In the

Supreme Court of the United States

Edward W. Maher, Commissioner of Social Services of Connecticut,

Appellant,

v.

Susan Roe, et al.,

Appellees.

No. 75-1440

Washington, D. C.
January 11, 1977

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Washington, D.C.
Tuesday, January 11, 1977

The above-entitled matter came on for argument at 11:38 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

EDMUND C. WALSH, Assistant Attorney General, 90 Brainard Road, Hartford, Connecticut 06114; for the Appellant.

MRS. LUCY V. KATZ, 1241 Main Street, Bridgeport, Connecticut 06604; for the Appellees.

C O N T E N T S

* * *

Afternoon Session begins on page 18

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 75-1440, Maher against Roe.

Mr. Walsh, I think you may proceed when you are ready.

ORAL ARGUMENT OF EDMUND C. WALSH, ESQ.,

ON BEHALF OF THE APPELLANT

MR. WALSH: Mr. Chief Justice, and may it please the Court:

The facts in this case--in this case the plaintiffs challenge Connecticut's Medicaid policy on payment for abortion under the Title XIX Medicaid program, the same as in the previous case. The challenge was made on both statutory and constitutional grounds.

The Connecticut policy, which is Section 275 of the Welfare Department Manual, provided that in order for the state to pay for an abortion under the Title XIX program, the patient's attending physician, the physician of her own choice, was required to submit a certificate of medical necessity, which is set forth at page 47 of the appendix.

Q Does it differ much from a Pennsylvania requirement?

MR. WALSH: The attending physician merely has to state that in his opinion the abortion is medically necessary for the patient's health. That is all. And that is not

challenged.

Q No, but is that much different from the one we have just been discussing in Pennsylvania?

MR. WALSH: I think it is even more liberal, Your Honor.

In addition to that certificate of medical necessity, the doctor must also submit a form W-601, which is at page 45 of the appendix, requesting prior approval for payment for the abortion. And in that form he must indicate what the medical need for the abortion is. As I just stated a moment ago, in answer to Mr. Justice Brennan's question, the attending physician's medical judgment as to the need for the abortion is never questioned by Connecticut.

Q I suppose there are provisions to detect and imply sanctions against fraud on the part of physicians under the Medicaid program, not only in this area but throughout the program, I think.

MR. WALSH: There are, Your Honor. But if the current press is correct, the country is quite remiss in that area at the present time. It is a difficult program to police.

Q I can understand why it would be. But that program would be applicable here as well as applicable in other parts of Medicaid, would it not?

MR. WALSH: Yes, Your Honor.

Q If they found a physician was consistently lying--

MR. WALSH: In this particular area--

Q --getting public funds that nobody was entitled to.

MR. WALSH: There is no question. That would be fraudulent. And the state does have a quality control system.

Q So, to that extent, I suppose, his certificate is subject to question, is it not?

MR. WALSH: Yes. Theoretically the veracity is subject to question. But I think under Roe v. Wade the appropriate disciplinary action in this event might be through the professional societies because of the sensitivity of this particular medical service.

Q If a physician were consistently prescribing drugs that were not needed, not medically necessary, just in order to get public monies that neither he nor the patient were entitled to, would he not be subject to sanctions?

MR. WALSH: He would, Your Honor, and I believe that at a certain point he would no longer be accepted for participation in the Title XIX program.

The plaintiffs then brought this action after the refusal--the two original plaintiffs. Their physicians would not submit the statement of medical necessity. There were several subsequent intervening plaintiffs for which temporary

restraining orders were granted. But in no case did the attending physician submit the certificate of medical necessity. And this action was then brought, challenging the state policy on both statutory and constitutional grounds.

The single-judge District Court, on the plaintiffs' motion for a summary judgment, disposed of the case initially on the pendant statutory claim, holding that the Federal Title XIX statute required payment for elective abortion.

The defendant commissioner then appealed, and the Second Circuit reversed and remanded, holding in effect that while Title XIX permits payment for abortion, it does not require payment for elective abortion. And one judge, Judge Mulligan of the Second Circuit, dissented in part from that decision.

The Second Circuit Court, when it remanded, instructed the District Court to determine if Connecticut would continue to refuse to pay for elective abortion since the Second Circuit had now decided that it was permissible to pay for elective abortions. The state's position originally had been that the Federal statute prevented payment. The state informed the court that it elected not to change its policy, that it would not pay for elective abortion.

Then once again a three-judge court was convened and once again on the plaintiffs' motion for summary judgment, the three-judge court, after oral argument, held that

Connecticut's medical abortion policy was invalid in so far as it required certification that an abortion is medically or psychiatrically necessary and in so far as it requires prior to the performance of an abortion any form of approval or consent or any other condition or requirement for the reimbursement of the expenses of an abortion performed during the first trimester of the pregnancy. This case was limited to first trimester abortions by the three-judge court since there were not second semester abortions performed.

There is a second semester abortion form in the appendix at page 46 or 47, I believe, which is a little different, but it apparently is not at issue here.

Prior to the entry of that judgment by the three-judge court, the defendant commissioner had made a motion to strike certain affidavits which had been attached to the plaintiff's memorandum in support of its motion for summary judgment. And at the oral argument the defendant requested the court to rule on the motion to strike, and the three-judge court said it would rule on that motion, but it never did so.

In striking down Connecticut's Medicaid policy, the District Court held essentially that the Constitution does not require the state to pay for any medical services. But, nevertheless, once a state chooses to establish a program to pay for the medical expenses of the indigent and as part of that program it pays for therapeutic abortions and it pays for

pregnancy, child birth, prenatal and postnatal care, but it does not pay for elective abortions, then in that event, the three-judge court held, the state was not acting strictly neutral and so it was infringing thereby on the plaintiff's constitutionally elected right to have an abortion, as announced in Roe v. Wade. And it cited Dunn v. Blumstein in support of its decision, and Memorial Hospital v. Maricopa County and Shapiro v. Thompson, the residency case.

Q Do you understand the District Court's judgment to have been based upon the Equal Protection Clause of the Fourteenth Amendment or upon something else in the Fourteenth Amendment?

MR. WALSH: It is not absolutely clear, Your Honor. My argument will be that it was upon the Equal Protection Argument. But there is this bit about infringing on the right to an abortion which conceivably could be based upon another amendment.

Q Or another part of that same amendment.

MR. WALSH: Another part of the same amendment.

Q Do you think it was both, then?

MR. WALSH: I think it may well have been both, Your Honor.

Q So, a little bit like the Shapiro case in this Court, which also I think involved your state?

MR. WALSH: Yes, Your Honor, the Shapiro case always

comes up in any discussion of this case.

We believe that the fallacy of the District Court's reasoning in this case was that Connecticut has no program for funding the medical expenses of pregnancy as such or prenatal or postnatal care. What it does have is a program to pay for medical expenses which are medically necessary for the patient's health. That is the test, whether it is necessary for the patient's health. If it is, it will be paid for. If it is not, they will be excluded, except for some medically necessary services which are excluded because of their prohibitive cost.

Dental expenses, particularly periodontia and orthodontia are two that are very costly that are excluded, although they are medically necessary for the patient's health.

Under Connecticut's program, pregnancy and abortion are treated alike. They must both be medically necessary for the patient's health in order to be paid for under the program. I think that the plaintiff's make much of the fact that if you pay for the expenses of pregnancy, you should pay for abortion. But it is the medical community that has determined really that the expenses of childbirth are medically necessary, and there was no medical testimony--and indeed the plaintiffs have admitted in their brief that the expenses of childbirth and pregnancy are medically necessary to the

patient's health. That test of medical necessity has been Connecticut's test since the inception of its program in 1965. That was nearly eight years before this Court announced the constitutionally protected right of a woman, in consultation with her physician, to choose to have an abortion, in Roe v. Wade.

The District Court did not dispute that this test of medical necessity for the patient's health was the test for payment under Connecticut's program. A lower court simply refused to judge whether this classification offended the Equal Protection Clause, and instead the lower court set forth its own proceed classification by narrowly focusing on how elective abortion was treated as compared to pregnancy. The lower court, we believe, thereby lost sight of the fact that the test for payment was whether the service was medically necessary for the patient's health. And the whole purpose of the program was to provide necessary health care, and that pregnancy or abortion or whatever were merely incidental treatments under the program of providing necessary health care.

We think there would be validity to the District Court's opinion if Connecticut had done either one of two things: If Connecticut had a separate program just for payment of expenses of childbirth and pregnancy, or if abortions which were admittedly medically necessary for the patient's health

were excluded from Connecticut's program, which they are not. In either of those events, we believe that the rationale of the District Court would be valid. But Connecticut has no such programs and it has never had such programs.

Q Do you think that Connecticut could exclude the expenses of childbirth either under the statute or constitutionally?

MR. WALSH: I believe they could. According to HEW's amicus brief that was submitted to the Second Circuit on the statutory question, Your Honor, HEW says that the states have very broad latitude.

Q Including paying for childbirth?

MR. WALSH: Yes, Your Honor, I believe so.

Q Do we have an amicus brief in this case from HEW? We had one in the case that was just argued. We do not, do we?

MR. WALSH: No, Your Honor, we do not.

Q I wanted to be sure I was not missing anything.

Q Mr. Walsh, if we analyze the case as an Equal Protection case for a moment, the three-judge District Court seemed to say that whether it is a compelling state interest or a rational basis test, Connecticut has not advanced any state interest whatsoever for discriminating between pregnant women who elect an abortion as opposed to pregnant women who elect to bear the child. They say the fiscal interest cuts the other

way and that there is no other interest involved. Do you rely on any state interest for that, this dic, and if so, what?

MR. WALSH: First of all, Your Honor, we rely very heavily on the fiscal interest because we think it is a very important interest to the state to be able to control its medical expenditures in the public health field. But what we are also afraid of is that the District Court's order forces Connecticut to include a service in the state's program which is admittedly not medically necessary for the patient's health, and I say admittedly because the determination is left to the patient's own attending physician.

Q Let me just take the two parts to your answer. First, on the fiscal point, if a trial should establish and there should be findings of fact--the District Court just stated the conclusion--that it actually would save the state money because it would eliminate certain welfare costs and eliminate the expense of childbirth for people in this category to allow the abortions, would that not be a complete answer to your fiscal argument?

MR. WALSH: No, Your Honor. That would be, in my judgment, an indication that the state legislature or, in this case, the administrative agency was guilty of enacting foolish legislation. That would be a challenge to the wisdom of the legislation because it is somewhat speculative, although I think it probably is true, that by not granting elective

abortions, the state will eventually pay more for these people, to the raising of these children, who may end up on welfare. But that is somewhat speculative.

But that is a decision, in our view, that is up to the legislat ure or by its delegation to the administrative agency because we think it is a perfectly rational basis for the state to set up a program whose purpose is to provide necessary health care. And that implies that it will exclude unnecessary health care.

An elective abortion, as Judge Mulligan said in his dissenting opinion in the Second Circuit, is really--starkly put--unnecessary medical care. That determination is not made by the state; it is made by the patient's attending physician. Because if it is necessary, all he has to do is sign the certificate and the abortion will be paid for.

Q What you are saying, let me just see if I can it in my own language because I am not quite sure I have it. But you are saying the state could rationally establish a program that differentiated between necessary and unnecessary medical care. Having established such a program, this distinction just falls into place. That is what you are saying?

MR. WALSH: That is correct, Your Honor, yes.

Q And some of the categories might be wise and some might be unwise, but you say the legislature has a right to make its own mistakes.

MR. WALSH: Yes, indeed, Your Honor.

The other part of the answer I was going to say was that when a state is compelled to include a non-necessary medical service in its program and at the same time because of fiscal necessity must exclude services like orthodontia and periodontia--and we have two cases right now in Connecticut challenging the Federal statute for excluding those things--we think that it will be almost impossible to defend those cases once an unnecessary medical service has been included in the program.

Q Mr. Walsh, what other medical service do you have to file all of these explanations?

MR. WALSH: I think, Your Honor, they are all listed on page 2 of appellees' brief in a footnote. They are 19 reasons, I believe--dental services, except for emergency dental services; chiropractic services, I believe; psychiatric services; physical therapy. There is 19 all together, Your Honor. There is a great many.

Q Is chiropractic medical?

MR. WALSH: HEW has amended this statute some time ago to--

Q I am not talking about HEW. I am talking about Connecticut.

MR. WALSH: Connecticut attempted to cut back its

medical--

Q You do admit that you do put special emphasis on abortions.

MR. WALSH: No, prior--

Q You put a little more than you do on appendectomies.

MR. WALSH: Yes, Your Honor. But the reason for that--

Q That is what I want to know.

MR. WALSH: One of the reasons for the seeking of prior approval is that if it were not done that way, the hospital would not know whether they were going to receive payment for the treatment until after they had submitted their request for payment to the state. That is one of the administrative reasons for the prior approval.

Q Mr. Walsh, I suppose there may be larger concerns on both sides surrounding the question of abortion than there are to the question of appendectomy or orthodontia. In defending your statute against a strictly Equal Protection attack, do you think the state can make any argument that at least it can advance as a rational consideration a policy to prefer births to abortions?

MR. WALSH: As I said earlier, Your Honor, it does not prefer births to abortions. That only comes about incidentally as these services are either medically or not

medically necessary. When the program was established, its purpose was to provide medically necessary health care, and it really is up to the medical community and the individual physician to determine whether the given service is or is not medically necessary. And so it is not really that the state is consciously favoring childbirth over abortion. That is the state of the medical art, that childbirth is universally regarded as requiring necessary medical care, I believe, whereas in abortion it is not the case because there are several physicians in this action that have submitted affidavits distinguishing--

Q What if in Connecticut, for some reason or other, the entire medical profession took the view that abortions were very much to be preferred to births so that the result was that even though women might not initially choose that course, Connecticut's birthrate simply declined to zero. Do you think that the state would have no interest in legislating to prevent that result if the legislature chose to do so?

MR. WALSH: Legislating to prevent--

Q Follow the birthrate to zero.

MR. WALSH: I believe that they would have an interest, yes, Your Honor. That would be for the legislature to determine, of course, I think. But I think there would certainly be a state interest to be debated in the legislature.

MR. CHIEF JUSTICE BURGER: Suppose it was in that broad reach that you argue that the state legislature could say, "We will pay for cosmetic surgery in order to make our people more beautiful," if they wanted to. You can respond to that after lunch at 1:00 o'clock.

MR. WALSH: Thank you.

[A luncheon recess was taken at 12:00 o'clock noon.]

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AFTERNOON SESSION - 1:00 o'clock

MR. CHIEF JUSTICE BURGER: You may continue, Mr. Walsh.

MR. WALSH: Thank you, Mr. Chief Justice. May it please the Court:

As we were saying before luncheon, it is the state's contention that there is no invidious discrimination on the basis of its classification of necessary versus unnecessary medical expenses. Therefore, there is no denial of equal protection.

I believe, as Mr. Justice Stewart in a separate opinion in Antonio v. Rodriguez summarized the purpose of the Equal Protection Clause, it was to measure the validity of the classifications made by the state. This classification withstands that validity, we believe.

Of course, the fact that there is no invidious discrimination is not all. The state must of course prove that Connecticut's action is not a mere pretext or a subterfuge or, as a counsel in a previous case stated, a smokescreen for the state to discriminate against abortion. There is no evidence in the record to support such a charge.

The District Court rejected Connecticut's purpose of preserving its fiscal integrity out of hand, and it thereupon attributed to the State of Connecticut--it imputed a reason. It called it an unarticulated reason for avoiding

the expenditure of public funds for a purpose the state found morally objectionable. There was nothing in the record to support that, and that was imputed to the state despite the fact that Connecticut's program included payment for no other medical service which was not necessary for the patient's health despite the fact that other medical services which were medically necessary--some were excluded because of their prohibitive costs. And another factor is that the very day after this decision was announced, December 31, 1975, the very next day Connecticut was forced to implement cutbacks in its Medicaid program of medically necessary services because of its fiscal crisis. As it turned out, that was preliminarily enjoined about two weeks later, and that is the status of that matter now. The state has not pursued that. The fiscal picture has brightened somewhat.

So, all of these factors attest to the legitimacy of the classification made by Connecticut's program. When this is considered in addition to the fact that the medical judgment of medical necessity is left soley to the attending physician of the plaintiff's own choice and the further fact, as indicated in the answers to the interrogatories that prior the single-judge District Court's entry of the first injunction, some 1,410 abortions were performed under the state's program in an 11-1/2 month period.

So, we feel that the imputation of the unarticulated

morally objectionable purpose was unfounded.

Q Do you think it would be constitutionally impermissible for part of the motivation of the State of Connecticut in this case to be its moral objection?

MR. WALSH: I think, Your Honor, that as long as the Court is satisfied that the state has a valid purpose and that its primary motive is not deceit or subterfuge, that the Court should then uphold the regulation because otherwise you would get into an extremely nebulous area of trying to ascertain subjective intentions of the legislature.

Q Let us assume that all those problems of proof have been surmounted and that it were established that at least part of the purpose of Connecticut in denying public funds for abortion on demand, or whatever you wish to call it, were moral. Would that make Connecticut's action invalid, in your view?

MR. WALSH: I believe it would not, Your Honor, unless the Court established that was the overriding purpose. I believe the Chief Justice in a dissent in Eisenstadt v. Baird, in which this Court had discredited Massachusett's reasons for not permitting sale of contraceptives--the Chief Justice said that in the absence of clear and convincing proof as to motivation, then the Court should not rule. I think that that is what is the situation in this case.

Q My question assumes that there has been clear

and convincing proof, and that it has been shown that part of Connecticut's reason for doing this is moral objection to abortion on demand. Do you concede that would be constitutionally impermissible for Connecticut to do?

MR. WALSH: No, Your Honor, because I said part reason. I say if it is partly, if it is a secondary reason--because after all, all legislators and executives, for that matter, have their private views on abortion, and that does not mean that their private views are necessarily implanted. It is very difficult to determine what percentage of their motivation is a factor in influencing their decisions.

Q But you do concede that if it were the sole reason, it would be constitutionally impermissible?

MR. WALSH: I think if it were the hole reason, Your Honor, that would certainly be a very terrible thing. I believe there is an article in 79 Yale Law Journal by Professor Ely who says, however, that his test is as long as the state has power to do it, then the motivation should not be the factor because if the succeeding administration then has a different view, why should not the classification stand?

Q It carries out the same program but for quite a different reason.

MR. WALSH: That is right, Your Honor.

Q What would be the constitutional basis, in your view, for saying that if the Connecticut statute--the primary

reason for passing it, as Justice Stewart's question, was the moral objection to abortion, why would that make it constitutionally invalid if there is not any other constitutional objection to it?

MR. WALSH: Of course, when you say Connecticut, that is of course some three million citizens. And I think if in fact the Court is convinced that there is a valid fiscal purpose for--

Q But we are assuming that there is no valid fiscal purpose, that the State of Connecticut in its legislature, in the legislative history of the bill, says, "We will go as far as we have to under the Supreme Court's decision and under the Constitution, and we will not criminally punish any doctor who provides an abortion. But we morally object to abortions, and we will not go any further than the Supreme Court requires us to go, and we think this is permissible. We are going to limit abortion in every way that we constitutionally can."

MR. WALSH: If I understand Your Honor's question, if you say it is permissible, that is the answer to the question. However, if the sole motivation of the state's leaders is to impose their own views on the populace, that is not--

Q Is that not the motivation of every single legislative act that is ever passed by a legislature, to

impose the views of the legislature on the populace?

Q Presumably representing the majority of the populace when it does so.

MR. WALSH: Yes, when it represents the majority, except that there are certain constitutional protections against the tyranny of the majority, which this Court has often fought to preserve.

Q We can analogize this, I suppose, to a jury trial. There is a constitutional right that every criminal has to a jury trial. There is also a constitutional right not to have a jury trial. I suppose this Court has held there is a constitutional right of a woman to have an abortion, and there is also, I presume, a constitutional right for her to have a child. But a state can certainly take the view that it would absolutely disrupt its criminal justice system if everybody had a jury trial. Could not a state legitimately take the view that it would disrupt the public policy, the welfare of its state, if nobody ever had a child, if every pregnant woman had an abortion?

MR. WALSH: Oh, I think, yes, that would be a legitimate purpose because the state then would clearly have an obligation, I think, to assure that it has a sufficient number of citizens coming up, so to speak, to run its functions.

Q And the legislature could take that moral view, could it not, legitimately?

MR. WALSH: I believe it could, Your Honor, yes.

Q Miller v. California and related cases say affirmatively by a majority of the Court that a state has a responsibility, an affirmative responsibility, for the moral environment and atmosphere of a community in the state.

MR. WALSH: I believe that is correct, Your Honor, yes.

Q Does that not really answer Justice Rehnquist's question?

MR. WALSH: I believe it would, Your Honor.

Q But you are not urging it, are you?

MR. WALSH: That was not my prime motivation. I was, maybe mistakenly, trying to be neutral in the question of the morality of this case because that is a very inflammatory issue.

Q And it is not necessarily here.

MR. WALSH: That is correct, Your Honor, it is not here, I do not believe.

Q Except that the District Court did find that that was one of the motivating reasons why Connecticut did what it did. So, it is here, is it not?

MR. WALSH: It is here, Your Honor.

Q Unless we say they were just wrong factually.

Q What evidence did the distinguished district judge cite for this conclusion?

MR. WALSH: The District Court cited no evidence whatever because--

Q What was his own opinion of the matter?

MR. WALSH: The only evidence, if you could call it that, Your Honor, was a newspaper clipping attached to the plaintiff's memorandum in support of her motion for summary judgment, purporting to convey the views of the Governor of the State of Connecticut on abortion, and we made a motion to strike that. That was not admissible evidence.

Q Was your motion granted?

MR. WALSH: The motion was never ruled on, although the court said it would rule on it.

So, in summary, Your Honor, we believe that was is involved here is not an interference by a state to a woman's right to an abortion. The issue is rather the right to receive public welfare benefits, and in that case we believe this case should be controlled by the test enunciated in Dandridge v. Williams. And I would like to reserve any time I have left, Your Honor.

MR. CHIEF JUSTICE BURGER: I think you have consumed your time, Mr. Walsh.

Mrs. Katz.

ORAL ARGUMENT OF MRS. LUCY V. KATZ

ON BEHALF OF THE APPELLEES

MRS. KATZ: Mr. Chief Justice, and may it please

this Court:

I represent the plaintiff-appellees in this action. This argument is being held today because the State of Connecticut denies Medicaid assistance to women who choose to terminate their pregnancies by abortion, while at the same time it provide payment for any and all forms of obsetrical care involved in the birth of a child.

We have a basic factual dispute with the state's assertion that this is simply a requirement that is part and parcel of the entire Medicaid program, and throughout my argument I will refer to the reasons for that dispute.

We also disagree with his assertion that Connecticut has a more liberal policy than this Court heard about in Pennsylvania. There is no requirement in Pennsylvania that I know about that a doctor must specially certify that an abortion is necessary for the health of the patient, nor is there a requirement in that state that the state give prior authorization for every abortion under Medicaid. The state is denying this assistance in a way which is directly contrary to this Court's recognition that a woman has a fundamental right, with her physician, to decide whether or not to bear a child. And, as I will show, the regulations main thrust is to impose upon poor women the moral and religious opinions of various state officials. Connecticut has asserted no state interest whatsoever which justifies this manipulation of a

public benefit program in favor of childbirth and against abortion.

I would like to preface my replies to the attorney-general by invoking the framework used by this Court in considering the landmark case of Roe v. Wade. That framework noted that there are two facets to any consideration of state action regarding abortion. One is our awareness of the very deep moral and religious and philosophical objections which many persons hold regarding abortion.

The other facet, however, is that in resolving these questions, we must be guided by the Constitution, and we must make an effort to free ourselves of the emotions and prejudices of the past. And the state, in particular, is obligated to act free of such prejudices.

Q Is this an Equal Protection case, in your view?

MRS. KATZ: I see this case as rather heavily a due process case because of the fundamental right asserted and as well an Equal Protection case. And the class under the Equal Protection standard is made up of persons who are asserting their fundamental right to make the abortion choice.

Q If it is a Due Process case, do we have to pay any attention to the question of whether benefits are provided in the event that the child is born? In Due Process terms, would your case be just as strong--I am inclined to think it would--even if the state had no welfare program at all?

MRS. KATZ: I thought your first question was, if it did not pay for birth at all.

Q Right. I did limit it to that.

MRS. KATZ: Then I believe if the state provided no benefits for childbirth whatsoever, then the case would certainly be very different in Due Process terms.

Q Why would it be different in Due Process terms? I can see why it would be different in Equal Protection terms. In Due Process it would seem to me it would be exactly the same case.

MRS. KATZ: That may well be a Due Process case. In fact, I conceive of the right to welfare benefits for maternity care as a Due Process question.

Q Everybody has a right to publish a free press, but that does not impose an obligation on the state to subsidize your free press, does it?

MRS. KATZ: Absolutely not, and we are not asserting here that the state has an obligation to pay for an abortion for indigent women. Just as in Shapiro v. Thompson, where the right to travel was the question, no one suggested that the state had to in fact buy a bus ticket for an indigent person. We are relying on the fact that when the state provides a comprehensive program for obstetrical care, then it must provide for abortion.

Q Is that not an Equal Protection argument though?

MRS. KATZ: I think it is both, Your Honor.

Q Would you state your Due Process argument in sort of simplified form for me.

MRS. KATZ: Yes. The right to terminate a pregnancy is a right of personal privacy and personal liberty which is incorporated in the kinds of liberty in the Fourteenth Amendment and which may not be deprived without due process of law.

By the same token, a classification cannot be created which imposes a deprivation of that sort of liberty, and the questions under the Equal Protection test then--

Q You are going into Equal Protection of course now.

MRS. KATZ: I added that, yes.

Q I would like to think through the two different arguments separately because one may be stronger than the other. In the case involving the teaching of German in schools, it was held to be a denial of due process to deprive the parents of the right to send children to school where German was taught.

Could the parents have insisted that the schools provide the teaching of German in public schools?

MRS. KATZ: I do not believe it could have.

Q Does that not refute your Due Process argument?

MRS. KATZ: I do not believe it does.

Q Your Due Process argument is that the state cannot stop you from getting an abortion. Well, the state is not stopping you.

MRS. KATZ: The Due Process argument I make is a little bit different from that. I am making the argument that under Due Process the state cannot condition the choice towards childbirth, that it cannot intrude into the decision-making process. And that is what Connecticut is doing. Whether the state has to provide medical services for pregnancy may include Due Process questions about just what the state is obligated to provide under a system of medical benefits to the poor. But I believe that is a different question which would not be resolved by the Court's decision in this case.

Q What would happen if the state says, "We will pay for a natural birth but not a Caesarean"? Would that be Due Process? Of course not.

MRS. KATZ: Yes, it would.

Q At best it would be Equal Protection, would it not?

MRS. KATZ: No, Your Honor, I believe that it might be a Due Process argument in terms of the kind of judgments the state is making in this protected area.

Q Would it be a denial of either constitutional right for the state to subsidize an educational program urging

women to bear children and to make the choice one way rather than another?

MRS. KATZ: It might, and that would raise different kinds of questions.

Q How would they be different?

MRS. KATZ: The state's interests would be different. The program we are discussing would be different. And the impact on the woman's choice would be different.

Q The motivation of the state would be precisely the same as what you say the motivation of the state was here, to exercise the influence of its moral view.

MRS. KATZ: What the state does all the time in the educational process is certainly to assert its moral views. What I am saying is this is such a direct and immediate impingement that evokes somewhat different considerations.

Q Take my jury trial case. A person, we both agree, has an absolute constitutional right to a trial by jury in a criminal case in a state or Federal court. And yet is it not true that a defendant who is convicted is charged with the costs of a jury, whereas if he had waived a jury trial, he would not have been charged with the costs of the judge's time?

MRS. KATZ: That is true.

Q Is that not the same point as you have here?

MRS. KATZ: I do not believe it is exactly the same,

Mr. Justice Stewart, because--

Q It is not exactly the same. Being tried in a criminal case is not exactly the same as having an abortion. But is that not the point constitutionally?

MRS. KATZ: As I see it, the opportunity for a jury trial is absolutely afforded to the defendant.

Q But he is going to have to pay for it himself in many states if he is convicted. He has to work it off in prison.

MRS. KATZ: That is correct.

Q Whereas if he exercises his equal right not to have a jury trial, he does not have to pay for the costs of the tryer of the facts.

MRS. KATZ: In the case we are discussing there is virtually an absolute prohibition on the opportunity of the woman to have this service.

Q Only an indigent woman, is it not?

MRS. KATZ: Yes, Mr. Justice Stewart, only an indigent woman. But in fact as this Court has recognized in its remarks in the Singleton v. Wulff case, in this context, that impact on an indigent woman is virtually identical to the criminal penalty at issue. By the same token, Mr. Justice Stewart, a woman receiving public assistance in the State of Connecticut has an obligation in some cases to repay that assistance. But I do not think that justifies denial of

assistance to one who asserts a substantial Federal right.

Q You do not suggest, as implied in my Brother Marshall's question, it is clear that any woman in Connecticut continues to have a constitutional right to have an abortion, be she rich or poor. The question is she may or may not be able to find a doctor who is willing to do that gratis, if she cannot pay his bill.

MRS. KATZ: Yes. I would like to make it clear, just as a start, that there has been no question that a class of abortions, which are clearly within the protection of Roe v. Wade, is available to Medicaid eligible women, and this includes the large majority of abortions, which are in fact chosen for economic reasons or for social or educational reasons or for other family demands, ant that under the prior authorization requirement, the physician must state that the abortion is medically necessary for the patient's health, and he must state the specific reasons for the medical necessity, and he must demonstrate that the patient has consented in advance.

Q Is that a separate question here?

MRS. KATZ: Yes, it is a separate question, Mr. Justice White.

Q The jurisdictional statement did not raise that issue separately as to whether independently the necessity to certify in detail was unconstitutional.

MRS. KATZ: I believe the prior authorization and certification of necessity is part and parcel--is the medical necessity requirement because that requirement is not imposed in any other way. This is the difference, I believe, between Pennsylvania and Connecticut's policies. This is not something that the department has stated that it will review in its mind, but the department has directly asked the physician to certify in advance of treatment.

Q Mrs. Katz, did Connecticut say that all medical procedures require a certificate of the same type?

MRS. KATZ: Absolutely not, Mr. Justice Marshall. This is the only service--

Q Why not. I said, could Connecticut do that?

MRS. KATZ: Could it? Perhaps it could.

Q Would you have any complaint?

MRS. KATZ: If every service had to have a certificate of medical necessity?

Q Yes.

MRS. KATZ: Any statement that an abortion must be medically necessary for the health of the patient I would have a complaint about.

Q If they said that any medical procedure requiring payment must first have the same type of certificate, would that be okay?

MRS. KATZ: I do not believe it would.

Q Why not?

MRS. KATZ: Because it is impossible to conceive of an unnecessary abortion unless the woman is not pregnant. If this standard were applied equally, truly equally, to all forms of pregnancy care, that would acceptable.

Q I did not say pregnancy.

MRS. KATZ: I understand that.

Q I said appendicitis, ingrown toe nails, et cetera. You have to file a certificate saying that this is medically necessary before you get paid.

MRS. KATZ: The reason I would object to that is that any suggestion, as this record well shows, that an abortion must be medically necessary works to immediately exclude abortions which are necessary for the end desired by the patient and the doctor but which may not--

Q Then your answer is that the state could not do that?

MRS. KATZ: No. That is my answer.

Q It could do it for everything but abortions.

MRS. KATZ: The state could require that every service be necessary.

Q Other than abortions?

MRS. KATZ: I am sorry, Mr. Justice Marshall, the state could require that every service, including abortion, be necessary. That is required under Doe v. Bolton.

Q That is the question I asked you.

MRS. KATZ: I differentiate between medically necessary and necessary.

Q So, if it is necessary, that would be all right?

Q In whose judgment, then, if it is not the judgment of the doctor?

MRS. KATZ: If the service had to be necessary, only that were necessary in the judgment of the doctor would be valid.

Q You have me confused.

Q Then you are now arguing Equal Protection, which is what I thought you were arguing all along.

MRS. KATZ: I think we are arguing both, Mr. Justice Marshall.

Q You mean, you will settle for either.

MRS. KATZ: Certainly. We have a situation where pregnancy is a condition which virtually every court has held to require some form of medical care. If we are truly to lay aside the emotions of the past, then abortion and full-term delivery become equally necessary, depending on the choice of the woman. Or, looked at another way, either service is unnecessary because the other could have been chosen.

Connecticut in fact does not limit obstetrical care to necessary services in this sense because in many obstetrical cases there are choices which may be harmful to the health of

the patient, but Connecticut will totally support the decision to continue the pregnancy and bear the child even if that continuation becomes in fact life threatening. In other cases the pregnancy may not be a threat to the health but there may be, for example, a danger of miscarriage. Yet Connecticut supports all services necessary to bring about birth. And that is true even though had the woman naturally miscarried there would be no danger to her health. It is the abortion choice here that is eliminated from coverage though, as with all of the above procedures, it is clearly a medical procedure necessary to the treatment of the condition of the patient.

Moreover, statements to the contrary notwithstanding, on its face the regulation requires review of the particular abortion by persons within the Department of Social Services. It is said that they must review the application and make a decision, and this becomes a veto of the abortion decision in many cases which this Court has most recently affirmed its objections to.

Q Mrs. Katz, what if your client were at the other end of the spectrum here, so to speak; she were in a state which had, under its Medicaid policies, said, "We are very concerned about too much population. So, we will fund abortions but not childbirth. We will not interfere with childbirths but we simply will not fund them." Your client

wanted to have a full-term delivery and not an abortion. Do you think your constitutional argument that the state program was invalid would stand on the same footing as the one you are now making?

MRS. KATZ: Yes, Mr. Justice Rehnquist, I believe it would in that case.

Abortion, I would like to stress again, is the only service subject to this statement of medical necessity, and I base that on answers to our interrogatories which were provided by the defendants. It is the only service covered by Medicaid which requires that consent be demonstrated in advance to the--

Q Mrs. Katz, let me take Mr. Justice Rehnquist's question one step further. Assume a state concerned with overpopulation were to adopt a statute that provided for everyone, the rich as well as the poor--that the price of an abortion will be paid, plus a $50 bonus. Would that be constitutional, the reason being they want to control population?

MRS. KATZ: I think that there would be definite constitutional objections to that sort of program. That is not to say that there are no steps the state can take which encourage or discourage population growth or population planning.

Q I assume in my example that they continue to

pay for childbirth for the indigent, but they just try to tip the scales in favor of abortion in the desire to control population. You say there would be a constitutional objection. If so, what would be the constitutional objection?

MRS. KATZ: That would again be a program which was weighting the choice.

Q Then you say the state has no legitimate interest in the rate of population within its borders?

MRS. KATZ: It may.

Q Then if it has an interest, why can it not tip the scales one way or another or seek to?

MRS. KATZ: Because that interest does not rise to the level of justification for an infringement in this area under this Court's prior decisions.

Q Which prior decision says you cannot pay a bonus for one choice rather than another?

MRS. KATZ: Roe--

Q The prior decision deals with preventing the choice. That is quite different, it seems to me, from urging one choice rather than another and being willing to pay a bonus for it.

MRS. KATZ: The prior decisions in Roe and Bolton do deal with preventing the choice. But the decisions on public benefit programs that consider this sort of interference go directly to weighting the choice. There may be a different

balancing process when the state asserts and demonstrates an interest in limiting population or increasing population. That is, the way that interest is asserted is different from the issues that are before the Court at this point.

Q What I am trying to identify in my own mind is whether it is critical to your case that we treat this as something like a deprivation as opposed to a subsidy. Is it critical for you to regard this as something that deters the woman from making one choice rather than the other?

MRS. KATZ: We do not argue that we have to prove that the woman was totally prohibited from making one choice rather than the other. Under Maricopa County and under Shapiro v. Thompson and past cases, a penalty is sufficient. I think that is the best answer I can give to that question.

Q There is no penalty here. There is a loss of an opportunity to get a benefit if you made the other choice. That is not quite the same as a penalty.

MRS. KATZ: Except that under Shapiro v. Thompson it was specifically stated that that is the same as a penalty. And under Memorial Hospital it was stated that that is the same as a penalty, that it is enough if there is an impingement, as this Court said in Singleton, an interdiction of the choice of the abortion.

Q Economic disincentive.

MRS. KATZ: Yes, Mr. Justice Stewart.

The Court has determined already that a woman has a right, with her physician, to choose to terminate her pregnancy, and this is a component of her right to personal privacy, and it is a fundamental personal right which is implicit in the concept of ordered liberty and which extends to matters relating to marriage, the family, procreation, child rearing, and to the decision whether or not to bear a child. What we are arguing is that whenever the state denies an important government benefit to a person who asserts such a fundamental right, it is violating the Fourteenth Amendment. The fundamental right is made the operative factor in the determination of eligibility for this benefit and, as a consequence, as I have stated, there is a substantial penalty imposed upon these plaintiffs.

The Court, I should note, in both Shapiro and in Memorial Hospital took into account the nature of the benefit we are discussing and the fact that this is the only way indigent women can get medical care. While there is no right to subsidies of medical care for anyone in this country, that does not mean the Court must close its eyes to the fact that this is a crucial benefit to recipients thereof.

Q Could I ask you, suppose in the case that went before we were to construe the Federal statute as the Second Circuit did in this case--

MRS. KATZ: As optional?

Q Yes. I take it then that Connecticut, if it wanted to, could pay for elective abortions and it would not cost them any money.

MRS. KATZ: That is correct. It would still cost them their share of the Federal program.

Q What is their share, how much?

MRS. KATZ: Fifty percent.

Q It is 50 percent. But their fiscal interest then is limited to that 50 percent.

MRS. KATZ: Yes.

Q As compared with carrying the birth to term, which they pay for?

MRS. KATZ: No.

Q That is 50 percent too.

MRS. KATZ: Yes, that is correct.

Q They are matching funds. It is a 50 percent matching program all the way across the board, is it not?

MRS. KATZ: Yes, sir. The Federal Government for all Medicaid services--

Q It is all 50 percent.

MRS. KATZ: In Connecticut it is all 50 percent. There are certain provisions for administrative costs--

Q Family planning is 90 percent.

MRS. KATZ: Family planning is 90 percent. Administration, I believe, is 75; I could be incorrect. The

basic physician service is 50 percent for all cases.

The state, when it is creating such a burden or penalty upon the exercise of a fundamental right, we argue, is obligated to show a compelling interest for the way it does that. And this Court has consistently applied this test to cases in the abortion area. And, in addition, the statement showed that this regulation is narrowly drawn to accomplish that purpose.

Connecticut, as the District Court found, has shown no interests which can be termed compelling or which even meet the more limited rational basis test. Connecticut in fact has never been very consistent in demonstrating exactly what its interest is. When the litigation first began, Connecticut asserted that the only reason it limited payments for these abortions was because the Social Security Act compelled it to do so, and that it would become ineligible for its matching funds if it paid for these services.

The Second Circuit Court of Appeals indicated that that was not so, that Connecticut had the option under the Federal statute to provide these services and it would be reimbursed for them, and the Court in effect urged Connecticut therefore to drop the regulations and to pay for the services for which plaintiffs were asking.

Connecticut chose instead, however, to continue its ban on payments for abortions, and then asserted that it had a

right to limit its program to necessary services and that it had a strong fiscal interest.

The fiscal interest, as noted by the District Court, is really non-existent in that case because it was in the record in fact that abortion is only a fraction as costly, as is normal childbirth, and that it is many times less costly than any complication of childbirth such as a Caesarean section.

Moreover, by definition, the new-born child with its mother will be eligible for aid to families with dependent children, which at the time of this litigation for a family consisting of an adult and a child, was $209 per month at a minimum, not including eligibility for other other services which may have been available.

Q Mrs. Katz, I am not sure that completely meets your opponent's argument. As I understand him, he is saying that if we eliminate the line between necessary and unnecessary, you will have to have a whole host of additional services which will impose costs over and above just the abortion cost, and that that is what you have to measure on both sides of the scale.

MRS. KATZ: Yes, Mr. Justice Stevens, but that is logically not a persuasive argument because Connecticut would not in fact have to pay for a whole host of services. We are arguing that abortion is a necessary service.

Q The District Court--they talked about cosmetic surgery, and the District Court said that is different because it is not a constitutionally protected right. But I just wonder if that is valid. Do you suppose a state could constitutionally pass a statute that said nobody shall have cosmetic surgery?

MRS. KATZ: Nobody in the entire state?

Q Correct.

MRS. KATZ: Perhaps not.

Q Then do you have a constitutional right to cosmetic surgery?

MRS. KATZ: But it would not be a fundamental right in this area of privacy.

Q Nothing could be more fundamental than a constitutional right, a constitutionally guaranteed right, which my Brother Stevens is hypothesizing.

MRS. KATZ: It is simply--

Q Suppose a person is seriously disfigured as a result of an accident and wanted to have plastic surgery to correct his appearance, and the state said, "No, we have a statute that prohibits that." You would say that is not a constitutionally protected right?

MRS. KATZ: It may be constitutionally protected--

Q But not as well protected as the right to make the abortion decision?

MRS. KATZ: Well, I think that may be correct, and that may also be a necessary service and in fact is paid for by the State of Connecticut in those circumstances.

Q But if the Second Circuit is correct in the way it construes the statute, Connecticut could pick and choose among the, quote, necessary, unquote, services that ought to--is that right?

MRS. KATZ: That is right except that there has to be some limitation on the constitutionality of its choices. It could pick and choose among--

Q That may be so, that may be so. But you would say that it would have to choose to fund the abortions because of the nature of the interest involved?

MRS. KATZ: Yes, sir, I would.

Q And the statute would permit that. But just because the statute would permit it would not mean that it would require therefore to pay for cosmetic surgery?

MRS. KATZ: Yes, sir.

Q Would it be equally wrong or less unconstitutional in your hierarchy of constitutional rights for a state to say, "We will pay for appendicitis operations but not for gall stone operations"?

MRS. KATZ: Within the Medicaid program?

Q Yes.

MRS. KATZ: It would be less wrong.

Q Less what?

MRS. KATZ: Wrong.

Q Why?

MRS. KATZ: Because this country just has not enunciated a right to free medical care for all forms of services.

Q Have we enunciated a right to it for any forms of surgery?

MRS. KATZ: I believe that once a woman is pregnant there is a right which does not come into play for a person--

Q Where has that ever been enunciated, a right to be subsidized?

MRS. KATZ: No, a right to be free from an imposition on the choice, whereas there are many forms of medical care which involve choices both by the patient and by the physician, and there is no right, absolute right, to make one choice or the other.

Q You are saying then that the state has to have a program of free medical services for indigents as a matter of constitutional law because there is a choice--if I have a bad stomach ache, I have got a choice of going to the doctor and not going to the doctor. And if I do not have any money, I do not have a choice of going to a doctor unless there is some assistance program available to me.

Q I believe, Mr. Justice Rehnquist, that I was

saying the opposite, that there is no right to free medical care for the indigent. Connecticut could perhaps have no program of Medicaid, and Connecticut could perhaps limit its program to life-threatening procedures. But it has not done that. It has a very comprehensive program which pays for many services which, by this definition, are not particularly necessary. And in the context of that program there cannot be a weighting of the choice of the pregnant woman one way or the other.

MR. CHIEF JUSTICE BURGER: I think your time is up now, Mrs. Katz. Thank you.

MRS. KATZ: Thank you very much.

MR. CHIEF JUSTICE BURGER: Your time is consumed also, counsel.

The case is submitted.

[Whereupon, at 1:42 p.m., the case was submitted.]

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