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**LOW-INCOME WOMEN OF TEXAS V. BOST,
38 S.W.3d 689 (Tex. Ct. App. 2000)**

FACTS

In 1965, Congress enacted Title XIX of the Social Security Act.¹ The federal government developed obligatory and elective medical services that a state should or could (respectively) offer to its citizens under Medicaid.² The Hyde Amendment to the Medicaid Act provides that no federal reimbursement funds may be used for state-funded abortion services unless such abortions are performed in cases of rape, incest or situations where the mother suffers from a physical ailment “caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed.”³ Although the Hyde Amendment prohibits the federal government from funding certain abortions, states are free to use state funds to finance abortions.⁴

The state of Texas has participated in the Medicaid program since 1967 when it established the Medical Assistance Program.⁵ Texas adopted the Hyde Amendment restrictions on state-funded abortion services.⁶ As a result, the Low-Income Women of Texas,⁷ commenced this suit challenging Texas’ monetary limitations on abortions provided by the state to poor woman.⁸ Texas’ monetary limitations on state-funded abortions allow physicians to use state funds only for abortions performed according to the parameters of the Hyde Amendment.⁹ Abortions falling outside the scope of the Hyde Amendment must be performed at the expense of the state or the patient.¹⁰ The difference between state-funded abortion services and all other state-funded medical services is that state-funded abortion services require a compounded showing of medical necessity, rather than the standard showing of necessity.¹¹

Both plaintiff and defendant filed summary judgment motions.¹² The

1. *Low-Income Women of Tex. v. Bost*, 38 S.W.3d 689, 692 (Tx. Ct.App. 2000) (citing 42 U.S.C.A. §§ 1396-1396v (West 1942 Supp. 2000)). Explaining that Title XIX of the Social Security Act instituted the federal Medicaid program that appropriates federal funds to each state that provides medical services to a variety of categories of needy individuals. The government pays a portion of the aggregate costs that a state expends in supplying these medical services.

2. *Low-Income Women of Tex.*, 38 S.W.3d at 692.

3. *Id.* at 692.

4. *Id.*

5. *Id.* at 693.

6. *Id.*

7. *Id.* at 692. The low-income women are represented by doctors who provide abortion services to indigent women in Texas.

8. *Id.* at 691.

9. *Id.* at 692.

10. *Id.*

11. *Id.* at 693.

12. *Id.* at 691.

District Court of Travis County, 126th District, granted summary judgment to Texas.¹³ Plaintiffs then appealed alleging that Texas' abortion-funding restrictions violate plaintiffs' equal protection rights, privacy guarantees and the equal rights amendments under the Texas constitution.¹⁴

HOLDING

The Court of Appeals of Texas reversed the trial court's grant of summary judgment in favor of the defendant. The Court of Appeals held that the Texas constitution's Equal Rights Amendment ("Texas ERA") raised sex "to a suspect classification," therefore subjecting any facially gender discriminatory statute to strict judicial scrutiny.¹⁵ Because Texas could not establish that its adoption of the Hyde Amendment supported any compelling state interest, the court ruled that Texas' application of the Hyde Amendment to state-funded abortion services violated the Texas ERA.¹⁶

ANALYSIS

The Court of Appeals of Texas began its discussion with a brief analysis of the parties' summary judgment motions¹⁷ and proceeded to dismiss plaintiffs' claim regarding the unconstitutionality of the Maternal/Infant Health Act for lack of ripeness.¹⁸ The court addressed only the issue of whether the state's placement of the Hyde Amendment limitation on state funded abortions violated the Texas constitution.¹⁹

As it delved into the state constitutional issue, the court noted that this case was not about a woman's right to state-funded abortion services, but rather the case was about the application of a different medical necessity standard to abortion services as opposed to all other medical services.²⁰ The court warned

13. *Id.*

14. *Id.*

15. *Id.* at 698.

16. *Id.* at 700.

17. *Id.* at 695.

18. *Id.* The court dismissed this claim because the state had not funded the maternal/infant health act since 1991 and plaintiffs made no showing that Texas would start in the imminent future.

19. *Id.* at 693 - 695 (explaining that the Hyde Amendment essentially prohibits spending federal funds for abortions for indigent women except in cases of rape or incest or if "a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed." Texas' application of the Hyde Amendment to state funded abortions requires that a pregnant women's life be in imminent danger in order for her to receive state funding for the abortion she seeks. It is not merely enough for a doctor to determine that a woman needs an abortion to maintain her health or to prevent her feeble health from getting even worse; rather the unwanted pregnancy must place the woman's life in imminent, mortal danger.)

20. *Id.*

that this case only involved the issue of “funding medically necessary abortions” and did not and would not concern the morality of abortion.²¹

The court explained that to prevail on their unconstitutionality claim, the low-income women would have to prove that the Texas constitution offers more comprehensive protection “of [their] individual rights” than the United States constitution.²² The Supreme Court has held that the Hyde Amendment, as it is applied in the federal realm, is neither a violation of a woman’s constitutional right to have an abortion, nor a violation of a woman’s First Amendment or Fifth Amendment protections.²³

Before the court addressed plaintiffs’ Texas ERA claim, it noted that plaintiffs may possess valid claims under the Equal Protection and Due Process clauses of the Texas constitution.²⁴ The court pointed out that Texas courts, like several other state courts, have interpreted the Texas constitution to include broader protections than the U.S. Constitution.²⁵ However, the court refused to explore this possibility because the court could resolve the issue of this case by simply addressing the Texas ERA.²⁶

The court examined the significance of the addition of the ERA to the Texas constitution, a document which already contained equal protection and due process clauses.²⁷ The court concluded that the Texas ERA affords people an even broader protection of their individual liberties than the equal protection and due process clauses of the Texas constitution and the U.S.²⁸ true the Texas ERA in a light akin to that of the existing equal protection and due process clauses in the Texas constitution would render the words of the Texas ERA useless.²⁹

The court stated that the Texas ERA “elevates sex along with race, color, creed and national origin to a suspect classification.”³⁰ This suspect classification demands that the court employ a strict scrutiny standard to determine whether a statute unfairly discriminates against a protected class of persons.³¹ Thus, a statute that classifies individuals and individuals’ rights on

21. *Id.*

22. *Id.* at 696.

23. *Id.* (citing *Roe v. Wade*, 410 U.S. 113 (1973), which merely protects a woman from undue interference with her right to have an abortion before her unwanted fetus becomes viable).

24. *Id.*

25. *Id.* at 697.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* (citing *In re Mclean*, 725 S.W.2d 696, 697-98 (TEX. 1987) (holding that to construe the Texas ERA to be only as protective as the U.S. Constitution and Texas constitution would render the Texas ERA hollow and pointless)).

30. *Id.* (citing *Mercer v. Board of Trustees*, 538 S.W.2d 201, 206 (TEX. CIV. APP. 1976) (holding that a statute that discriminates solely on the basis of sex violates the Texas ERA)).

31. *Id.*

the basis of sex violates the Texas ERA unless the state establishes that the "classification is somehow required by the unique physical characteristics of the sexes."³² If the particular makeup of the sexes genuinely necessitates unequal treatment of the sexes, then the state must present a rational basis for the statute.³³ If the state does not or cannot demonstrate a rational basis justification for the statute, then the state must prove that enactment of the statute is the least limiting method available to protect a compelling state interest.³⁴

The court rejected Texas' initial argument asserting that Texas discriminates against no one since Texas "refuses to fund medically necessary abortions for *all* indigent citizens, regardless of gender."³⁵ The court stated that since it is biologically impossible for a man to give birth, the only individuals affected by application of the Hyde Amendment on state-funded medical services are pregnant women.³⁶

The Hyde Amendment discriminates against pregnant women seeking state-funded medically necessary abortions by requiring these women to show medical necessity beyond the standard medical necessity required for other medical services.³⁷ The Hyde Amendment requires a showing of rape, incest or imminent danger to the life of the mother caused by her pregnancy in order for a woman to attain approval for a federally-funded abortion.³⁸ To show imminent danger under the Hyde Amendment, it is not sufficient for a woman to show that she has a pre-existing condition that would aggravate and be aggravated by her pregnancy and possibly take her life, rather a woman must establish that her pregnancy was the cause of the imminent, almost inevitable danger to her life.³⁹ The same standard existed with the application of the Hyde Amendment to state-funded abortions in Texas,⁴⁰ therefore the application of the Hyde Amendment discriminated against women and not men based solely on sexual difference. The court concluded that discrimination on the basis of pregnancy is defined by Texas law (and the federal government) as discrimination on the basis of sex and is prohibited by both state and federal law.⁴¹

After deciding that Texas' denial of state-funded medically necessary

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 698.

36. *Id.*

37. *Id.*

38. *Id.* at 693.

39. *Id.*

40. *Id.*

41. *Id.* at 698.

abortions to indigent pregnant women unlawfully discriminated on the basis of sex, the court then asked if “physical characteristics require and thus excuse that sex based distinction.”⁴² The court stated that it must strictly scrutinize the statute unless the proponent of the law rebuts plaintiffs’ ERA prima facie claim by illustrating that “unique physical characteristics require different treatment under the law.”⁴³

The court refused to answer the question of whether women are men and men are women, noting that the question had already been answered in Texas.⁴⁴ However, the court rejected Texas’ argument that because men cannot give birth, the physical difference between men and women necessitates the discrimination inflicted by the Hyde Amendment.⁴⁵ “If that were the case, discrimination based on pregnancy would never constitute sex discrimination, and we know from the cases and statutes that this not the law.”⁴⁶ To illustrate this point, the court discussed *Finley v. State*,⁴⁷ which explained why a Texas statute that made it impossible for a woman to commit rape did not violate the Texas ERA.⁴⁸ The *Finley* court, utilizing the “physical characteristic exception,” searched for a valid nexus between the sex-based classification of the statute and the reasons why the legislature passed the statute.⁴⁹ The *Finley* court concluded that the leading principle behind the statute was to avert assaults of men against women, therefore “the different characteristics of the sexes justified the sex-based definition of perpetrator in the statute.”⁵⁰

Here, the court employed the *Finley* holding to illustrate that not only must Texas show how the sexes are different,⁵¹ Texas must also elucidate how “singling out” sex accomplishes the objectives of the statute in question.⁵² In other words, it was not sufficient for Texas to state that only women are able to get pregnant, but Texas additionally also had to assert “some explanation of why the physical characteristics of pregnancy justify or require different health care treatment under the Medicaid law.”⁵³

42. *Id.* at 699.

43. *Id.*

44. *Id.* (citing *Mercer*, 538 S.W. 2d at 206. with a direct quote, “For us to adjudicate that women are men would be as futile as it would be absurd. Neither the ERA nor the rights established by it require us to construe it so as to deny sexual or reproductive differences between the sexes.”).

45. *Id.*

46. *Id.*

47. 527 S.W.2d 553 (TEX. CRIM. APP. 1975).

48. *Low-Income Women of Texas*, 38 S.W.3d at 700 (discussing *Finley*, 527 S.W.2d at 555).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

The court noted that the purpose of the Medicaid law is to provide quality health care to indigent persons.⁵⁴ The court stated that the effect of Texas' application of the Hyde Amendment to its state-funded medical services cuts off a statutorily protected group of people from exercising their rights to adequate, quality medical care under the Medicaid statute.⁵⁵ The court did not find a valid nexus between the sex-based distinction (of the Hyde Amendment) and the purpose of the Medicaid statute.⁵⁶ But, the court did find that the restrictions contained in the Hyde Amendment could be deleterious to women's health.⁵⁷ In the court's view, the Hyde Amendment actually worked in opposition to the original purpose of the Medicaid law, that is, to provide quality medical care to indigent citizens.⁵⁸ By requiring a showing of rape, incest or imminent danger to the mother, the Hyde Amendment deprived poor women with pre-existing medical condition the care to which they are entitled under the Medicaid law and the Texas ERA.⁵⁹

Through its strict scrutiny analysis, the court rejected Texas' argument that the state "has a legitimate state interest in protecting both fetal and maternal health." The court, relying on previous case law⁶⁰, reminded Texas that "the state may impose regulations on abortion only to protect the health of the mother, not to protect the unborn fetus."⁶¹ The court explained that the state does not possess an interest in the fetus until it is viable.⁶² The court repeatedly repudiated Texas' application of the Hyde Amendment as being antithetical to the purpose of the Medicaid law and noted that less restrictive measures were available to further Texas' compelling interest in its citizens' health and fiscal conservatism.⁶³

The Court of Appeals of Texas held Texas' application of the Hyde Amendment to be unconstitutional because sex-based discrimination under the Texas ERA is prohibited and, consequently, subject to strict judicial scrutiny as to whether compelling state interests exist to validate the facially unconstitutional law. The court found the Hyde Amendment, as applied to Texas law, deprives indigent pregnant women of their right to the state-funded medically necessary health service of abortion.⁶⁴

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 701.

58. *Id.* at 700.

59. *Id.*

60. *Id.* at 701 (citing *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)).

61. *Id.*

62. *Id.*

63. *Id.* at 702.

64. *Id.*

CONCLUSION

A woman's positive right⁶⁵ to legalized abortion access is unlike any other civil liberty. No other civil liberty involves the substantive right to purposefully terminate a potential human life.⁶⁶ Furthermore, no other civil liberty belongs solely to women or solely to men. The right to legalized abortion access, because of its female specificity, is from its very inception unique and anomalous.

Notwithstanding the particularly unique nature of abortion access rights, courts continue to employ traditional interpretation mechanisms to determine the right to publicly-funded non-therapeutic abortions. Traditional interpretation mechanisms simply do not work, because, after all, a woman's right to legalized abortion access is not a traditional civil right.

If not traditional interpretation (of strict scrutiny analysis), then what interpretation mechanism should the court have used in this situation? Such a question will remain unanswered in this conclusion because the answer involves more detail, discussion and politics than are appropriate for this case. Nevertheless, food for thought is appropriate in this context. While this case might be lauded by women's rights activists as a step in the right direction, those same activists should consider the chilling effect of this decision. When the Texas legislature enacted the equal rights amendment, did it consider that Texas would have to pay for every Medicaid-eligible woman's abortion? Did the Texas legislature intend to make abortion available as birth control? Probably not. What effect will such a broad interpretation have on the other state legislatures as they contemplate enacting their own equal rights amendments?

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65. A positive right is a right *to* something rather than a right *from* something.

66. See *Harris v. McRae*, 448 U.S. 297 (1980).

