10-1979

Harris v. McRae

Lewis F. Powell Jr.

POELKER, MAYOR OF ST. LOUIS, ET AL. *v.* DOE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 75-442. Argued January 11, 1977—Decided June 20, 1977

The city of St. Louis, in electing, as a policy choice, to provide publicly financed hospital services for childbirth but not for nontherapeutic abortions, *held* not to violate any constitutional rights. *Maher* v. *Roe*, *ante*, p. 464.

515 F. 2d 541, reversed and remanded.

Eugene P. Freeman argued the cause for petitioners. With him on the brief was *Jack L. Koehr*.

Frank Susman argued the cause and filed a brief for respondent.*

PER CURIAM.

Respondent Jane Doe, an indigent, sought unsuccessfully to obtain a nontherapeutic abortion at Starkloff Hospital, one of two city-owned public hospitals in St. Louis, Mo. She subsequently brought this class action under 42 U. S. C. § 1983 against the Mayor of St. Louis and the Director of Health and Hospitals, alleging that the refusal by Starkloff Hospital to provide the desired abortion violated her constitutional rights. Although the District Court ruled against Doe following a trial, the Court of Appeals for the Eighth Circuit reversed in

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*Briefs of *amici curiae* urging affirmance were filed by *Leo Pfeffer* for the American Jewish Congress et al.; and by *Sylvia A. Law*, *Harriet F. Pilpel*, and *Eve W. Paul* for the American Public Health Assn. et al.

Briefs of *amici curiae* were filed by *Dennis J. Horan*, *Dolores V. Horan*, and *Victor G. Rosenblum* for Americans United for Life, Inc.; by *Jerome M. McLaughlin* for Missouri Doctors for Life; and by *Robert E. Ratermann* for James R. Butler et al.

an opinion that accepted both her factual and legal arguments. 515 F. 2d 541 (1975).[1]

The Court of Appeals concluded that Doe's inability to obtain an abortion resulted from a combination of a policy directive by the Mayor and a longstanding staffing practice at Starkloff Hospital. The directive, communicated to the Director of Health and Hospitals by the Mayor, prohibited the performance of abortions in the city hospitals except when there was a threat of grave physiological injury or death to the mother. Under the staffing practice, the doctors and medical students at the obstetrics-gynecology clinic at the hospital are drawn from the faculty and students at the St. Louis University School of Medicine, a Jesuit-operated institution opposed to abortion. Relying on our decisions in *Roe* v. *Wade*, 410 U. S. 113 (1973), and *Doe* v. *Bolton*, 410 U. S. 179 (1973), the Court of Appeals held that the city's policy and the hospital's staffing practice denied the "constitutional rights of indigent pregnant women . . . long after those rights had been clearly enunciated" in *Roe* and *Doe*. 515 F. 2d, at 547. The court cast the issue in an equal protection mold, finding that the provision of publicly financed hospital services for childbirth but not for elective abortions constituted invidious discrimination. In support of its equal protection analysis, the court also emphasized the contrast between nonindigent women who can afford to obtain abortions in private hospitals and indigent women who cannot. Particular reliance was placed upon the previous decision in *Wulff* v. *Singleton*, 508 F. 2d 1211 (CA8 1974), reversed on other grounds, 428 U. S. 106 (1976), in which the Court of Appeals

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[1] The facts concerning Doe's visit to the hospital and the reason for her inability to obtain an abortion are hotly disputed. Our view that the Court of Appeals erred in the application of the law to the facts as stated in its opinion makes it unnecessary to describe or resolve this conflict.

had held unconstitutional a state Medicaid statute that provided benefits for women who carried their pregnancies to term but denied them for women who sought elective abortions. The court stated that "[t]here is no practical distinction between that case and this one." 515 F. 2d, at 545.

We agree that the constitutional question presented here is identical in principle with that presented by a State's refusal to provide Medicaid benefits for abortions while providing them for childbirth. This was the issue before us in *Maher* v. *Roe*, *ante*, p. 464. For the reasons set forth in our opinion in that case, we find no constitutional violation by the city of St. Louis in electing, as a policy choice, to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions.

In the decision of the Court of Appeals and in the briefs supporting that decision, emphasis is placed on Mayor Poelker's personal opposition to abortion, characterized as "a wanton, callous disregard" for the constitutional rights of indigent women. 515 F. 2d, at 547. Although the Mayor's personal position on abortion is irrelevant to our decision, we note that he is an elected official responsible to the people of St. Louis. His policy of denying city funds for abortions such as that desired by Doe is subject to public debate and approval or disapproval at the polls. We merely hold, for the reasons stated in *Maher*, that the Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth as St. Louis has done.[2]

The judgment of the Court of Appeals for the Eighth Circuit

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[2] The Court of Appeals awarded attorney's fees to respondent under the "bad faith" exception to the traditional American Rule disfavoring allowance of such fees to the prevailing party. See *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U. S. 240 (1975). It follows from our decision on the constitutional merits that it was an error to award attorney's fees to respondent.

is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

[For dissenting opinion of MR. JUSTICE MARSHALL, see *ante*, p. 454.]

[For dissenting opinion of MR. JUSTICE BLACKMUN, see *ante*, p. 462.]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN join, dissenting.

The Court holds that St. Louis may constitutionally refuse to permit the performance of elective abortions in its city-owned hospitals while providing hospital services to women who carry their pregnancies to term. As stated by the Court of Appeals:

> "Stripped of all rhetoric, the city here, through its policy and staffing procedure, is simply telling indigent women, like Doe, that if they choose to carry their pregnancies to term, the city will provide physicians and medical facilities for full maternity care; but if they choose to exercise their constitutionally protected right to determine that they wish to terminate the pregnancy, the city will not provide physicians and facilities for the abortion procedure, even though it is probably safer than going through a full pregnancy and childbirth." 515 F. 2d 541, 544 (1975).

The Court of Appeals held that St. Louis could not in this way "interfer[e] in her decision of whether to bear a child or have an abortion simply because she is indigent and unable to afford private treatment," *ibid.*, because it was constitutionally impermissible that indigent women be " 'subjected to State coercion to bear children which they do not wish to bear [while] no other women similarly situated are so coerced,' " *id.*, at 545.

For the reasons set forth in my dissent in *Maher* v. *Roe*, *ante*, p. 482, I would affirm the Court of Appeals. Here the fundamental right of a woman freely to choose to terminate her pregnancy has been infringed by the city of St. Louis through a deliberate policy based on opposition to elective abortions on moral grounds by city officials. While it may still be possible for some indigent women to obtain abortions in clinics or private hospitals, it is clear that the city policy is a significant, and in some cases insurmountable, obstacle to indigent pregnant women who cannot pay for abortions in those private facilities. Nor is the closing of St. Louis' public hospitals an isolated instance with little practical significance. The importance of today's decision is greatly magnified by the fact that during 1975 and the first quarter of 1976 only about 18% of all public hospitals in the country provided abortion services, and in 10 States there were no public hospitals providing such services.[1]

A number of difficulties lie beneath the surface of the Court's holding. Public hospitals that do not permit the performance of elective abortions will frequently have physicians on their staffs who would willingly perform them. This may operate in some communities significantly to reduce the number of physicians who are both willing and able to perform abortions in a hospital setting. It is not a complete answer that many abortions may safely be performed in clinics, for some physicians will not be affiliated with those clinics, and some abortions may pose unacceptable risks if performed outside a hospital. Indeed, such an answer would be ironic, for if the result is to force some abortions to be performed in a clinic that properly should be performed in a hospital, the city policy will have operated to increase rather than reduce health risks associated with abortions; and in *Roe* v. *Wade*,

[1] Sullivan, Tietze, & Dryfoos, Legal Abortion in the United States, 1975–1976, 9 Family Planning Perspectives 116, 121, 128 (1977).

410 U. S. 113, 163 (1973), the Court permitted regulation by the State solely to *protect* maternal health.

The Court's holding will also pose difficulties in small communities where the public hospital is the only nearby health care facility. If such a public hospital is closed to abortions, any woman—rich or poor—will be seriously inconvenienced; and for some women—particularly poor women—the unavailability of abortions in the public hospital will be an insuperable obstacle. Indeed, a recent survey suggests that the decision in this case will be felt most strongly in rural areas, where the public hospital will in all likelihood be closed to elective abortions, and where there will not be sufficient demand to support a separate abortion clinic.[2]

Because the city policy constitutes "coercion [of women] to bear children which they do not wish to bear," *Roe* v. *Wade* and the cases following it require that the city show a compelling state interest that justifies this infringement upon the fundamental right to choose to have an abortion. "[E]xpressing a preference for normal childbirth," *ante*, at 521, does not satisfy that standard. *Roe* explicitly held that during the first trimester no state interest in regulating abortions was compelling, and that during the second trimester the State's interest was compelling only insofar as it protected maternal health. 410 U. S., at 162–164. Under *Roe*, the State's "important and legitimate interest in potential life," *id.*, at

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[2] "The concentration of services among relatively few providers—mostly clinics—in the nation's larger cities is clearly associated with the failure of hospitals—especially the smaller hospitals that are the major health institutions in small cities and nonmetropolitan areas—to offer abortions along with their other health services. Since public hospitals are even less likely than private hospitals to provide abortions, it is poor, rural and very young women who are most likely to be denied abortions as a result of the need to travel outside their own communities to obtain terminations. It is these women who are least likely to have the funds, the time or the familiarity with the medical system that they need to be able to cope with the problems associated with such travel." *Id.*, at 121.

163—which I take to be another way of referring to a State's "preference for normal childbirth"—becomes compelling only at the end of the second trimester. Thus it is clear that St. Louis' policy preference is insufficient to justify its infringement on the right of women to choose to have abortions during the first two trimesters of pregnancy without interference by the State on the ground of moral opposition to abortions. St. Louis' policy therefore "unduly burdens the right to seek an abortion," *Bellotti* v. *Baird*, 428 U. S. 132, 147 (1976).

I would affirm the Court of Appeals.

Caldwell

SUPPLEMENTAL MEMORANDUM

February 15, 1980 Conference
Supplemental List

No. A-663	Application for Stay Presented to Justice Marshall and Referred to the Court
BUCKLEY	
v.	
McRAE	DC (ED N.Y.)
No. A-679	(Same)
HARRIS	
v.	
McRAE	

Some 80 members of Congress have filed a letter, which they request to be considered as an amicus submission, in support of the stay application. They wish to bring the following to the Court's attention.

"No money shall be drawn from the Treasury, but in consequence of Appropriations made by law."

The Labor/HEW Appropriations Act fails to appropriate funds for the purpose now covered by Judge Dooling's order. We respectfully request a stay of the order because it is contrary to [Article I, Section 9, Clause 7.] Secretary Harris is bound to respect the mandate of Congress. Accordingly, we urge the Court to grant a stay pending appeal to avoid an invalid and unconstitutional judicial usurpation of legisla-

This is a fair point, reinforcing the need for a stay. F.l.a.

lative power and the issuance of a judicial decree directly contravening an explicit and fundamental constitutional provision.

2/14/80 Caldwell

PJC

I would DENY

Caldwell

The DC invalidated Hyde Amend & its order requires all states (receiving fed medicare funds) to treat abortions like natural birth — & 9 Hemb, to do this retroactively since Hyde was adopted.

February 15, 1980 Conference
Supplemental List

I'm inclined to Grant

No. A-663
BUCKLEY
v.
McRAE

Application for Stay Presented to Justice Marshall and by him Referred to the Court

stay requested by SG.

We have granted Williams v.

No. A-679
HARRIS
v.
McRAE

(Same)

Z stay. There is a motion (not sure is before us yet) to note these cases, accelerate & set with Williams

SUMMARY: Pending appeal, the SG and Intervenors-Appellants seek to stay the mandate of the DC (ED NY, Doolings, Judge) which enjoined the so-called Hyde Amendments as being unconstitutional. The DC granted a stay, which expires today, February 14. Justice Marshall today continued the stay pending further order of the Court. Appellees, who oppose the stay, request that the Court note probable jurisdiction, and consider their motion to schedule argument in tandem with Williams, et al. v. Zbaraz, Nos. 79-4, 79-5 and 79-491.

Makes sense but we need response from

FACTS: The DC declared the Hyde Amendment to be unconstitutional. The Court held that the statutory provisions limiting the availability of federal Medicaid funds for abortions during the current and the three preceding fiscal years violate the equal protection com-

Because the impact

Cover

ponent of the Due Process Clause of the Fifth Amendment because they bear no rational relationship to any legitimate governmental interest. The DC also ruled that the Hyde Amendment, deprives pregnant women of the liberty protected by the Fifth Amendment and the religious freedom guaranteed by the First Amendment, to the extent that the statutes discourage "individual decisions of religiously formed conscience to terminate pregnancy for medical reasons."

Accordingly the DC ordered the Secretary to "[c]ease to give effect" to the Hyde Amendment insofar as it forbids federal Medicaid payments for abortions that are "necessary in the professional judgment of the pregnant woman's attending physician exercised in the light of all factors, physical, emotional, psychological, familial, and the woman's age, relevant to the health-related well-being of the pregnant woman." The DC directed the Secretary to "[c]ontinue to authorize the expenditure of federal matching funds" for such abortions. Finally, the DC ordered the Secretary to inform HEW's regional directors of the DC's decision, and to require the directors in turn to instruct participating states to notify all Medicaid providers of the existence of the injunction.

Plaintiffs in these consolidated cases originally filed their complaints on September 30, 1976, the day that Congress enacted the original version of the Hyde Amendment. They alleged that the status violated the equal protection component of the Due Process Clause of the Fifth Amendment because it drew an invidious distinction between Medicaid recipients who carry their pregnancies to term and Medicaid recipients who choose to have an abortion, whether therapeutic or nontherapeutic. On October 22, 1976, the district court enjoined the Secretary from enforcing the statute and ordered him to provide

reimbursement for services related to pregnancy and childbirth. McRae v. Mathews, 421 F. Supp. 533, 543 (E.D.N.Y. 1976). Several days later, the DC affirmed that it had "implicitly" held the Hyde Amendment unconstitutional.

The Secretary appealed to this Court and suggested that the case be held for disposition in light of two other abortion funding cases then pending before the Court, Maher v. Roe, 432 U.S. 464 (1977), and Beal v. Doe, 432 U.S. 438 (1977). After deciding Maher and Beal, this Court vacated the injunction in McRae and remanded the case for further consideration in light of those decisions. Califano v. McRae, 433 U.S. 916 (1977). See also Califano v. McRae, 434 U.S. 1301 (1977).

On remand, the DC again invalidated the statute and ordered the Secretary to fund abortions not fundable under the Hyde Amendment. Here, the DC held impermissible the legislative distinction between medically necessary services generally, for which federal Medicaid funds are available, and medically necessary abortions, for which federal funding is available only in limited circumstances. On its own motion, the DC stayed its order for 30 days, until February 14, 1980. On February 4, 1980, the DC denied the applications of the SG and Intervenor-Appellants for a further stay pending disposition of the direct appeal to this Court.

SG'S APPLICATION FOR STAY: (1) A stay should be granted because the DC decision is incorrect, since the currently effective version of the Hyde Amendment and its predecessors are rational legislative measures intended to: (a) further the governmental

interest in preserving potential human life and encouraging childbirth, and (b) avoid the expenditure of public funds for a purpose many taxpayers find morally repugnant. (See government's brief in United States v. Zbaraz, No. 79-491, pp. 50-64.) (2) It is foolish to suggest, as the DC does, that the constitutionally guaranteed rights to speak and publish entail corresponding entitlement to federal financial assistance to support those activities. The Hyde Amendment does not infringe upon the religious conscience to terminate pregnancy for medical reasons; it simply prohibits expenditures of federal funds for such, unless continuation of pregnancy would endanger the life of the mother. (3) A stay should be granted to allow an Act of Congress to remain in effect, since federal statutes generally enjoy a presumption of constitutionality, consistent with the principle that Congress is entitled to implement its social and fiscal policies until they are definitively determined to be wrong. (4) Although the Court denied a stay in Zbaraz, this case differs because: (a) it is directed to the federal government, and not an individual state, and thereby affects all states; (b) it invalidates past, as well as present, versions of the Hyde Amendment, which would afford the interpretation that the Secretary is obligated to process claims for abortions performed as long ago as Oct. 1976. (c) it requires subsidization of medically-necessary abortions even during the period after fetal viability, which states could have outlawed earlier.

APPELLEES' OPPOSITION TO THE SG'S STAY APPLICATION: (1) The standards which govern this application are the same as those applied by Justice Stevens in Zbaraz at 99 S.Ct. 2095, and by the full Court

in Zbaraz at 99 S.Ct. 2833. (2) A DC order is ordinarily presumed to be valid, as should this one, which was decided consistent with precedents of this Court; this offsets the presumption of validity given to federal statutes, particularly in the absence of irreparable injury. (3) Even the SG concedes that denying a stay will not irreparably injure the federal government, but will rather cause administrative inconvenience to the participating states. (SG's Application No. 679, p. 7.) (4) However, implementing the injunction in the 26 states which do not now fund medically necessary abortions will simplify, rather than encumber, administration of the Medicaid programs, since implementing the injunction requires only a simple notice and momentary change of practice; the 23 remaining states will welcome the change. (5) The DC order is not a warrant for illegal activity simply because it requires subsidization of medically necessary abortions even during the period after fetal viability, since it orders reimbursement only for those abortions which in fact were legal. (6) In balance, the irreparable injury to appellees is enormous, including mental health and life-threatening unwanted pregnancies, death and complications from resort to illegal abortions, and, for those who may acquire the money, a delay which involves a significant increase in mortality and morbidity for the 25,000 indigent pregnant women who live in non-funded states. (7) The Court should treat the stay applications as jurisdictional statements and expedite.

INTERVENOR-APPELLANTS' APPLICATION FOR STAY: Intervenor-Appellants filed a memo in support of the SG's position. They add that a stay is necessary to facilitate the orderly exercise of appellate jurisdic-

tion, in light of the trial transcript of 5,000 pages, and the DC opinion of 329 pages, with 92 footnotes and a 313 page review of legislative history. They do, however, oppose acceleration and consolidation with Zbaraz.

APPELLEES' MEMORANDUM IN OPPOSITION TO THE INTERVENING-APPELLANTS' INTERIM STAY APPLICATION: (1) As the trial record has been available to counsel for 13 months, no delay is necessary, as they suggest, to permit them to file this with their jurisdictional statement, for which they have had an additional 30 days since the DC order. (2) An interim stay could militate against appellees' motion to schedule argument in tandem with Zbaraz.

APPELLEES' MOTION TO SCHEDULE ARGUMENT IN TANDEM: Appellees submit that such is warranted because it: (1) obviates substantial questions concerning the propriety of exercising direct appellate jurisdiction in Zbaraz; and (2) avoids piecemeal litigation of the issues presented by federal and state restrictions on Medicaid reimbursement for abortions.

2/14/80 Caldwell

PJC

JAMES L. BUCKLEY

vs.

CORA McRAE

Application for stay presented to Justice Marshall and by him referred to the Court.

Here a single judge has invalidated an Act of Congress. I can't imagine not staying his judg until we can consider it.

~~Grant~~ Granted motion to expedite & set with Ill. case.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.										✓			
Brennan, J.											✓		
Stewart, J.											✓		
White, J.											✓		
Marshall, J.											✓		
Blackmun, J.											✓		
Powell, J.										✓			
Rehnquist, J.										✓			
Stevens, J.											✓		

February 15, 1980 Conference
Supplemental List

No. A-679

HARRIS

v.

McRAE

Application for Stay Presented to Justice Marshall and Referred to the Court

DC (ED N.Y.)

See Memorandum No. A-663.

2/14/80 Caldwell

PJC

February 15, 1980 Conference
Supplemental List

No. A-679

HARRIS

v.

McRAE

Application for Stay Presented to Justice Marshall and by him Referred to the Court

See Memorandum No. A-663.

2/14/80 Caldwell

PJC

February 15, 1980

Court .....
Argued ....., *19*...
Submitted ....., *19*...

Voted on....., *19*...
Assigned ....., *19*...
Announced ....., *19*...

No. A-679

PATRICIA R. HARRIS

vs.

CORA McRAE

Application for stay presented to Justice Marshall and by him referred to the Court.

Same
as
A-663

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													
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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 15, 1980

Re: A-663) Buckley v. McRae
A-679) Harris v. McRae

Dear Chief:

There are two points with respect to these cases on which it was necessary to give Mike Rodak instructions even though they were not expressly discussed by the Conference. I believe my instructions are consistent with the consensus but this letter is intended to make sure there is no objection.

First, in order to set the cases for oral argument, it is, of course, necessary first to note probable jurisdiction. The response on behalf of McRae requested the Court to treat the stay application by the Government as a jurisdictional statement. Obviously it is in the Government's interest to accept this suggestion by the respondent. Accordingly, the order will contain a reference to that request, and will specifically note probable jurisdiction.

Second, I do not recall whether we agreed on a date to announce the decision to deny the application for a stay, but it seemed to me that there was no reason for action between now and Tuesday and that it would be more orderly simply to include that denial as a part of the disposition of the case in the regular order list on Tuesday. I therefore did not instruct the Clerk to advise the parties today of the Court's action. The order will, of course, note that The Chief Justice, Mr. Justice Powell and Mr. Justice Rehnquist would grant the stay.

I don't think there should be any objection to the foregoing, but I thought it proper to make these points clear.

Respectfully,

JPS

The Chief Justice

Copies to the Conference

Argued ....., 19... *Assigned* ....., 19... No. 79-1268

Submitted ....., 19... *Announced* ....., 19...

HARRIS

vs.

MC RAE

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	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

March 28, 1980 Conference
List 3, Sheet 3

No. 79-1268	Motion of the Solicitor General to Consolidate Cases for Oral Argument
HARRIS	
v.	Motion of Intervening Appellees for Divided Argument in 79-1268
McRAE	Motion of Appellees for Divided Argument in 79-1268
	USDC (ED NY: ND Ill.)

See Memorandum No. 79-4.

3/26/80 Marsel

PJC

SUPPLEMENTAL MEMORANDUM

March 28, 1980 Conference
List 3, Sheet 3

No. 79-1268	Motion of the Solicitor General to Consolidate Cases for Oral Argument
HARRIS	
v.	Motion of Intervening Appellees for Divided Argument in 79-1268
McRAE	Motion of Appellees for Divided Argument in 79-1268
	USDC (ED NY; ND Ill.)

See Memorandum No. 79-4.

3/26/80 Marsel

PJC

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

file

April 3, 1980

MEMORANDUM TO THE CONFERENCE:

I attach a memo from the Clerk. Absent dissent, we will proceed to hear 79-1268, Harris v. McRae, first. That seems to be the sensible solution.

Regards,

WEB

cc: Mr. Rodak

WILLIAM J. SCOTT
ATTORNEY GENERAL
STATE OF ILLINOIS
130 NORTH FRANKLIN STREET, SUITE 300
CHICAGO, ILLINOIS 60606

April 1, 1980

TELEPHONE
793-2380

WELFARE
LITIGATION DIVISION

The Honorable Michael J. Rodak, Jr.
Clerk of the Supreme Court
Supreme Court Building
Washington, D.C. 20543

RE: Williams v. Zbaraz, et al.
Nos. 79-4, 79-5 and 79-491

Dear Mr. Rodak:

By letter of March 26, 1980, we have been advised to inform your office of the names of the members of the bar of the Supreme Court who will argue for the appellants in the above cases, the order of argument and the division of time.

William A. Wenzel, III will present oral argument on behalf of appellant Miller, and attorneys for the other appellants are in apparent agreement that the attorney for Mr. Miller should make the opening argument as he is the principal defendant in these cases.

No agreement, however, has yet been worked out with respect to the division of the 45 minutes alloted to the appellants and there are several reasons behind the present impasse.

First, it should be noted that appellants in No. 79-4 (intervenors Williams and Diamond below) and appellees in No. 79-1268 (intervenors Buckley et al.) are represented by the same attorneys and have indentical interests in these cases, namely, defending the constitutionality of the federal statute. Due to the manner in which the Court took jurisidiction over the McCrae case, intervenors Buckley, et al., are cast as appellees whereas in reality their interests are aligned with appellant Harris. Since the Court has denied the motion of intervenors Buckley et al. to argue in McCrae, intervenors Williams and Diamond cannot reasonably be expected to agree to a division of the time to argue which gives them less than fifteen minutes. Appellant Miller agrees with this assertion.

As the principal defendant and with the responsibility for making "a fair opening of the case," Rule 44(5), Rules of the Supreme Court, appellant Miller believed that he would be allowed the remaining 30 minutes to argue. This belief was predicated, in part, upon the apparent waiver of any entitlement to argue in Zbaraz made by the Solicitor General in writing to the Court. See, Motion of the Secretary of Health, Education and Welfare to Consolidate Oral Argument, filed March 21, 1980, denied March 31, 1980. The willingness to waive argument in Zbaraz was "Because the Secretary's primary interest lies in defending the federal statute." Id. p.3

It is now apparent that the Solicitor General desires to retract his waiver and this office has been informed that the United States will seek a full 15 minutes of time in Zbaraz. If granted this time, it would reduce the time of the State of Illinois to 15 minutes in Zbaraz and would increase the time of the United States to 45 minutes taking into account both McCrae and Zbaraz. We submit that this would be unfair to the appellant Miller and the State of Illinois. It also places Intervenors Williams and Diamond at risk should the additional time the state seeks be taken from them, a step which would be punitive in view of action of the Court to deny intervenors Buckley et al. an opportunity to argue in McCrae.

On behalf of appellant Miller we submit that the Solicitor General should not be permitted to withdraw his waiver of entitlement to argue in Zbaraz. Alternatively, any time permitted the United States for argument in Zbaraz should be less than the time allotted either the State or intervenors Williams and Diamond. This is reasonable since the position of the United States in Zbaraz is that the Court lacks jurisdiction to review the constitutionality of the Hyde Amendment. Brief for the United States, p.23-29. As to the remaining non-Hyde Amendment issues, no case or controversy exists between the United States and the other parties arising from the final judgment of the District Court. Accordingly, it would be wasteful of the Court's time to permit the Solicitor General to merely argue that the Hyde Amendment should not be reviewed in the Zbaraz cases given the fact that it will be reviewed in McCrae. Moreover, the argument in the federal government's brief at pp.38-49 can only be viewed as that of an amicus curiae since it is unrelated to the only issue involving the United States, namely, the Hyde Amendment's constitutionality.

In summary, appellant Miller respectfully requests that any division of time for oral argument in the Zbaraz cases be measured against the "primary interests" of the three appellants as articulated in briefs and motions filed with the Court to date, with due regard being given to the fact that the responsibility for defending the constitutionality of the Illinois statute at issue in Zbaraz is entrusted under Illinois law solely to the Illinois Attorney General. See, e.g., Lehnhausen v. Lake Shore Auto Parts Co., 409 U.S. 1072 (1972).

Respectfully submitted,

William A Wenzel III

WILLIAM A. WENZEL, III
Special Assistant Attorney General
Counsel for Appellant Miller

WAW:bw

cc Wade H. McCree, Jr.
Patrick Trueman
Peter Buscemi

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

April 3, 1980

MEMORANDUM TO THE CHIEF JUSTICE

RE: Williams et al. v. Zbaraz et al.;
Miller et al. v. Zbaraz et al.; and
United States v. Zbaraz et al.
Nos. 79-4, 79-5, and 79-491

A problem has arisen among counsel in the Zbaraz cases as to the division of time for oral argument. I am attaching a copy of the letter received from the Special Assistant Attorney General of Illinois who will make the opening argument on behalf of appellant Miller.

All parties have agreed that the problem on division of argument time could be resolved if Harris v. McRae, No. 79-1268, were to be argued first. The Government apparently intends to make the thrust of its argument in the McRae case and would have 30 minutes for the opening argument.

Approval is requested to change the order of argument in the abortion cases to list Harris v. McRae as the lead case. If you agree to this change, I will promptly notify counsel by telephone.

Respectfully submitted,

Michael Rodak, Jr.
Clerk

Attachment

April 7, 1980

Dear Roger:

If conveniently available, I would like to have references to factual information on abortions.

This Court's decision in Roe v. Wade was announced in February 1973, legalizing abortions during the first trimester. It would be interesting to see a table showing the number of abortions performed in the United States in each year from 1973 through 1979.

I read in the press (within the last month as I recall) that last year (1979) the number of abortions in the United States exceeded for the first time the number of births. I would like the source of this information, if indeed there is an authoritative source.

Finally, there seems to be wide differences of opinion as to whether legalized abortions have had a favorable impact on maternal morbidity and mortality among indigent pregnant women.

There is a book entitled "Aborting America" published in 1979 by B. Nathanson. It is stated in Chapter 24 of that book that:

> "The current rule of thumb is that fewer than 20 of 100,000 pregnant women die."

If there are any general statistics in this area, I would be interested in knowing whether Nathanson's statement is documented.

Some of this information is set out in the District Court opinion in Harris v. McRae, No. 79-1268. In addition, the literature of the two contending lobbying groups (the "Right to Live" and the "Pro-Abortionists) may address these and like questions. Perhaps congressional hearings also have

developed statistical data. And possibly there may be census information.

I do not want you to divert any of your staff from regular duties, as this is a low priority request. Indeed, if you could give me a bibliography with references to the relevant information, one of my clerks could conduct the research itself.

Sincerely,

Mr. Roger F. Jacobs

lfp/ss

of this case is substantially greater than Zbaraz, which did not involve the U.S., and because the order would require payments going back 3 or 4 years, I'd lean to grant the stay sought by the SG.

The motion to expedite and consolidate has not been set for Conference tomorrow. Although the Court could act on it, I would recommend asking the SG to respond promptly. There are responses from the Zbaraz plaintiffs (they have no objection), and from the "Right to Lifers" (they oppose). At first blush, the motion seems well-taken - it would be desirable to hear both cases together.

Ellen

See most troublesome argument: That Hyde Amend" permits" ~~[illegible]~~ where it extends assistance generally for "necessary medical" costs but denies it to women who seek or obtain abortions - 11,12 (Maher 432 U.S. at 474-5 N 8

er 4/19/80

BENCH MEMORANDUM

TO: Mr. Justice Powell

FROM: Ellen

DATE: April 19, 1980

RE: No. 79-1268, Harris v. McRae

Question Presented

Do the Hyde Amendments, which authorize federal Medicaid funding for abortions only "where the life of the mother would be endangered if the fetus were carried to term," deprive indigent pregnant women of rights secured by the First Amendment or by the Equal Protection component of the Fifth Amendment Due Process Clause?

Background

Title XIX of the Social Security Act establishes an assistance program (Medicaid) under which the federal government provides matching funds to States that reimburse the costs of medical treatment for needy persons. Although the Act does not specifically require participating States to pay for any particular procedure, it seems fairly clear that but for the

Hyde Amendments, Title XIX would require States that wished to maintain their Medicaid eligibility to fund a certain minimum benefit package that would include medically necessary abortions. This statutory issue is raised in the Zbaraz cases, but I do not find it a difficult one.

In September 1976, Congress first enacted the Hyde Amendment as a section of the HEW appropriations act for fiscal year 1977. The amendment provided that "none of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term." 90 Stat. 1434.

The 1978 appropriations bill included a similar provision, which added that funds could also be used for "the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service," and "in those instances where severe and longlasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians." 91 Stat. 1460. This language was repeated in the fiscal year 1979 appropriations bill. After intense debate that delayed final decision for nearly two months, the fiscal year 1980 bill deleted the third exception. It provides that funds will be available only in cases of life-endangerment and promptly reported rape or incest.

Although the issue is not entirely free from doubt, I also think it clear that Congress did not intend that Title XIX

would require States participating in Medicaid to fund medically necessary abortions that do not meet the Hyde standards. Despite some comments in the voluminous legislative history suggesting that the only question was whether the State or Federal Governments would pay for such abortions, the overall purpose of those who voted for the Hyde Amendments was overwhelmingly anti-abortion. It is inconceivable that these Congressmen would have intended to force the States to assume -- on pain of losing all right to federal reimbursement for Medicaid -- a burden of funding that Federal taxpayers had relinquished. This issue is also raised in Zbaraz, but apparently not in this case.

These consolidated cases were filed on the same day that Congress enacted the original Hyde Amendment. The DC's first injunction was entered on grounds similar to those rejected in Maher v. Roe, 432 U.S. 464 (1977). After this Court vacated and remanded in light of Maher and its companion cases, the case took on a different shape. The present plaintiffs are indigent pregnant women who were in need of medically necessary abortions, doctors and health care providers who perform or provide facilities for abortions, two church-related women's groups whose membership is alleged to include poor pregnant women who believe that their freedom of conscience is inhibited by the Hyde Amendments, and several federal taxpayers. The DC certified nationwide classes of indigent women in need of medically necessary abortions and of abortion providers.

Trial was had between August 1977, and September 1978. In January 1980, the DC issued its 300 page opinion (plus a 300 page appendix) holding the Hyde Amendment invalid on Equal Protection and First Amendment grounds. The DC's rambling opinion is not clearly grounded on any particular Equal Protection theory. It appears that the DC thought (1) that the Hyde Amendment impinged upon a woman's fundamental right to decide to have an abortion under Roe v. Wade (313), (2) that it operated to the disadvantage of a "suspect class of adolescents (315), and (3) that it therefore must fall under the strict scrutiny branch of Equal Protection analysis.

Alternatively, the DC held that the purpose of the Hyde Amendments was to prevent the exercise of a constitutional right and to prefer the life of the fetus over the health of a pregnant women. Neither was a permissible purpose. (313-314). Finally, the DC held that even if the purposes were permissible, the means were irrational. The DC simply found no reason to distinguish among medically necessary procedures or to prefer the life of the fetus over the health of the mother (319-320). The DC added that it was irrational to impose the burden of fighting abortion on the class "least able to sustain withdrawal of the procedure from the physician's battery of procedures," to exclude severe and long-lasting physical health damage as a ground for abortion, and likewise to exclude grave fetal defect. (321-323).

Turning to the First Amendment, the DC rejected the

plaintiffs' Establishment Clause attack on the ground that the legislation had plain secular purposes and that any "entanglement" was not of the type forbidden by the First Amendment. But the DC held that the Government violated the Free Exercise Clause by interfering in religiously formed beliefs that abortion is mandated to preserve the pregnant women's health, or that it is a matter for responsible religious individuals to make for themselves.

Discussion

I confess that I have not studied all of the Briefs, and my views are tentative at best. I do think, however, that there are several fairly easy issues in the case.

A

I can't see even the shadow of a valid Establishment Clause objection here. Nothing could be plainer than that there are secular purposes for measures seeking to limit the use of taxpayers' funds for abortion. Nor do I believe that the unquestionable political divisiveness arising from the abortion controversy is the sort that should prevent Congress from acting in the area on Establishment Clause. To accept this position would prevent Congress from ever agreeing with a church that had taken a public position on a controversial issue. It would certainly also mean that Maher was incorrectly decided -- Congress also "establishes religion," in this view, by cutting off funds for non-therapeutic abortions. The First Amendment does not require this result.

B

The Free Exercise claim is equally insubstantial. Congress need not fund any exercise of religious belief. However, the Free Exercise claim may be relevant to the Equal Protection analysis. If an indigent pregnant woman could actually show that her religious beliefs would be violated by carrying a fetus to term when an abortion was medically necessary, it is at least arguable that Congress "burdens" the exercise of that belief by cutting off otherwise available assistance only for abortions. See Sherbert v. Verner 374 U.S. 398 (1963). It would follow that a court should scrutinize the discrimination under the strict scrutiny test.

Nevertheless, I tend to agree with the SG that none of the plaintiff-appellees has properly raised the Free Exercise point. No plaintiff who holds the religious belief relied upon has alleged that she desired an abortion, and no indigent pregnant plaintiff has alleged any such religious belief. We do have plaintiff associations who claim that some of their members meet both criteria. But the SG asserts that an association may not assert the constitutional rights of its members where they are so personal as to require individualized proof. See Hunt v. Washington State Apple Advertising Comm'n, 431 U.S. 333, 342-343 (1977).

This makes some sense to me, although my view may be colored by my incredulity that any religion would actually command a woman whose life was not endangered by her pregnancy

to have an abortion. The DC seemed to think some religions hold this view, but most of the actual testimony cited appears to say only that the religion would find abortion justified. I doubt that this would be enough to trigger First Amendment protections -- if it were, a person could claim similar protection whenever he decides to do what he believes is right. In any event, I would want to see an actual plaintiff come forward to make this claim before I would rely upon it as a ground for invalidating an Act of Congress.

C

Turning to the Equal Protection claims, I agree with the SG that the various different versions of the Hyde Amendment should stand or fall together. There is no constitutionally significant difference. On the merits, I would have considerable difficulty upholding the DC's decision to strike down the Hyde Amendments on rational basis grounds. In none of the voluminous briefs has it been adequately explained why the State interest in the potential life of the fetus is not legitimate. Roe v. Wade recognized, as you wrote for the Court in Maher, that the State has a strong interest in protecting potential life throughout pregnancy, although it does not become compelling until the third trimester. 432 U.S., at 478. The Zbaraz appellees say that this interest is not present in this case, because the legislature (I would add that the same may be true of Congress) thought of the fetus as an actual rather than a potential life, and Roe held that the fetus is not a person. It think this argument is absurd.

The various appellees also argue, quoting Maher, that the interest is only in promoting "normal childbirth." I also find this distinction insubstantial. Although the quality of the child's life in the circumstances posited in this case may not be what we would desire for our children or for society, I would not be prepared to say that the State may not value life for its own sake -- even in the case of a deformed child. We may disagree with the wisdom of the State's judgment in forcing indigent women to bring such children into the world. But to say the interest is not legitimate would be to constitutionalize a hotly disputed and deeply troubling area. If we are to say that a State's interest in "normal" potential lives is legitimate but its interest in "unhealthy" or "unsound" potential lives is not, what about actual lives? Does a State have a legitimate interest in barring euthanasia? In preventing infanticide of deformed children? I don't think a court can say that such interests are not permissible.

Assuming the legitimacy of the State interest in potential life, the question is whether a State's choice to favor that interest over the health of the mother is a rational one. The SG arques that the Government may discourage resort to abortion except in the most urgent of circumstances, by creating incentives that make childbirth a more attractive alternative. Yet, the findings of both DC's are that the Hyde Amendment will substantially increase maternal morbidity and death, despite the life-endangerment exception. And there are other findings

indicating that the existing families of such women may be seriously affected by her inability to terminate the pregnancy. The individual cases cited in the briefs are pathetically sad, and the Government choice seems to me both cruel and tragically unwise. It undoubtedly inflicts suffering, pain, and even death on the class of indigent pregnant women.

Nevertheless, I do not see how a court can apply the rational basis standard to second guess the Congress' judgment that all of these consequences are less substantial than the interest in preserving the potential life of even a non-viable fetus. The Zbaraz DC held that the State interest in the viable fetus outweighed the mother's interest in her own health, but that the interest in the non-viable fetus did not. But the very delicacy of this analysis, adapted from the Court's opinion in Roe v. Wade, reveals the defect in applying the rational basis standard here. Under that standard, it is not appropriate to weigh the competing interests in the way that the Court did in Roe, a strict scrutiny case. If the State has a substantial interest, it is not the Court's business to conclude that some other interest outweighs it -- at least where the interests are not so strikingly and grotesquely out of proportion as to make the choice plainly irrational.

I don't think that kind of striking disproportionality is present in this case. There is just no question that there are substantial interests on either side. Although I have not had time to analyze the figures provided by the Library in any

depth, the magnitude of the abortion phenomenon since Roe v. Wade is truly stunning. In 1978, 28.9 % of pregnancies nationwide ended in abortion. Looked at in a different way, there were 406 abortions for every 1000 live births. The figures for metropolitan areas are higher (35% and 579, respectively). In the District of Columbia in 1978, 59% of pregnant women had abortions. And there can be no doubt that the "medically necessary" standard, which includes psychological necesssity, leaves plenty of room for doctors to certify abortions in cases well removed from the extremes of cruelty that appellees rely upon. The figures from states that have switched from funding elective to only medically necessary abortions show that 20 - 50 % of all abortions meet the standard. Surely the Government may rationally conclude that a tighter standard is appropriate. Nor do I think the "life-endangerment" standard is as vague and underinclusive as the appellees contend.

In these circumstances, the fact that a court may disagree with the weights assigned to the competing interests by Congress is not a valid basis for holding the statute unconstitutional. Consequently, I would conclude that unless there is some basis for elevating the level of scrutiny, the judgment of the DC must be reversed.

D

The level of scrutiny is, for me, the most difficult issue in the case. Maher established that there is no

constitutional right to have a Government-paid abortion, or indeed any abortion at all. Rather, the Government's obligation is not to interfere unduly with the zone of privacy that protects a woman's decision to have an abortion. Moreover, the State's election to encourage childbirth by funding it while denying funds to non-therapeutic abortions imposes no burden on the abortion decision. The State is not responsible for the indigency that makes it difficult for these plaintiffs to have abortions. Thus, the refusal to fund non-therapeutic abortions does not impinge on the interests protected by Roe v. Wade. 432 U.S. 464.

On its face, this reasoning appears to control this case as well, and I think the Court could legitimately reach that result. Yet, there may also be a way to distinguish Maher and apply strict scrutiny. In Maher, the State of Connecticut refused to grant a benefit to pregnant women that it also denied to other claimants -- funds to cover purely elective procedures that were not necessary to health. The only "necessary" treatment for those pregnancies were prenatal and childbirth services. Here, on the other hand, physicians have certified that the abortion is the preferred and "medically necessary" procedure. Although the Federal Government generally funds medically necessary procedures, it has singled out abortion in a way that makes it more difficult for recipients -- who would otherwise be entitled to payment -- to exercise their constitutional rights. In a sense not present in Maher, the

Maher may be distinguishable

State does "create" the problem by extending a benefit generally to medically necessary procedures, then withdrawing it in a constitutionally protected context.

The legal analogy is to Shapiro v. Thompson, 394 U.S. 618 (1969), and Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974). Both cases recognize that denial of welfare benefits on the basis of residency requirements penalizes the right to travel across state lines. Similarly, denial of reimbursement for medically necessary expenses that otherwise would qualify for Federal assistance may penalize the right to seek an abortion. Indeed, in Maher you recognized this possibility:

> If Connecticut denied general welfare benefits to all women who had obtained abortions and who were otherwise entitled to the benefits, we would have a close analogy to the facts in Shapiro and strict scrutiny might be appropriate under either the penalty analysis or the analysis we have applied in our previous abortion decisions. 432 U.S., at 474-5 n. 8.

Of course, in Maher you were talking about "general assistance," not medical payments. Indeed, you continued:

> But the claim here is that the State "penalizes" the woman's decision to have an abortion by refusing to pay for it. Shapiro and Maricopa County did not hold that States would penalize the right to travel interstate by refusing to pay the bus fares of the indigent travelers. Ibid.

There, of course, you were referring to the Maher situation where the abortion claimants asked payments for elective procedures not available to anyone else. But this case is not the same. The analogy here might be to a State that generally paid bus fares for indigents but refused to pay it for

those who crossed State lines. Although the case falls somewhere between the two examples given in Maher, I think it is at least arguably close enough to Maricopa County to trigger strict scrutiny. Indeed, the analogy is strengthened by some rather strong language in that case observing that medical care is a "basic necessity of life" and noting the absurdity of denying a sick person necessary treatment until his life is actually at risk. 415 U.S., at 259-261.

I believe that this analysis may provide the only way to affirm the decision below. Although there is some talk in the briefs about the mother's interest in her own health, there is no precedent for elevating the level of scrutiny because of a "fundamental interest" in health. Although health may be more basic to liberty than food, shelter, and education, I would have difficulty seeing a difference of constitutional proportions.

If strict scrutiny is applied, the Government's choice must fall, at least as to the non-viable fetus. However, I have not thought the proposed analysis through in any depth and will try to supply further briefing some time next week.

Conclusion

A number of the issues here are not difficult. (1) I believe there is no Establishment Clause claim, and (2) no properly presented Free Exercise claim. In addition, (3) various claims strike me as so insubstantial as not to require much discussion. Among these are the intervenors' political question and appropriations power claims and the DC's mention of

unconstitutional vagueness and discrimination against a "suspect class" of teenaged women.

I think the Equal Protection claim is the real issue in the case. On that point, I do not believe the Court can invalidate this Act of Congress as irrational. (4) The purpose is plainly legitimate under settled law. (5) And the means, while undoubtedly unwise, represent a legislative balance that a court should not upset.

There is a possibility, however, that (6) the Amendment might trigger strict scrutiny by analogy to the right to travel cases. I am troubled by the fact that neither court below proceeded on this basis. Nevertheless, if there is a way to invalidate the legislative choice in this case, I think that this is it.

79-1268 Harris v. McRae

Argued 4/21/80

McCree (SG)

Two Q

1. Does Hyde Amend violate E/P Clause.

2. ~~By~~ Whether D/P or 1st Amend is infringed.

Classification is bet. med. necessary services generally & abortions

Copelon (Reply)

Agree that standard is rationality.

Crucial Q in the "balance" struck by Congress

"fetus" is not a person under Const.

Relies on Roe v Wade as holding Hyde Amend is fundamentally irrational.

Maternal mortality: for blacks, 37 per 100,000 {1% = 1000, 01% = 100, 005 = 50.

Relies on Califano v Westcott

[RE 4/24/80]

Supreme Court of the United States

Memorandum

....., 19.....

Pre Conference
Notes

Apply Maher v Roe (non-therapeutic) 4/24/80
(Pre Conference Notes)

1. Const. imposes no obligation on Govt to pay any medical expenses. Maher and Poelker v Doe (432 U.S. at 521)

2. If a State provides some med. care, the E/P Clause imposes some limitations

3. No "suspect class". Maher expressly said: "An indigent woman desiring abortion" is not within a "suspect class" ~~Not class indigents~~. "We have never held that financial need alone identifies a suspect class.

4. No "fundamental right" to abortion at State expense. Maher so held. Also Poelker
If there were, the State would have to show a compelling interest to impinge upon it. Doe v Wade so held. (Became compelling only in 3rd Trimester)
This was "central Q" in Maher

5. Reasoning of Maher & applies to funding of any abortion, whether ~~therap~~ therapeutic or not. on fundamental right unit

(Ill Ct. accepted this holding of Maher - & applied rational basis test.
Counsel in both Harris & Zbaraz accepted this view of Maher.
DCs below also

6. Roe v Wade vs. Maher

There is a → "Basic dif. between direct State interference with exercise of a right, and State encouragement of ~~~ the exercise of another right." Maher.

7. Maher emphasized that there are legitimate state interests supporting encouragement of live birth. Weighing of these interests is for Congress — not for a court as 9 Ct. D.C. held. Both Congress and States are free to make societal judgments on the issue.

Roe v Wade also acknowledged State's strong interest in potential life of fetus.

8. More appealing case than Maher. Recap view issue as health & life of mother vs. potential life of fetus. Even if viewed this starkly, the Q is whether the Constitution requires funding of all medically necessary ~~~ treatment of indigents if Congress elects to fund some. As Maher said with respect to abortions, "policy choices as sensitive as those implicated" by funding abortions, traditionally & properly should be made by democratic processes - not courts.

9 & 9 were in Congress I would have voted against Hyde Amend

Zbaraz.

2. E/Protection Issue

Identical as to both State statute & Hyde Amend.

DC held ~~applied the wrong~~ rational basis standard is applicable, but misapplied it.

Fundamental flaw: DC "weighed" the State and private interests, & concluded the private interest in obtaining "medically necessary" abortion "out-weighed" the State's interest.

(see DC's fundamental flaw)

The State's interest in "fetal life" is substantial (Roe v Wade). Also State has legitimate interest in not spending tax payers money for activity believed immoral by large % of population.

(Roe v Wade held →)

→ DC erred in substituting its judg. for that of Leg. | Yes

Harris - possible Qs

1. E/P - DC ~~was~~ invalidated Hyde on both E/P & 1st Amend grounds.

Ask → (1) Exactly what E/P analysis did DC apply (not clear)?

Free Exercise Issue

DC held violation of Free Exercise of Religion Clause. Said to interfere with religious beliefs as to necessity to preserve mother's health

(1) What was purpose of Congress on Hyde A.? Could it have been the purely secular purpose of not spending public money on ~~abortion~~ this morally sensitive issue?

(2) If we agreed with DC, would this mean Congress could never resolve an issue that coincided with some Church's belief.?

Ask: (2) How would you apply your 1st Amend argument to Harris

(3) What about Maher's holding as to non-therapeutic abortions? Does cut off of funds for these interfere with someone's beliefs?

Ask · (3) Which, if any, plaintiff raised this issue of Free Exercise of Relig? Any ev. supporting interference?

(Association can't assert generalized - not proved - rights of members.

Equal Protection Issue (Both Cases)

I "Rational basis" standard { applied in Ill. / not applied in N.Y.

Ask 1. Do you argue that the state interest is not legitimate? Substantial? Counsel for Roe. argue no leg. interest-

Roe v Wade & Maher recognize strong interest in protecting fetus throughout pregnancy. ~~Compelling~~ ~~interest~~

Maher did speak of interest in promoting "normal childbirth". Do you think there is no interest in life of a child that may be sub-normal in only marginal ways? Interest only in perfectly healthy children? (Programs for handicapped) (Blind, deaf, club feet, etc)

→ If child is abnormal is there no interest in keeping it alive?

Ask Congress was fully aware of all arguments advanced here. In a democratic society, should a court reach a dif. judg. as to relative importance to society of the choice it has made after full debate?

Roe v Wade.

Effect of abortion phenomenon since (Stunning!)

Statistics (1978)

Nationwide: 28.9% of all pregnancies end in abortions.

Metropolitan areas: 35%

D.C. – 59%

Maternal mortality for preg. women 2/10,000 – Dr Depp – 106

406 abortions for every 1000 live births.

(the 28.9% above is increased when still-births + miscarriages are considered)

DC in 2a bar rag relies on affidavit of Dr Depp (17a) (+ other Drs) in supporting its conclusion that:

A pregnant woman's interest in her health (not in life) so far outweighs State interest in a non-viable fetus as to make State interest not legitimate – 20a.

Dr Depp's perception of "medically necessary" is that 20 to 50% of ~~pregnancies~~ pregnancies come within this category – (App. Br 42; Appendix 107

1. What is mortality rate for preg woman? (Dr Depp said 2/10,000 – appendix 106)

2. If proper for judges to ~~not~~ weigh the interests, when up to 50% of pregnancies ~~are~~ are aborted when funds are available, how would these figures affect balance?

Zbaraz (Z-bar-raz)

Statutory issue.

This decision became final - no appeal

CA7 (first op.) held State is required to fund abortions only as provided in Hyde Amend. (i.e. Hyde Amend in effect limits XIX to extent it may be read to require funding of "medically necessary abortions"). State objects that XIX doesn't require it to fund any abortions. And Appellees, argue XIX requires funding by State of all "med. necessary" procedures - including abortions

Ellen recognizes difficulty of finding statutory issue is alive in this case. She thinks we could so hold - tho far from clear to me.

If we reach issues:

1. Ellen thinks Hyde Amend does limit XIX.
2. But Ill. remains obligated to fund abortions ≠ permitted by Hyde Amend. (agrees w/ the CA7)
   (I'm inclined also to agree)

Magazine: Family Planning Perspectives
Nov/Dec issue '79 (Vol 11, No 6)
Article: Abortions in U.S., 1977-78, p 329

ask (1") { 1.32 million legal abortions U.S. 1977
1.37 " " " 1978 (Estimated)
(In spite of Hyde Amend)

For 1978 (p 331): Percent of pregnancies terminated by abortion

ask (2") Total in U.S. - 29% of pregnant women terminated by abortion

ask (3) Abortion ratio '78: 406 abortions for every 1000 live births (excludes stillbirths + miscarriages)

Rate of abortions per 1000 women age 15-44 (1977
U.S. - 26.9%
Eng. + Wales - 10.8%

But this may mean fewer Brit. women get preg.

ask (4) Ten states & DC fund most abortions from State funds

Alan Guttmacher Institute's fifth annual survey

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But this may mean fewer Brit. women get preg.

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- Eng. & Wales - 10.8%

But this may mean fewer Medicaid women get preg.

ask (4) Ten states & DC fund most abortions from State funds

Reverse 5-4

79-1268 Harris v. McRae Conf. 4/25/80

The Chief Justice Reverse

DC found no rational basis for distinguishing bet. abortions & birth. It also defined term as "unpaid" claim.

Both views are contrary to our precedents. Congress could exclude drug addictions just as it did mental disease (Did Congress do this? Could have excluded or included abholics

Mr. Justice Brennan Affirm

Nothing to 1st Amend argument.

Exclusion of med. necessary abortions violates E/P clause - even when spending power is involved. Congress could let classify blacks dif. from whites.

DC found hostility to abortions to be the Congressional purpose - not a legitimate one.

Affirm on E/P alone

Mr. Justice Stewart Reverse

Mr. Justice White *Reverse*

I s different from Maher & Doe -
as health of mother is involved.
Rational basis is standard.
Counsel did not make same arguments
that WQB.

Mr. Justice Marshall *Affirm*

Agree with WQB.
Mayer is dif.
No leg. state interest.

Mr. Justice Blackmun *Affirm*

Hyde Amend tried to repeal by implication
- but no quest. as to what Congress intended
This is an E/P case.
Vote is "controlled" by "my vote
in Maher + Beal".

Mr. Justice Powell *Reverse*

See my several pages of my yellow notes. (I outlined my views to the Conference)

Mr. Justice Rehnquist *Reverse*

Can add little to what has been said. Stanley is relevant.

Mr. Justice Stevens

Different case. Not controlled by Maher. Interest in a Fed interest in fetal life - not a state interest. By denying funds for abortions, more fed. funds will be spent for birth. A substantial additional cost will result from Hyde.

Maher is correct. But this is different. Gov't has decided have to "harm" a certain number of women.—

> Under Roe v. Wade a State could not impose a fine on a woman who aborts. Nor can a State impose the risk of poor health or death as a penalty for getting pregnant.

er 6/9/80

MEMORANDUM

TO: MR. Justice Powell

RE: No. 79-1268, Harris v. McRae

Mr. Justice Stewart's well-written opinion seems adequately to dispose of the case, and I recommend a join. I would note, however, that Justice Stewart's treatment makes the case appear somewhat easier than it actually is. The opinion does not meet the most serious arguments in the case head on; indeed, in places it is almost too glib. Thus, some additional footnotes or even rewriting may be necessary if those arguments are made in dissent. Moreover, there are places in which the Court's summary disposition of issues may have unwanted implications. If you agree that there are problems, I could raise some of these questions with Saul.

The spots that I find a bit tenuous are as follows. (i) The discussion of Title XIX on pp. 13-16 cites practically no authority. It does not deal in any substantial way with the

statutory structure, related provisions, or the legislative history. Since the Court is reaching the result in a way that differs from that taken by all of the Courts of Appeals to have addressed the question, the discussion may be a little too thin. On the other hand, I doubt that any Justice has much interest in this and the dissent is not likely to attack it.

(ii) Beneath the surface of the otherwise excellent standing discussion at pp. 30-33 is a puzzling question about the intersection of standing doctrines with class actions under Rule 23. The only mention made of this is in FN 22 on p. 51. The Court there seems to hold that a plaintiff who lacks standing to challenge action on a certain ground may never represent a class of people who do have standing. Although the principle seems unexceptional on its face, the full reach of the Court's statements could be unsettling to courts considering motions for class certification.

In many Title VII cases, for example, named plaintiffs who have suffered from some form of employment discrimination are permitted to represent classes of persons who have suffered in very different ways. For example, present employees may represent classes of applicants for employment. Some courts have even permitted blacks to represent Hispanics and Asians. In deciding whether such classes are permisssible, courts generally do not apply strict standing doctrines. Instead, they ask whether the representative's claims are "typical" and

whether he will represent the class adequately. I do not think the Court should imply that the named plaintiff has to have "standing" to make every claim that every member of the class may make.

(iii) The Court disposes of the "fundamental interest" branch of the Equal Protection claim merely by referencing its Due Process analysis and saying that the Equal Protection Clause adds no "substantive rights or liberties." P. 34. This, again, may be too quick. For example, there is no substantive right to have the State pay for a person's exercise of religious belief. But if the State establishes a general program of paying for certain items, it probably may not constitutionally discriminate against persons who desire those same items for religious purposes. Thus, if a State distributed free wine to anyone upon demand, I wonder if it could deny the wine to someone merely because he wishes to use it in a religious ceremony. See Sherbert v. Verner (State may not deny unemployment benefits to an employee discharged for exercising his religion). When the Court summarily equates the absence of a fundamental interest with the absence of an equal protection claim, it calls in question this line of analysis.

(iv) Finally, the opinion finds a rational basis for this statute without really addressing the appellees' principal claim that it is irrational--that is, that it trades maternal health and possibly life for fetal life. Pp. 37-40. I think

this section could be strengthened substantially; perhaps, as you have suggested, by pointing out the elasticity of the medical necessity standard and the magnitude of the abortion phenomenon. In this respect, however, I think it better to wait to see how the dissent will approach the problem. I do not think the rationality issue is a very substantial one, and the Court should not give the impression that it is unless the dissent presses the point.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 9, 1980

Re: 79-1268 - Harris v. McRae; 79-4, 79-5
and 79-491 - Williams v. Zbaraz

Dear Potter:

As soon as feasible--whatever that may mean--
I shall circulate a dissent.

Respectfully,

JPS

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 9, 1980

Re: No. 79-1268 - Harris v. McRae

Dear Potter:

I await the dissent.

Sincerely,

T.M.

Mr. Justice Stewart

cc: The Conference

June 9, 1980

79-1268 Harris v. McRae

Dear Potter:

Please join me.

Sincerely,

Mr. Justice Stewart

lfp/ss

cc: The Conference

Potter: I think you have written a fine opinon. Therefore, my join is unconditional. I may have some suggestions for your consideration.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 10, 1980

Re: No. 79-1268 - Harris v. McRae

Dear Potter,

With reservations about footnote 24,

I join the remainder of your opinion.

Sincerely yours,

Mr. Justice Stewart

Copies to the Conference

cmc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 10, 1980

Re: No. 79-1268 Harris v. McRae

Dear Potter:

Please join me in your opinion for the Court.

Sincerely,

WHR

Mr. Justice Stewart

Copies to the Conference

June 12, 1980

79-1268 Harris v. McRae

Dear Potter:

I mentioned the possibility of making a suggestion or two with respect to your fine opinion that I have joined.

The most appealing point in the District Court's opinion (particularly in Zbaraz) is that Congress acted irrationally in subordinating maternal health and possibly life for fetal life. Since our opinion applies (as did Maher) a rational basis standard, meeting this argument is rather central to the analysis. Indeed, this focuses on the only difference between Maher and the two cases presently before us.

As you argue, the basic answer to the "maternal health and life versus fetal life" argument is the one you have made: the question of rationality normally is left to the legislative branch. Only in the exceptional case can a court properly substitute its judgment for that of the legislature as to rationality. This is especially true, again as you make clear, where sensitive policy choices are involved.

I do think, however, that our position can be strengthened substantially by emphasizing the elasticity of the "medically necessary" standard. Appellants argue that, in effect, this more often than not permits abortions at the election of the mother. The testimony of some of the physicians, particularly in Zbaraz, makes clear that doctors tend to be persuaded easily that there is some "medical necessity".

The testimony of Dr. Depp in Zbaraz (to take one example) was that from 20% to 50% of all pregnancies come within this category. (App. 107; Appellant's brief 42). Dr. Depp also testified that the mortality rate for pregnant women was two per 10,000 (App. 106). One could guess that two out of every 10,000 pregnant women die from automobile accidents, slipping in bathtubs, or in quarrels with their husbands or lovers.

I am sending you with this letter the November/December 1979 issue of Family Planning Perspectives. I think you will find some interesting statistics in the article that commences on page 329. They show, for example, that 28.9% of all pregnancies ended in abortions in the year 1978. (Or putting these figures differently, for every live 1,000 births in 1978 there were 406 abortions). The rate climbs to 35% in major metropolitan areas. Although I am not sure where I saw the figure, the rate in the District of Columbia was reported to be 59%.

I do not think that statistics such as the foregoing add significantly to strictly legal analysis. They - or at least some of them (such as Dr. Depp's testimony) - nevertheless could be viewed as supporting the rationality of the decision made by Congress, even though one may have wished it had gone the other way.

In terms of legal analysis the fundamental flaw in the District Court's opinion is that it undertook to "weigh" the state and private interests, and concluded that the private interest of pregnant mothers in obtaining medically necessary abortions "outweighs" the state interests that you have identified in your opinion. The District Court erred in substituting its judgment for that of the legislative branch.

There may be another point or two that I will ask my clerk, Ellen Richey, to speak to your clerk - I believe Saul Goodman has worked with you on this case. I suppose, however, that it may be well in any event to "hold your fire" until you see what the dissenting opinions have to say. One can be certain that they are not likely to say anything very complimentary.

Sincerely,

Mr. Justice Stewart

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 20, 1980

RE: No. 79-1268 Harris v. McRae
79-4, 79-5, 79-491 Williams v. Zbaraz

Dear John:

Please join me in your dissenting opinion in the above cases. As you know, we were on opposite sides in Maher. In order to avoid any inconsistency between your opinion and my views in that case, I wonder if you could make the following two changes in your discussion of Maher:

On page 2, line 4: delete the word "fundamentally".

On page 2, line 17: insert at the end of the line, "Court held that the".

Sincerely,

Bill

Mr. Justice Stevens

cc: The Conference

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
		4/25/80						
Join PS 6/23/80	Typed Draft 6/20/80	typed Draft 6/7/80	Join PS except fn 24 6/10/80	concur dissent 6/9/80	Join w/ BB 6/23/80	Join PS 6/9/80	Join PS 6/10/80	wrtg dissent 6/9/80
	1st Draft 6/26/80	1st printed draft 6/11/80	Typed Draft 6/23/80	typed draft 6/23/80	typed draft dissent 6/20/80			typed draft 6/13/80
	2nd draft 6/27/80	2nd Draft 6/25/80	1st printed Draft 6/25/80	Join w/ BB 6/24/80 1st printed 6/25/80 2nd draft 6/27/80				1st printed draft 6/23/80
								2nd draft 6/25/80
				79-1268 Harris v. McRae				