project. In short, the authority of the State to promote its interests does not vanish because one can predict statistically some human tragedy. Rather, whether the human cost is or is not disportionate with regard to an action undertaken to accomplish the legitimate goals of the State is to be determined according to normal democratic processes. This demonstrates, once again, what actually underlies Plaintiff's stated position: they simply do not like the manner in which the Congress and the State of Illinois have assessed the relative importance of what Plaintiffs perceive to be conflicting state interests, and they invite this Court to "second-guess" the legislature.

these interests were incompatible with the State's interest in health (as, for example, a fiscal interest might be), this section will demonstrate that medical treatments alternative to abortion are fully effective and that, therefore, an aborion funding limitation is not incompatible with the health purpose of the Medicaid Act.

Plaintiffs and their supporting Amici maintain that the abortion funding limitations are unreasonable because they harm the State's interest in maternal health while advancing its interest in fetal life. This argument rests, however, upon the assumption that the State, through the Hyde Amendment and the Illinois law, fails to meet the health needs of pregnant women*—that it does not fund adequate alternative treatments. The Brief of Intervening Defendants-Appellants (at 70-76), as well as the Amicus Brief of Certain Physicians, Professors, and Fellows in support of the Appellants in this case, shows that there are such

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* Plaintiffs' attack on the Hyde Amendment and its Illinois counterpart is based to a great extent on their prediction that limiting funds for abortion to life endangering situations will result in increased mortality of pregnant women. However, this prediction finds little statistical support, as is shown by the report of the Center for Disease Control, Morbidity and Mortality Weeky Reports, Feb. 2, 1979 at 4 (introduced by Intervenors into the record below), according to which "No increase in abortion related complications was observed in this surveillance project [to determine if there was excess mortality attributible to the Hyde Amendment]."

One problem with the methodology of the Center for Disease Control in conducting this "surveillance" is that it focused on "abortion related complications", whereas the real question is whether there are pregnancy related complications which cannot be treated successfully by medical means alternative to abortion. It is thus more appropriate to examine the effectiveness of alternative treatment to abortion, as is done in the medical literature cited in this Brief.

treatments and that they are effective. In response to the briefs of Plaintiffs and the Amici supporting them, this brief will demonstrate that for each complication of pregnancy cited by our opponents, except for those instances in which the life of the mother would be endangered if the fetus were carried to term, there exists an effective and available treatment alternative to abortion. From this perspective, the funding schemes before this Court harmonize the State's interests in maternal health and in fetal life.

The following table summarizes each complication of pregnancy and the treatment for it, and it comments on Plaintiffs' understanding of it. Extensive notes referring to available medical literature detail and substantiate each conclusion.

Chart Setting Forth Effective Medical Treatments Alternative to Abortion for Diseases Cited by Plaintiffs*

Diseases Cited By Plaintiffs and Their Amici in the Answer Briefs	Plaintiffs' Elected Treatment for the Disease	Treatment Recommended in the Medical Literature	Intervenors' Response to Plaintiffs' Cl
Cardiac Disease (**See** Planned Parenthood Federation **et al.** at 14)	Abortion	Decrease cardiac work via[1] 1. Rest 2. Reassurance 3. Medication	1. Plaintiffs' o claim.[2, 3] 2. Not support cited literat 3. Plaintiffs' p posed treatr presents sig ficant risk.[5]

* To preserve the continuity and readibility of this Chart, all footnotes are set forth in a separate Appendix attached to this Brief.

ıses Cited By ıtiffs and r Amici in the ver Briefs	Plaintiffs' Elected Treatment for the Disease	Treatment Recommended in the Medical Literature	Intervenors' Response to Plaintiffs' Claims
le Cell Anemia Planned Parent- Federation et al. ;)	Abortion	1. Prevention of infection 2. Prevention of crises 3. Maintenance of adequate hematocrit & hemoglobin.[6]	1. Plaintiffs assume non-treatment of women which is not consistent with good medical practice.[7]
er Planned Parent- Federation et al. ; Plaintiffs- llees at 63)	Abortion	1. Treatment not altered due to pregnant state. [8, 9, 10] 2. Pregnancy does not affect or worsen cancerous state.[11]	1. Plaintiffs cannot justify a delay in cancer treatment. [12, 14] 2. Evidence indicates abortion may do more harm than good.[13]
rtensive ders Planned Parent- Federation et al. ; Plaintiffs- llees at 10)	Abortion	Treat Hypertension using 1. Bed rest 2. Changes in diet, lifestyle 3. Anti-hypertensive drugs.[15]	1. Plaintiffs' own citations dispute claims.[16] 2. Studies show no treatment failure.[17]
l Disease Planned Parent- Federation et al.)	Abortion	Treatment not altered due to pregnant state.[18]	1. Renal clearance often improves in pregnancy.[19] 2. Sole exception funded under "life of the mother" standard.[20]

Diseases Cited By Plaintiffs and Their Amici in the Answer Briefs	Plaintiffs' Elected Treatment for the Disease	Treatment Recommended in the Medical Literature	Intervenors Response to Plaintiffs' C
Diabetes (**See** Planned Parenthood Federation **et al.** at 19; Plaintiffs-Appellees at 10)	Abortion	Control of Diabetes by regulating diet, insulin, physical activity and daily stress.[21]	1. Authorities by Plaintiffs mit the inad quacies of c studies and sent contrad evidence in port of App lants.[22]
Venous Disease (**See** Planned Parenthood Federation **et al.** at 20)	Abortion	Treatment is elective for varicose veins. Other venous disease treated using anti-coagulant therapy.[23]	1. Abortion is more dange treatment.[24] 2. Efficacy of ment not di puted.[25] 3. Medical lite does not su Plaintiffs.[26]
Psychiatric Factors (**See** Planned Parenthood Federation **et al.** at 21)	Abortion	Psychiatric treatment not affected by pregnancy.[27]	1. Plaintiffs d cite medical ature since support for claim exists 2. Every psyc indication f abortion is dication ag
Teenage Pregnancy (**See** Planned Parenthood Federation **et al.** at 22)	Abortion	Proper prenatal care including psychological and nutritional education.[29]	1. Plaintiffs' a sumptions a based on n natal care. 2. Risks of ab and compli of abortion serious and considered Plaintiffs.[30]

In view of the lengthy and somewhat complicated treatment given by both sides to the medical issues, this Court might be tempted to conclude that it has no competence to resolve medical disputes, and that deference is required to the viewpoint of the attending physician. But the foregoing chart and its supporting notes demonstrate that the crux of the issue between the parties on the factual question of adequacy of alternative treatment is not really one of differing medical analysis at all. Both sides ultimately agree that effective alternative treatments exist.* Plaintiffs and their supporting Amici refer, however, to the model of the "uncooperative woman." Specifically, Plaintiffs argue that, if the woman does not cooperate with these alternative treatments, the State harms her health by refusing to provide an abortion. Thus, although on the surface it may appear that this issue is of great medical complexity, in reality the only issue on which there is a genuine dispute is the significance of the woman's failure to cooperate.

Surely the State does not act unreasonably by refusing to provide funding for a procedure destructive of important state interests when 1) the State offers adequate and effective alternative treatment for all diseases complicating pregnancy, and 2) the pregnant woman refuses to cooperate with the alternative treatment, to the detriment of her health.

The State does not act unreasonably with regard to its interest in maternal health merely because it does not accomodate itself to the attitude of the woman. *See* Reply Brief of Intervening Defendants-Appellees, *Harris* v. *McRae,* No. 79-1268, at 2-4. Illinois fully meets the health

* The only exceptions relate to a couple of instances in which the problem is related to outdated medical literature (*See* Appendix, nn. 7, 22) or to a desire to avoid treatment potentially harmful to the fetus (*See* Appendix, nn. 10, 12, 25). *See esp.* n. 25.

needs of all Medicaid-eligible women for treatment of pregnancy complications which are not voluntarily self-imposed.

In sum, although the abortion funding limitations would be constitutional and legal solely on the basis of the legitimate interest in the fetus, regardless of their maternal health effect, *in fact* the limitations reflect a complementary integration of the State's fetal life interest and maternal health interest, accomodating the ends of both.

IV.

CONCLUSION

Intervening Defendants-Appellants pray this Court to reverse the decision of the District Court holding the Hyde Amendment and Illinois P.A. 80-1091 unconstitutional, and to reverse the decision of the Circuit Court holding that Title XIX of the Social Security Act requires the States to fund abortion to the extent of the Hyde Amendment or to the extent the physician deems "medically necessary."

Respectfully submitted,

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APPENDIX

[1]Throughout their discussion of the medical evidence, Plaintiffs misrepresent the medical facts concerning alternate treatments and neglect to mention selective portions of the complete remedy. Plaintiffs specifically fail to respond to the following measures that decrease cardiac work:

(1) Elastic support for legs,

(2) Prophylactic antibiotic therapy,

(3) Prompt treatment of urinary tract infections and respiratory infections,

(4) Moderate sodium restriction,

(5) Oral iron to avoid anemia,

(6) Frequent visits to cardiologist and obstetrician/gynecologist, and

(7) Drugs to improve heart function as needed.

The relevant medical literature strongly supports these measures. *See, e.g.,* Ueland, *Cardiovascular Diseases Complicating Pregnancy,* 21 Clinical Obstetrics and Gynecology 431 (1978); Ueland, *What's the Risk when the Cardiac Patient is Pregnant,* 13 Contemporary OB/GYN 119 (1979); Rovinsky and Guttmacher, *Medical, Surgical and Gynecological Complications of Pregnancy,* 8 (2nd ed. 1965); MacLeod, *Rheumatic Heart Disease in Pregnancy,* 2 Lancet 668 (1954); Gorenberg, *Rheumatic Heart Disease, A Controllable Complication of Pregnancy,* 45 Am. J. Ob. Gyn. 835 (1943); O'Driscoll, M. K. Coyle and M. Drury, *Rreumatic Heart Disease Complimating Pregnancy,* 2 Br. Med. J. 767-68 (1962); C. Burwell, *The Special Problem of Rheumatic Heart Disease in Pregnant Women,* 166 J. A. M. A. 153-58 (1958); D. Ian, *Practical Obstetric Problems,* 169-177 (5th ed. 1979); Kahler, *Cardiac Disease, in Medical Complications During Pregnancy* 105 (Burrow & Ferris ed. 1975). *See also* Amicus Brief of Certain Physicians at 6-8.

[2]Plaintiffs' use of *Medical Complications During Pregnancy* as a resource is an intelligent choice, provided, of course, such a text is not quoted out of context. Plaintiffs fail to take note of several important points stated explicitly in the text. For example, "At the present time termination of pregnancy is rarely recommended or indicated. Gorenberg and Chesley (1953) feel that abortion is *un*necessary in patients with rheumatic heart diseases. . . . Conradsson and Werks state that, 'Therapeutic abortion is no longer a realistic choice, since surgical or intensified medical treatment (or both) can carry the patient through pregnancy with reasonable safety'." *See* Kahler, *Cardiac Disease, in Medical Complications During Pregnancy* 129-130 (Burrow & Ferris eds. 1975).

[3]Plaintiffs' Amici present a "shopping list" of complications of pregnancy, Amicus Brief of Planned Parenthood Federation of America, Inc. *et al.* at 14n.6, which merely lists the Table of Contents of *Medical Complications During Pregnancy.* The Amici do not claim that any of the listed complications might or would lead to a consideration of a medically necessary abortion. An extensive review of the text indicates that the authors give no indication that such complications should *ever* be used as justification for a "medically necessary" abortion. *See generally Medical Complications, supra* n.2.

[4]Amici Planned Parenthood *et al.* claim that maternal mortality from cardiac disease is decreasing "in part because of the increased availability of abortions." For this proposition they cite *The Merck Manual* 518 (13th ed. 1977) as their sole source. But their citation does not support their claim. It contains no reference at all to abortion availability as an explanation, partial or otherwise, for the trend in reduction of maternal mortality associated with cardiac disease over the past several decades.

The Amici's claim that maternal mortality from cardiac disease is decreasing "in part because of the increased availability of abortions" is not supported by Kahler, who states:

> Over past decades there has been a progressive decline in maternal mortality so that in recent years the overall mortality rate in pregnant cardiac patients has been less than 1 per cent. This reduction has been due to a number of factors including a better understanding of the cardiovascular adaptations to pregnancy, resulting in more rational management during pregnancy, improvement in medical therapy and surgical treatment of heart disease in general, and some changes in the pattern of heart disease.

Kahler, *Cardiac Disease, supra* n.8, at 105. Abortion is nowhere included on Kahler's list.

The statement Amici quote from Pritchard & MacDonald, *Williams Obstetrics* 612-13 (15th ed. 1976) as "cardiac disease is an urgent indication for therapeutic abortion" reads, in its entirety, "Her desire for a child may be a determining factor, but Class III cardiac disease is an urgent indication for therapeutic abortion unless the woman can be hospitalized for the duration of her pregnancy." *Williams Obstetrics* 612-613. Thus, the primary determining factor is the woman's "desire for a child." Only if she is *not* hospitalized do Pritchard and MacDonald assert there exists an indication for abortion. Of course, there is no medical reason why someone cannot be hospitalized. Illinois will pay for such hospitalization. If the woman refuses hospitalization because the pregnancy is unwanted or for some other personal or social reason, this means that the medically appropriate (and fully adequate) treatment has been rejected, not that there is a medical indication for a therapeutic abortion.

[5]*See* Amicus Brief of Certain Physicians at 8. This Court should note that statistics on abortion mortality are based on a young healthy population, not on a population suffering from cardiac disease. *See Center for Disease Control Abortion Surveillance Annual Summary* (1977) at 3, U.S. Dept. HEW. Abortion mortality can be expected to be higher in the typically older, ill cardiac patient. The risks of *any* pregnancy termination are not small. *See Medical Complications of Pregnancy, supra* n.2, at 936-939.

[6]Specific treatment includes:

(1) Close observation and frequent physician visits,

(2) Folic acid supplements,

(3) Transfusions as necessary,

(4) Avoidance of hypoxia during anesthesia,

(5) Early delivery should be considered, and

(6) Manage pain crises with heparin.

Citations to medical literature::

Fiakpui and Moran, *Pregnancy in the Sickle Hemoglobinopathies,* 11 Journal of Reproductive Medicine 28 (1973).

M. Barnhart, R. Henry, J. Lusher, *Sickle Cell* 89 (2d Ed. 1976).

Morrison and Wiser, *The Use of Prophylactic Partial Exchange Transfusion in Pregnancies Associated with Sickle Cell Hemoglobinopathies,* 45 Obstetrics and Gynecology 516 (1976).

Horger, *Managing the Patient with Sickle Cell Disease,* 2 Contemporary OB/GYN 55 (1973).

Horger, *Hemoglobinapathies in Pregnancy,* 17 Clinical Obstetrics and Gynecology 139-143 (1974).

[7]*See* Amicus Brief of Certain Physicians at 4, 5. Plaintiffs' Amici rely on a 1975 publication and a 1972 publication for the proposition that '[i]n many instances the maternal risk is considered to be too great, and therapeutic abortions are recommended.'' Amicus Brief of Planned Parenthood *et al.* at 17 n.22. These publications antedate the 1976 publication of clear evidence that a prophylactic partial exchange transfusion successfully manages the problem which constituted the basis for the Amici's recommendations. *See* Amicus Brief of Certain Physicians at 2 n.14.

[8]Neither Plaintiffs nor their Amici dispute the fact that alternate treatments exist and are effective. The claim of Plaintiffs that "the authorities cited do not stand for the proposition that abortions in other than life-preserving situations are not medically necessary," Brief of Plaintiffs-Appellees at 64n., is not supported by any citation. Plaintiffs misrepresent medical authorities by making fallacious claims and attributing them to such authorities. A blatant example of such misrepresentation can be seen in Plaintiffs' claim that, "Some of the authorities in fact recognize the medical advisability of abortion under non-life-threatening circumstances." *Id.* They cite Levine and Colea, *When Pregnancy Complicates Chronic Granulocytic Leukemia,* 13 Contemporary OB/GYN 49 (1979) in support of this claim. But Levine and Colea make no such statement in the cited article. In fact, *abortion is never mentioned* in the article. To further embarrass this ill-conceived attempt at medicolegal legerdemain would serve no purpose. Suffice it to say that *none* of the authorities to whom they refer *ever* cite abortion as a treatment for chronic granulocytic leukemia—or for any other disease.

[9]Treatment of Chronic Granulocytic Leukemia includes:

(1) Frequent visits to hemotologist and obstetrician,

(2) Complete blood and platelet counts biweekly,

(3) Busulfan (chemotherapeutic agent), and

(4) Splenic irradiation as necessary.

Citations:

Levine and Colea, *supra* n.8.

Sheehy, *An Evaluation of the Effect of Pregnancy on Chronic Granulocytic Leukemia,* 75 Am. J. Obstet. Gynecol. 789 (1958).

[10]*Carcinoma in Situ*

Treatment:

(1) punch biopsy, or

(2) ring biopsy.

Citation:

Ayre and Scott, *Carcinoma in Situ and Pregnancy,* 176 J.A.M.A. 102-105 (April 1961).

Cancer of the Rectum

Treatment:

Colostomy can be done for obstruction during surgery for the cancer. If in treating the cancerous lesion the fetus is lost, this would be an indirect result. *Cf.* n.25.

Citations:

1. O'Leary and Bepko, *Rectal Carcinoma and Pregnancy,* 84 Am. J. Ob. Gyn. 459-461 (August 1962).
2. Warren, *Carcinoma of the Rectum and Pregnancy,* 45 Br. J. of Surgery 61-67 (July 1958).

[11] According to the most recent data the course of breast cancer arising in a pregnant or lactating woman is no different from that in nonpregnant women of the same age or even older.

Medical Complications of Pregnancy, supra n.2, at 738. *See also* Sheehy, *An Evaluation of the Effect of Pregnancy on Chronic Granulocytic Leukemia,* 75 Am. J. Obstet. Gynecol. 789 (1958). There is no evidence that either the developing fetus or the pregnancy resulting from such a developing fetus is cancerous, causes cancer, or aggravates a pre-existing cancer.

[12]Patient treatment should not be delayed by concern for fetal life or welfare. *Compare* Amicus Brief of Planned Parenthood *et al.* at 16. In many cases, treatment can occur during pregnancy. Should fetal loss occur indirectly, due to or as a result of treatment, such treatment would not be considered an abortion but treatment of a physical illness that *would* be paid for by medicaid funds. *Cf.* n.25.

[13]Plaintiffs neither contest the availability of alternate treatments for cancer, nor the fact that they are effective. They also present no evidence that abortion cures or in any way ameliorates *any* form of cancer. The contrary may actually be the case. In fact, in cases involving acute leukemia, "Interruption of the pregnancy is of no benefit and may hasten the death of the mother." Mulla, *Acute Leukemia and Pregnancy,* 75 Am. J. Obstet. Gynecol. 1285 (1958). "Moreover, the leukemia does not necessarily prevent the patients carrying their pregnancies to term. And, although premature deliveries are frequent, therapeutic abortion is not indicated." *Ibid. See also* R. Lee, C. Johnson, and D. Hanlon, *Leukemia During Pregnancy* 844 Am. J. Ob. Gyn. 455-58 (1962).

Further, statistics supporting abortion as a form of treatment are based on a population that is primarily young and healthy. *See* U.S. Dep't of HEW, Center for Disease Control, *Abortion Surveillance Annual Summary* 3 (1977). In all fairness, a young and healthy population cannot be compared with a population requiring cancer chemotherapy or any other form of medical treatment for complications and conditions not related to pregnancy. Any attempt at comparison would be meaningless because of the great discrepancies in patient population.

[14]Plaintiffs and their amici are vague and nonspecific with regard to cancer as a criterion for a "medically necessary" abortion. "Let us sum up the situation in cancers by noting that there are at least 100 different types of cancer in humans. . . ." C. F. Herreid, *Biology* 819 (1977). The point, of course, is that any attempt to consider and examine *all* of the different forms of cancer and the effective treatments available for each one would require

several large volumes. Plaintiffs and their Amici fail to present a specific case because either (1) they cannot recall a specific case, or (2) no such instances exist. Abortion is not a treatment for cancer.

[15]*See* Amicus Brief of Certain Physicians at 10.

[16] With the present availability of effective hypertensive drugs there is no reason that blood pressure in each instance cannot be brought to normal. Their proper utilization depends upon the cooperation between the obstetrician and an internist with experience in the treatment of hypertension.

Medical Complications of Pregnancy, supra n. 2, at 86.

Plaintiffs' Amici openly predicate their claim that abortion may be "medically necessary" for preeclampsia upon the notion that the woman may not choose to cooperate with therapy. Amicus Brief of Planned Parenthood *et al.*, at 18-19. But when the State offers to fund fully adequate therapy, and the woman chooses to reject it, the State cannot be said to have failed in its obligations.

[17]*See* Amicus Brief of Certain Physicians at 10; *see also supra* n.16.

[18]*See* Heffernan and Lynch, *Is Therapeutic Abortion Scientifically Justified?,* 19 Linacre Quarterly 11 (1952); Herwig and Jackson, *Renal Disease and Pregnancy,* 92 Am. J. Ob. Gyn. 1117-1121 (1965).

[19]Plaintiffs cite to Messer, *Medical Indications for Pregnancy Interruption, in Pregnancy Termination* (Sciarra, Zatuchni and Speidel eds. 1979) at 307 who points out that "owing to increased blood flow, compromised renal function will sometimes spontaneously improve during pregnancy."

[20]Referring to patients with advanced renal disease, Ferris writes, "If renal function and hypertension become worse early in pregnancy, termination is advisable, since there is little likelihood of a successful pregnancy and renal function may be permanently impaired." *Medical Com-*

plications During Pregnancy, supra n. 2 at 34. The symptoms to which Ferris refers would constitute an acute crisis threatening the life of the mother. Such an occurrence would fall under the "life of the mother" exception, would occur early in pregnancy (thus avoiding any of the serious complications of late abortion), and would be funded by the medicaid program.

[21]*See* Amicus Brief of Certain Physicians at 12.

[22]The 1975 authority cited by Amici Planned Parenthood, *et al.*, Brief at 20, points out that the study of diabetic retinopathy by White on which Amici's conclusions rely had a severe deficiency, to wit: "Control data for a matched nonpregnant group were not presented . . ." *Medical Complications During Pregnancy, supra* n.1, at 191. This, therefore, does not allow conclusions to be drawn from the data. The authority further concedes that any evidence of an increased degree of complications is inconclusive. More importantly, there have been developments in the treatment of diabetes since 1975 and 1973, the dates of the only two authorities upon whom Amici reply. Amici Brief of Planned Parenthood Federation *et al.* at 19 n.32, 20 nn.33-37.

> During the past ten years, important advances have been made in caring for the pregnant woman with diabetes mellitus. Maternal mortality has been all but eliminated and maternal morbidity has been reduced significantly.

Gabbe, *New Ideas on Managing the Pregnant Diabetic Patient,* 13 Contemporary OB/GYN 109 (1979).

Thus, by 1979 it was possible to conclude, "Provided that the patient is well-controlled throughout pregnancy, the diabetic state is not permanently worsened." *Id.* at 191.

[23]*See* Amicus Brief of Certain Physicians at 11, 12.

[24]Plaintiffs' authority states:

> Although the risk is small, particularly in young mothers, thromboembolism occupies relatively greater importance as other causes of maternal mortality (e.g. hemorrhage, sepsis) come under control. Only *abor-*

> *tion* remains a more common cause of mortality, and pulmonary embolism is clearly the leading fatal pulmonary disease associated with pregnancy.

Hume, *Vascular Disease,* in *Medical Complications During Pregnancy, supra* n.1, at 155 (emphasis added).

[25]Plaintiffs do express fear that a hemorrhage may require termination of treatment. But Hume, *supra* n.1, at 161, cites other methods of treatment to deal with such an occurrence.

Plaintiff's Amici state that because treatment may entail a risk to the fetus "an abortion may become medically necessary." Amicus Brief of Planned Parenthood Federation *et al,* at 21. But the risk to the fetus does not increase the risk to the mother. Presumably, the only motive to avoid such risk would be an interest in the fetus. It is a paradox, therefore, to urge this as an indication for an abortion. Even if it is argued that the fetus might be damaged, such an eugenic basis for an abortion is not a *maternal* health indication and, from the standpoint of an interest in fetal life, the viewpoint that a handicapped life is worse than no life at all is not one which Congress or Illinois are constrained to adopt in their funding policies. Their interest in the life of a handicapped fetus is no less legitimate than that in the life of a healthy one.

Treatments for maternal health which carry an attendant risk to the fetus are not, of course, thereby made "abortions." Thus, such treatments are fully funded.

[26]Plaintiff Zbaraz's opinion (that abortion may become "medically necessary") is solely his own and is not supported by the medical literature. *See Hume, supra* n.1, at 161. *See also* Amicus of Certain Physicians at 12.

[27]"Abortion has no place in the treatment of the mentally ill or, for that matter, in the prevention of mental illness." Brief of Intervening-Defendants Appellants at 74. *See also Psychological Aspects of Abortion* (ed. Mall & Watts, 1979); Sim, *Abortion and the Psychiatrist,* 2 Brit. Med. J. 145-148 (1963).

[28]*Ibid.* The medical literature demonstrates that any psychiatric factors which might contraindicate pregnancy also contraindicate abortion.

[29]Studies indicate that proper pre-natal care is the significant factor in teenage pregnancy. Moreover, of the 28,634 live births to teenagers occurring in Illinois in 1978 only one death resulted. This indicates a maternal mortality rate significantly *less* than the general population, even in the face of inequities alleged by Plaintiffs. The cause of death was not specified. Telephone Interview with Josephine Stock, Illinois Dep't of Public Health, Public Information Office, Springfield, Illinois (April 14, 1980). *See also* Amicus of Certain Physicians at 4.

[30]The court should be extremely wary of "medically necessary" abortions for teenagers in light of recent evidence of the gross overprescription of such treatment. Severe, long term complications and handicaps have resulted. *See* Bulfin, *A New Problem in Adolescent Gynecology,* 72 Southern Medical Journal 967-968 (Aug. 1979).