In the

Supreme Court of the United States

Frank S. Beal, Et Cetera, Et Al.,

Petitioners

v.

Ann Doe Et Al.

No. 75-554

Washington, D. C.
January 11, 1977

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v. : No. 75-554

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Washington, D. C.

Tuesday, January 11, 1977

The above-entitled matter came on for argument at 10:35 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:

NORMAN J. WATKINS, ESQ., Deputy Attorney General, Department of Justice, Capitol Annex, Harrisburg, Pa. 17120
For Petitioners
JUDD F. CROSBY, ESQ., 310 Plaza Building, 535 Fifth Avenue, Pittsburgh, Pennsylvania 15219
For Respondents

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Number 75-554, Frank S. Beal against Ann Doe et al.

Mr. Watkins, you may proceed whenever you are ready.

ORAL ARGUMENT OF NORMAN J. WATKINS, ESQ.

ON BEHALF OF PETITIONERS

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

In 1965, Congress enacted Title XIX of the Social Security Act which has commonly been referred to as MedicAid. The general purpose of that statute was to provide necessary medical services for the indigent and near-indigent as they may be determined by the states.

It is an optional program on the states. The primary or premium judgment -- the medical judgment of the physician was, of course, the primary factor to determine which services should be reimbursed and which should not.

It was left up to the states whether or not the recipient or the provider would be reimbursed for the services. There are general requirements in the statute that require equality of treatment for the various groups that are covered within a program and there are general descriptions of the types of services that are required.

There are five basic categories of services which cover such things as in-patient services, out-patient services,

skilled nursing services, physician services and the like.

Pennsylvania opted to participate in this program and accordingly, drew up a plan, a Medicaid plan which was submitted to the Department of Health, Education and Welfare and approved by the Department.

The plan, again, consistent wit Title XIX, places primary reliance on the physician's judgment as to which services in the covered categories would be necessary and required. As required also by the federal statute, Pennsylvania has a utilization review program which reviews the use of services to make sure that unnecessary services are not being spent and reimbursed under the program.

As part of the program, Pennsylvania covers pregnancy-related services including abortion. However, each such service must be medically necessary at the time of its utilization. This is where the controversy arises in Pennsylvania in this case.

Pennsylvania's abortion policy basically requires that at the time the abortion service is rendered, it be medically necessary in the judgment of the physician. That is, that the condition for which the abortion is prescribed threaten the health or the life of the mother.

There is also a two-doctor concurrence and a requirement that the abortion be performed in the JCAH-accredited hospital.

Those two requirements were never litigated in earnest in this case and it is quite reasonable with respect to the two-doctor concurrence because that, I am told, in practice is rather a rubber stamp.

In any event --

QUESTION: What do you mean,"was never litigated in earnest"? Was it litigated at all?

MR. WATKINS: It was raised -- it was challenged in the original complaint, Mr. Justice Blackmun. However, it was the decision of the district court and the decisions of the court of appeals do not discuss these issues and their compliance or lack of compliance with respect to Title XIX or the Constitution.

The Plaintiffs in this case were all pregnant women with pregnancies ranging, I believe, from seven to 17 weeks term.

By their own admission, some -- at least some of the Plaintiffs in affidavits filed and contained in the Joint Appendix -- some of the women sought their abortions for reasons totally unrelated to health. In fact, the stipulation of counsel filed in this case so states.

Accordingly, these women were not able to procure the required certification of medical necessity from the attending physician or two other physicians and therefore, they were unable to receive the abortion because they were indigent,

they were unable to provide the funds for the abortion on their own. Thus this lawsuit was filed challenging these Medicaid regulations on both the statutory basis and the constitutional basis.

The district court held that Pennsylvania's medical necessity requirement as applied to abortion does not violate Title XIX but that rather, the court went on quite properly and decided that under the Constitution, in its view, with one judge dissenting, the regulation violated the 14th Amendment Equal Protection Clause.

The court of appeals en banc effectively reversed that holding of the lower and found that Pennsylvania's Medicaid regulations, as applied, violate Title XIX of the Social Security Act.

QUESTION: What did it do about the constitutional question?

MR. WATKINS: It did not go to the constitutional question under this Court's teaching in Wagans v. Lavine.

There are, in my view, at least seven compelling reasons why this holding of the court of appeals en banc must be reversed.

First, as the Court was well-aware, in 1965 when Title XIX was enacted, non-therapeutic -- and I might say at the outset that I am using the terms non-therapeutic and medically unnecessary interchangeably. I do not see any distinction

between the two, nor did the court of appeals, nor did --

QUESTION: Mr. Watkins, are you tying that definition, however, into what was said here in Doe against Bolton?

MR. WATKINS: I am, Mr. Justice Blackmun.

QUESTION: So that you are conceding that medical necessity, under the Pennsylvania statute, means what was spelled out here in Doe against Bolton?

MR. WATKINS: Absolutely, and there is nothing in the record in this case to indicate to the contrary. In fact --

QUESTION: Well, that is a substantial concession on your part, isn't it?

MR. WATKINS: Well, it is not a concession at all, Mr. Justice Blackmun. The 1970 policy of the Pennsylvania Medical Society which formed the basis for our regulations in fact points out that both psychological or physical health reasons certainly should be taken into account by the physician in determining the necessity of an abortion and, as well, I might say, the physicians in Pennsylvania, like every other state, are certainly bound by the pronouncements of this Court and the teachings of this Court.

Pennsylvania certainly realizes that it couldn't restrict the physicians' judgment to any more narrow a scope than this Court pronounced in those cases.

QUESTION: Well, I gather from some of your prior remarks you were equating it to almost an abortion on demand,

but I am accepting your concession, then.

MR. WATKINS: That is correct. I am --

QUESTION: And I want no misunderstanding about it.

MR. WATKINS: Let me -- let me make perfectly clear my concession. That is, that a physician, in examining a patient, may take psychological, physical, emotional, familial considerations into mind and in the light of those considerations, may determine if those factors affect the health of the mother to such an extent as he would deem an abortion necessary.

I think the key in the Bolton language, and the key in the Vuitch language is the fact that the physician, using all of these facts -- and there are probably more that he should use -- must determine if the woman's health -- that is, her physical or psychological health is jeopardized by the condition of pregnancy.

That is not to say, obviously, as I believe the Plaintiffs are asserting, that the fact that the family is going to increase makes an abortion medically necessary.

If that were the case and if that is what this Court meant, then I would say that what we are really saying is that the only medically unnecessary abortion is when the woman is not pregnant and I don't believe that this Court was reaching that result in Vuitch or Bolton. Certainly --

QUESTION: Possibly the subjective psychological or emotional problem caused by the expectant mother, by her concern

about the increase in the family might be a health problem such as would lead a physician to certify that an abortion was medically necessary. You would concede that?

MR. WATKINS: Absolutely. Absolutely. Again, I don't consider these concessions. This is the clear policy in Pennsylvania and --

QUESTION: Right.

MR. WATKINS: -- in fact, until the filing of Respondent's brief in this case, the use of the term "health" in Pennsylvania has never even been raised.

The fact of the matter is, in Pennsylvania, it is the physician who determines whether or not an abortion is medically necessary.

QUESTION: Now, what -- apart from the certification by the two other physicians --

MR. WATKINS: Yes.

QUESTION: What physician is this?

MR. WATKINS: This would be the physician of the woman's choice.

QUESTION: Of the woman's choice?

MR. WATKINS: That is correct.

QUESTION: Well, wouldn't -- couldn't this lead to physician-shopping?

MR. WATKINS: Very possibly. Very possibly.

QUESTION: Very easily?

MR. WATKINS: That is something that we can't and don't pretend to control. If some physicians have a very, very broad view of medical necessity, that is their judgment. They are physicians. They are licensed to practice medicine. As long as it is legal and as long as their professional organization says that they are practicing medicine within the proper realm, it is not for the Commonwealth of Pennsylvania, it is not for welfare bureaucrats to tell a physician which abortion is medically necessary and which abortion isn't and that is not the portent of this plan.

QUESTION: In other words, until the Medical Association or some other such authority might step in on that kind of an issue, the state accepts with finality the medical opinion.

MR. WATKINS: Well, they are -- and I -- this is a trickier question. Obviously, as I said, at the outset there is a utilization review program.

Now, if a certification of medical necessity came in and from the face of it -- and I am telling you now what the department tells me, although, again, the record doesn't contain this because it was never challenged -- if, on the face of it, it is apparent that, say, that physician never treated this individual, then there would be a review. But if there is nothing irregular on the face of it, that is correct, there would be -- there is no different treatment of an abortion

reimbursement request than any other reimbursement request.

QUESTION: I take it, though, that in the state's view there will be a substantial number of cases in which a physician would not certify medical necessity but nevertheless it would be an abortion that the woman would have a constitutional right to obtain under this Court's decisions.

MR. WATKINS: Well, that is -- if this Court analyzes the constitutional problem on the basis of reasonableness, which I think is the appropriate standard, then I would say that these requirements also meet constitutional muster because they are entirely reasonable as a medical services program, a medical services program.

QUESTION: Well, we don't want to rearque the --

MR. WATKINS: The constitutional question.

QUESTION: -- the constitutional issue but I understood you to mean that there will be cases where a woman would have a constitutional right to get an abortion from somebody but she couldn't get a certification of medical necessity under your rule.

MR. WATKINS: There may be those cases. I can't -- I can't --

QUESTION: Well, there is but this case doesn't focus it. This case is moot.

MR. WATKINS: No, no, that is not --

QUESTION: We are talking about that segment --

MR. WATKINS: I misunderstood your question.

QUESTION:--argued by my brother White, of women who would have a constitutional right to have an abortion performed but who no reasonable, qualified physician could certify that it was necessary for her health.

MR. WATKINS: That is correct.

QUESTION: Unless there is such a segment, this case shouldn't be here.

MR. WATKINS: That is absolutely correct. In fact, that is what -- that is the situation these plaintiffs were in. They were unable to obtain that certification of medical necessity.

QUESTION: General Watkins, before you leave that point, the court of appeals listed five things, five conditions that had to be met, each one of the five before an abortion would be performed. It seemed to me they described the right to an abortion in Pennsylvania as narrower than you describe it.

Am I -- are you describing a nontherapeutic abortion in the same terms that the court of appeals found it?

MR. WATKINS: I believe so. In other words, when I say -- the bottom line of those regulations, other than the physical deformity provision, the bottom line is whether or not the pregnancy creates a condition that jeopardizes, threatens, the health or life of a mother and my point is that when the physician examines the mother, he, of course, applies this

Court's teachings in Vuitch and Bolton to determine whether or not there is a health-threatening condition. Anything to the contrary would clearly violate the holdings in these cases.

QUESTION: Is that made clear to the physicians in Pennsylvania?

MR. WATKINS: Well, I assume that it is by virtue of the fact that the Pennsylvania Medical Society, which I assume represents a good segment of them, issued the policy statement from which we adopted these regulations and, in fact, contained in the brief in the section "statutes involved," there is a hypothetical that the Medical Society used to point out that psychological and emotional as well as physical considerations may well be taken into account.

I might add that that --

QUESTION: That is in the record.

MR. WATKINS: That is in the -- that is not in the record, your Honor. That is in the"statutes involved" section of my brief. I think it was, in fact, a published Medical Society position.

Returning to the other reasons why I feel that the court of appeals opinion must be reversed -- and I'll try to move more rapidly -- as I pointed out, a nontherapeutic abortion in 31 states at least in 1965 was, in fact, illegal.

It is difficult for me to imagine that Congress would have mandated -- and we have got to keep that in mind --

that the Respondents in this case are arguing that not only does Title XIX allow reimbursement for non-therapeutic abortions but in fact, it requires it.

It is difficult for me to conceive that Congress would have required states to fund a procedure that was, in fact, illegal in a vast majority of them.

Secondly, Title XIX itself makes no mention whatsoever of abortion. Couple that with the fact that every time, save one, every time that Congress has addressed this issue, it has in one way or another expressed its clear displeasure with non-therapeutic abortions. The save one is the possible removal of the prohibition against funding of abortions as a family-planning device.

But there has never been an affirmative expression or approval by Congress of non-therapeutic abortions or funding thereof.

Next, and fourth, I believe this is, every other circuit court that I am aware of that has addressed this issue has gone contrary to the Third Circuit on this point.

Fifth, Pennsylvania's medical necessity requirement, and I have already alluded to this, is entirely reasonable. There can be nothing more reasonable, in my view, than in a medical services program relying on the judgment of the physician to determine which services are reasonable, which services are necessary and which services are not.

Sixth, the lower court's reasoning, which basically relies on two points, is faulty. First, they -- the court held that the medical necessity requirement interferes with the judgment of the physician.

Well, we have discussed this already but again I'll reiterate it so that there is no confusion about Pennsylvania's position.

QUESTION: Do you regard that as somewhat a contradiction in terms?

MR. WATKINS: I certainly do. The lower court's holding, in fact, I found a little bit curious in the sense that it says that we interfere with the physician's choice of nontherapeutic abortion. To me, that is a contradiction.

Physicians, exercising their medical judgment, don't choose non-therapeutic services. The exercise of medical judgment, a fortiorari to me, means that when the physician determines the services necessary he is determining that it is necessary for medical reasons.

QUESTION: Well, some physicians perform profes - sional services for purely cosmetic reasons.

MR. WATKINS: Absolutely. Absolutely. Pennsylvania does not pay for those as part of its medical program.

QUESTION: No, but in other words, why is it a contradiction in terms?

MR. WATKINS: Because --

QUESTION: Physicians do other things besides therapeutic things.

MR. WATKINS: That is correct but it would seem to me that a nose repair, say, for purely cosmetic reasons, would not be a therapeutic procedure. It would be a medical service; there is no question that a physician would be required to perform it.

QUESTION: Properly and legitimately performed by a physician.

MR. WATKINS: There is no question about it and a physician probably would be required to perform it but that does not make it medically necessary.

QUESTION: No.

MR. WATKINS: In other words, when the physician examines this individual, his diagnosis would not be, you need to repair your nose. The physician in that instance that you raised, Mr. Justice Stewart, is really a technician. He performs a service requested by the patient.

The motivational factor is probably key in this case. Who requests the service? Is it the physician that requests the abortion? If it is, we pay.

Is it the woman that requests the abortion? If it is, then we want to know from the physician, despite this request, in your judgment, is this procedure necessary?

That is why I say I think the Court's holding in the

first instance is probably a contradiction in terms, at least to my mind. I have yet been unable to understand the distinction between non-therapeutic and medically unnecessary.

Secondly, the court held that our medical necessity requirement violates the general broad equality provision of Title XIX.

Now, I have examined that reasoning very closely and all that can be said for it is that they pointed to no instance in Pennsylvania where the medical necessity requirement is not applied and in fact, if the lower court's opinion stands, what will be created is a situation where the woman who requires an abortion for nonmedical reasons will be treated differently than all other medical assistance recipients in Pennsylvania because she will be entitled to reimbursement for a procedure nonmedically necessary where no others would.

The final reason that I am convinced that the lower court's opinion must be reversed is the fact that the Respondents themselves have conceded that a medical necessity requirement is, in fact, permissible under Title XIX.

I have addressed this in my reply brief. Unfortunately I was informed this morning that my opposing counsel had not yet received it. I furnished him a copy. I am not certain what the problem was there. Service was made.

The problem with this position of the Respondents is, first, that it is a little late. They have never

questioned the use of the term "health" in Pennsylvania before. There has been no discussion of it in either of the opinions below. The fact of the matter is, and we have discussed this quite at length, Pennsylvania as early as 1970 recognized that-- and, in fact, makes no -- has no intention to interfere with the exercise of that physician's judgment.

We just want to make sure, we want to insure that that step is not omitted. It is a medical services program. Therefore, we want the physician to tell us if these services are required, not the woman.

Now, there have been some fairly sophisticated definitions and syllogisms urged upon this Court by amici and the Respondents; one being that it is the condition of pregnancy that determines whether a service is medically necessary.

I would submit to you first that Pennsylvania does not fund conditions. It funds services and again, it is the physician --

QUESTION: But it does fund pregnancy at some time, doesn't it?

MR. WATKINS: No question about it. Yes, Mr. Justice Blackmun.

QUESTION: And isn't that a pretty good argument that it does fund conditions?

MR. WATKINS: No, I would only say that the conditions of pregnancy -- for instance, one physician may treat

pregnancy with a series of services, A, B, C. Pennsylvania pays for those.

Another physician may treat pregnancy with services D, E and F. Pennsylvania pays for those. We pay for the services. We pay for the services. The physician determines what the condition requires.

QUESTION: Well, I don't think you have answered my observation but go ahead.

MR. WATKINS: I am sorry, Mr. Justice Blackmun. The argument can be made and has been made. I don't see the time, quite frankly.

The second step of this rationale is that medical necessity must be defined as that type of procedure, that procedure which is a safe and efficacious response to the problem.

First, what is the problem? Is the problem medical? Or is it economic or social?

In this case, these Plaintiffs had an economic, social, educational problem. They did not have a medical problem. That is the first problem with that definition.

If the problem is medical, again, Pennsylvania pays.

QUESTION: Well, by hypothesis, though, these people have gone to some doctor, have they not, who would perform an abortion. I mean, they have not gone to a midwife.

MR. WATKINS: Well, no, a temporary restraining

order was issued. Is that --?

QUESTION: Well, but isn't the gist of their complaint that they can find a doctor who would perform an abortion but that Pennsylvania would not pay for it under the circumstances if they perform it.

MR. WATKINS: Well, Mr. Justice Rehnquist, they can't find a doctor that would say the abortion is medically necessary to preserve or to stave off a threat to their health.

They certainly could find a doctor who would perform the abortion, just as I could certainly find a doctor to perform cosmetic surgery.

The distinction is that one is a consumer service, albeit medical. The other is a medical prescription for treatment and that is what Pennsylvania --

QUESTION: Related to health.

MR. WATKINS: Related to health. That is what Pennsylvania intends to fund with its limited Medicaid resources and if this Court would reverse the lower court, that is what Pennsylvania will be permitted to fund.

QUESTION: General Watkins, in Pennsylvania, is it lawful for anyone except a doctor to perform an abortion?

MR. WATKINS: I don't believe that it is but I am not 100 percent certain.

QUESTION: Well, it is not a consumer service that just anybody could perform.

MR. WATKINS: That is correct. It is a medical service but the distinction to me is very real and very clear. That is, if I go to a physician because I am dissatisfied with my appearance, I know that I have to go to a physician because I can't get that service anywhere else, so it is a medical service, no question about that.

But the physician isn't telling me that I need that service to preserve my health. I am telling the physician I want it because my solcial life is at an impasse.

QUESTION: Well, but I take it when the pregnant person goes to the doctor, sooner or later she is going to require some kind of service by that doctor or some other doctor.

MR. WATKINS: That is correct.

QUESTION: There is medical treatment that is necessary.

MR. WATKINS: That is correct. That is correct. That is the key.

QUESTION: So if she makes one choice she gets reimbursed, another choice and she does not.

MR. WATKINS: If she makes one choice, she does not get reimbursed. If the physician makes a choice, she gets reimbursed. The problem is --

QUESTION: Well, now, if the physician makes a choice, if the physician makes the choice for an acceptable

reason.

MR. WATKINS: Well, no. Well, Pennsylvania does not place a premium on a physician's choice of an abortion for non-medical reasons. The reason to me is entirely reasonable. Physicians are trained in the skill of diagnosing medical needs. Pennsylvania places a premium on that.

Pennsylvania does not place a premium on a physician's recommendations of how to provide a better economic or social environment for that particular family. That is entirely reasonable in my view.

Thus, if the physician at any stage in the pregnancy says,"abortion is necessary." it is paid for, or any other service. It is paid for.

If the woman -- in fact, if the woman came in and demanded delivery services before the physician said they were necessary, they would not be paid for, either. It is the question of who is requesting the service, who determines whether it is necessary.

The problem with the lower court's analysis is that if it is extrapolated it would be very difficult to cap. If you determine that it is a condition that determines medical necessity you really have taken the physician out of it. You have taken the physician out of the program, thus Pennsylvania can list 30 or 40 conditions and that is it.

Any service that any physician will perform for

that condition, heit an accurate dispensation of services or not, Pennsylvania must be required to pay. We consider that error and we request this Court to reverse the opinion of the Third Circuit.

Thank you.

OUESTION: General Watkins, let me ask one other question that just crossed my mind. Supposing during childbirth a doctor determined that it would be desirable for a patient to have a particular kind of anesthesia but that it was not really necessary. She could deliver the child without that particular anesthesia but it is more expensive. Would she be reimbursed for that?

MR. WATKINS: If the physician, and this -- there is no question --

OUESTION: Does it say it is necessary for her to be reimbursed?

MR. WATKINS: We give the physician broad discretion, as Mr. Justice Blackmun brought out initially in this argument.

If the physician thinks that it is advisable, if it, in his view --

OUESTION: But not medically necessary. That is my question.

MR. WATKINS: Then it would not be paid for. As a practical matter, there would be no way of --

QUESTION: As a practical matter, it would be paid for but legally it shouldn't be.

MR. WATKINS: Well, there would be no way of marshalling it because the physician would not say that it was not medically necessary. If he said -- if the physician came out and said, "I applied this most expensive anesthesia although it was not medically necessary," it would not be reimbursed.

Thank you.

QUESTION: In other words, if he said, "I advised her it was not necessary but she insisted upon it as a matter of choice," then you would not pay for it.

MR. WATKINS: Absolutely. That is correct. Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Watkins.

Mr. Crosby.

ORAL ARGUMENT OF JUDD F. CROSBY, ESQ.

ON BEHALF OF RESPONDENTS

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

The Court has today before it in Title XIX what the Second Circuit has otherwise described as a long and complicated statute.

Given the complexity of the statute, Respondents submit that the statute is certainly capable of various judicial approaches. The approach which Respondents have

presented to the Court in our brief attempts to take into account the traditional roles of all the participants necessary for the delivery of medical services to the indigent.

That is, the state, the provider of services and the recipient of the services.

Keeping that distinction in mind, as we go through the argument I think it is important to keep in mind the distinction between state attempts to eliminate a broad condition and state attempts to limit a physician's choice of alternative treatments for a given condition because as we see with the situation of pregnancy and the alternative treatment for that condition, that the realm of the physician's discretion which my brother at the Bar, Mr. Watkins, suggested he was not trying to interfere with, is, in fact, being interfered with.

What Respondents have done is look to Section 1396 (A a17) of the act which requires, mandates upon the state that they include reasonable standards for determining the extent of medical assistance and that those standards must be consistent with the purposes of the act.

What Respondents extrapolate from that language is that the state must have some rational reason when they begin to eliminate services from coverage under the Medicaid program.

QUESTION: Mr. Crosby, I am interested in one preliminary matter and I should have asked Mr. Watkins, maybe.

Do we have today funding for these abortions that your clients want?

MR. CROSBY: My clients, of course, your Honor, the 11 Respondents have already received their abortions pursuant to the temporary restraining order back in 1973.

The state instituted a temporary revised policy where they eliminated the distinctions between medically-necessary and other abortions and that is in effect today.

QUESTION: As a result of this litigation and this injunction?

MR. CROSBY: Well, yes, the Third Circuit's declaratory judgment, your Honor.

QUESTION: Yes.

QUESTION: But are funds available?

MR. CROSBY: To the best of my knowledge, your Honor, yes.

QUESTION: In the light of the Hyde Amendment, are funds available?

MR. CROSBY: Yes, your Honor.

QUESTION: I want to be sure we have a live controversy here.

MR. CROSBY: I think we do. I don't think, if we are talking about a mootness issue in terms of the Hyde Amendment, I don't think, given the fact that it was enjoined and it is still enjoined, that it is still the state policy, the old

state policy, but for the temporary Bayh's policy that we would be functioning under.

Continuing then, what Respondents assert is that we must look at what interests the state might suggest are being furthered by the restrictive Medicaid abortion policy which is consistent with what the lower court did.

Initially we looked to a fiscal interest and Respondent's submit, as the lower court found, that given the cost of prenatal obstetrical and post-partum care, that there is simply no fiscal interest being furthered by the state's restrictive Medicaid abortion policy.

QUESTION: Are you arguing the constitutional question or the statutory question?

MR. CROSBY: Only the statutory question, Mr. Justice Rehnquist.

QUESTION: And why do you look to these particular interests in arguing the statutory question?

MR. CROSBY: I think that the fiscal interest, for example, that there is -- that the statute -- Congress was concerned about the state's concern for its limited financial resources to distribute limited Medicaid resources and that is why we would submit that the state could in some cases rely on the saving of money as an interest to eliminate particular services.

QUESTION: Well, don't you have to start from the

other end, though, and show why the 1965 Act of Congress prevents Pennsylvania from doing this unless it can show these interests you are talking about?

MR. CROSBY: I think, your Honor, if you are talking about a standard for inclusion, then what what we are saying is what the attorney for the state said in his argument.

That is, that he is going to look to the physician's discretion. To the extent that a particular service is within the legitimate practice of medicine within the state, then it is included because of the emphasis that the statute puts on the physician's discretion and that works to the best interest of the recipient.

QUESTION: When you say "the statute," do you mean the Pennsylvania statute?

MR. CROSBY: No, your Honor, the Social Security Act.

QUESTION: What is your authority for that last statement?

MR. CROSBY: The emphasis that the statute places on the physician's discretion is found in several places, as we have analyzed in our brief.

First we looked to the simplicity of administration and the best interest requirements, specific statutory requirements and say that within those two provisions is found the notion that the recipient's best interest can only be furthered when the doctor is making the decision as to alternative

treatment for a given condition but to the extent that the state becomes involved in those medical determinations, as this Court realized in Doe v. Bolton, that the best interests of the recipient are not being served.

We would also point to the precedent of -- excuse me, not precedent but the lower court decisions in Roe v. Ferguson and Roe v. Norton indicating that the statute places great emphasis on physicians' discretion and also we point to page 8 of the brief for the state where they have agreed that the statute places great emphasis on physicians' discretion.

QUESTION: Well, what if the state excluded appendectomies?

MR. CROSBY: If the state excluded appendectomy, your Honor, it would have to be analyzed in terms of those interests. I think that may be out there somewhere in a future case. I think that there are specific provisions, for instance the HEW regulations which prohibit an exclusion based on diagnosis, type of illness or condition so that didn't --

QUESTION: Mr. Crosby, what is the precise statutory test? Is it, as the government's amicus brief says, whether or not the state's program establishes reasonable standards for determining the extent of medical assistance under the plan which are consistent with the objectives of Title XIX? Are those the dispositive -- it that the dispositive standard?

MR. CROSBY: Yes, your Honor, to the extent that what that means is, if a particular service is within the legitimate practice of medicine, that standard says it should be included. Now, we don't admit that everything --

QUESTION: We have a statutory -- preliminarily, here at least we have a statutory question.

MR. CROSBY: Correct.

QUESTION: Whether or not what the state has done here is consistent with Title XIX and it is -- in such an inquiry it is quite important, I think, to find out what the statutory language is we are talking about and have I correctly quoted the applicable statutory language?

MR. CROSBY: 1396A(A-17), your Honor. The state must include reasonable standards for determining the extent of medical assistance which are consistent with the objectives of the act.

QUESTION: Those are the dispositive words.

MR. CROSBY: Yes, your Honor.

QUESTION: But that is somewhat indefinite, isn't it?

MR. CROSBY: Correct, your Honor. What we are saying basically is that what that means is that, given that the particular service is within the legitimate practice of medicine, then the state is going to have to show some specific interest as being furthered by their exclusion of that

acceptable practice and this is particularly important when you are talking -- when the state is not eliminating broad conditions, as the lower court recognized. It is particularly important when the state is directly interfering with the choice of the physician.

QUESTION: Does the record show that doctors would have performed these abortions in these people here?

MR. CROSBY: Yes, your Honor. If they had been -- if they were going to be reimbursed, they would have, with the stipulation, the affidavit of Attorney R. Stanton Wettick. I believe it is at page 31 of the Appendix.

QUESTION: Even though it was not medically required?

MR. CROSBY: No, the physicians refused to perform the abortions and that is why the temporary restraining order had to be issued. They refused because the services were not going to be reimbursed by the state.

QUESTION: Well, my point was, they would have done it, if they had been paid --

MR. CROSBY: Correct.

QUESTION: -- even though medically it was not required.

MR. CROSBY: Right.

QUESTION: Is the record clear on that?

MR. CROSBY: I believe so, your Honor, in the

stipulation.

QUESTION: Mr. Crosy, does 1396 indicate that a statutory objective of meeting the cost of necessary medical assistance?

MR. CROSBY: No, your Honor. Specifically, 1396A (A17) does not address the question of medical necessity.

QUESTION: I did not ask you about A17. I asked you about 1396. Anywhere in 1396, does it?

MR. CROSBY:They talk about -- there is some language, for instance, in the purpose clause, the initial clause talking about --

QUESTION: Saying what the purpose of the --

MR. CROSBY: Correct.

QUESTION: All right, what does that say?

MR. CROSBY: It refers to --if I can recall the exact languge, it is "necessary medical care." In defining the persons who would be eligible.

QUESTION: WEll, don't you think that is rather relevant statutory language as to what the Social Security Act is trying to do?

MR. CROSBY: Certainly, your Honor.

QUESTION: Well, is that any different from what Pennsylvania at least claims that it's program provides for?

MR. CROSBY: Yes, your Honor, because Respondents submit that that language, what that means, for instance, on

the appendectomy example that Mr. Justice Rehnquist used, that if the state -- perhaps a better example would be one --

QUESTION: Well, if the state has excluded appendectomy. Because it claims that it has excluded paying for abortions that are not medically necessary.

MR. CROSBY: Correct, your Honor, but we submit --

QUESTION: And that the department that administered the act says that this is what the act aims at, namely, just necessary medical services and that Pennsylvania's program is consistent with the act.

MR. CROSBY: What we submit, your Honor, is that the state could look to considerations of medical necessity in certain cases, especially when eliminating broad conditions.

Normally when they are doing that, it is going to be accompanied by the interest in terms of saving money.

QUESTION: Well, anyway, that language is in the act and it is relevant and it does bear on the case.

MR. CROSBY: It bears on the case, so far, your Honor, as to what Respondents are saying, is that under the particular issue before the Court today, the state's overall interest in terms of saving money, preserving maternal health and safety, they are not going to be defeated by affirming the circuit court's decision.

Proceeding to the second interest which, as I just mentioned, was maternal health and safety, I would refer the

Court to an article not mentioned in Respondent's brief which is the morbidity and mortality report of HEW, Volume 24, number 3 dated January 18th, 1975 simply substantiating the notion that abortion in any trimester -- abortion services in any trimester are safer in terms of mortality and morbidity than childbirth.

And I would also refer the Court to the statement to that effect in the affidavit of Dr. Douglass S. Thompson in the Appendix at page 36a.

The final potential --

QUESTION: Before you go on, let me return to the appendectomy.

MR. CROSBY: Yes, your Honor.

QUESTION: Hypothetical. There was a period in medical practice, as these things go, when appendectomies were a fad and doctors were doing them and surgeons were doing them in a preventive way so that you don't have an attack of appendicitis while you are out on a hunting trip or some such thing.

Now, suppose you had an appendectomy which is performed but where there was no medically-indicated acute condition or necessity for it --

MR. CROSBY: Well --

QUESTION: -- for which a surgeon could be found to perform it. Pennsylvania should pay for an elective appendectomy which is not medically indicated?

MR. CROSBY: In a situation like that, your Honor, given the utilization review, we would submit, no. We would distinguish that situation very clearly from the situation where a woman is pregnant and the question Mr. Justice Stevens brought out, and Mr. Watkins agreed, that when a woman is pregnant, she requires medical services and the only question is, are the medical services going to result in termination of the pregnancy or are they going to be addressed to the woman's condition at childbirth?

Again, in terms of that medical necessity thing, I'll bring out quickly at this time that we are talking about a condition that does require medical services and that is distinguishable, I think, from your situation.

Clearly, if the woman is not pregnant, then we are not maintaining that the state would have to reimburse for the abortion services.

QUESTION: Mr. Crosby, could I just interrupt? I am still troubled by the same problem I think Mr. Justice Rehnquist was concerned about. You are arguing about state interests that are not necessarily served here. You argue the fiscal interest and the maternal health interest but neither of those is an argument made by your opponent and we basically have a statutory question and you haven't met any of the seven points he makes and I assume you are going to meet those rather than arguing what sounds to me like a constitutional argument.

MR. CROSBY: Two points then, your Honor. I think it is very important, given the section of the act that we are going under to understand that what we submit the state is putting up a smoke screen, almost, in terms of the language, "medical necessity," and they cannot -- as we argued in the brief, that medical necessity in a vacuum is not sufficient under the act.

That is, normally medical necessity considerations will further in other interests, such as the fiscal interest.

I can, very quickly at this time, perhaps, diverge from a normal pattern here and get back and take a quick look at some of the considerations that Mr. Watkins raised.

For example, he talked about the illegality of abortions in 1965. I would refer the Court, in terms of legislative history, to the House Report number 213 of the 89th Congress, 1965, page 24. That House Report was talking about Title XVIII, Medicare, but as many other courts have recognized, the legislative history can be read somewhat collectively and there they specifically stated that in terms of the extent of services that they intended to include new services as they were adopted in the future, indicating the breadth of what Congress intended in 1965.

I would also refer the Court to the drug example of the lower court when they were talking about the -- clearly as new drugs became marketable -- that they could not read the

statute as requiring them to be prohibited.

Also, I would suggest that in 1972, not 1965, when Congress amended the Social Security Act to include family planning services, that they were aware at that time that HEW considered abortion to be part of comprehensive system of family planning services there again, so when they were specific, using the term "family planning services" as indication of their intent to include the abortion and finally, I would refer the Court to the case of the United States versus Southeast Underwriters Association 322 U.S. 533 where the Court realized the expansive nature of the Sherman Antitrust Act and that is exactly what we are saying is involved here in terms of allowing for new services as they are developed in the future, meaning, of course, whether or not they are legally developed in the future or medically developed in the future, as they become an accepted, legitimate professional service.

QUESTION: You say "allowing," Mr. Crosby when what you mean, really, is "requiring," isn't it?

MR. CROSBY: Correct, your Honor. What Mr. Watkins raised in terms of the lack of any specific language in Title XIX, Respondents would submit that, as we pointed out before, that the Second Circuit described it as a long and complicated statute and they really didn't mention any specific service and there is no reason to have expected them to specifically refer to abortion services.

However, we would also submit that in terms of the specificity argument that, again, the term "family planning services," when it was added to the act in 1972, it is narrow enough in terms of what Congress was attempting to accomplish through family planning services, that is, to permit indigent women to limit and/or space their children. But the very alternative to the doctors available to meet that purpose for the woman, the alternatives are so narrow that Congress must have meant for the states to include all those alternatives.

QUESTION: Mr. Crosby, let me just -- you perhaps mentioned it in your brief, but I am just trying to be sure I understand.

Is it your position that abortion on demand is "necessary" within the applicable standard or that the state may not impose a standard of necessity?

MR. CROSBY: The latter.

QUESTION: It may not impose a standard. Then, in my example about anesthesia where the patient wants a more expensive anesthesia than the doctor could in good conscience say was necessary. Is she entitled to it?

MR. CROSBY: I would submit, your Honor, no. I assume that the doctor is making that determination because of alternative anesthetics available. What we are saying is when the doctor and the woman are faced with condition of pregnancy, they have two alternatives, childbirth services or

abortion services and in that context, neither service can be considered more or less necessary than the other services so it is distinguishable from a situation where a doctor, for very obvious reasons, might say something is not medically necessary and we do admit that the state can consider notions of medical necessity, again, such as the example we used in our brief which was the physical examination.

They could say physical examinations the state will determine are not medically necessary. Now, some doctors may disagree with that but to the extent that they say that and use that to exclude that service, they are also saying that the money that we are going to save by not providing those services can be addressed to more urgent needs but when the state says "medical necessity," in terms of the issue before the Court today, there is no money saving. There is no one else to be serving; there is no interest to be furthered when they say "medical necessity at the time of utilization of the service."

Turning quickly to the family planning services argument, again, and trying to be brief, focusing in on the HEW regulations. Respondents submit that the regulation contained in 45CFR24910(A5), namely, that HEW requires that the services provided must be sufficient in amount, scope and duration to reasonably achieve their purpose and what we are saying here, as I indicated before is, the purpose, the specific Congressional purpose of the family planning services was to limit -- to permit

the indigent woman to limit or space her children, that that goal is so narrow that if you eliminate what has been professionally accepted as a part of a comprehensive system of family planning services, namely, contraceptive, abortion, sterilization and treatment for infertility, that the state's discretion becomes much more narrow and in fact, they cannot restrict services of any of those four major components of a comprehensive system of family planning services.

Secondly, as to the categorically needy individuals, we focus on the HEW requirement that the state cannot arbitrarily deny or reduce the amount, scope or duration of a service because of the type of illness or condition.

What we submit for the categorically needy women is that to the extent that a woman's previous family planning services did not work, that is, a method of contraception failed and she is now pregnant, she is totally being excluded by the state's restrictive policy.

And secondly, for those women who never sought family planning services until they became pregnant, she, too -- we have two classes of individuals who are totally being excluded by the state's policy.

Returning quickly to the medical necessity issue, our position here is that, again, medical necessity in a vacuum -- that is, where the state can't show some other interest that is going to be furthered is not permitted under

the act because the act requires a rational connection between the exclusion and the furthering of some legitimate state purpose.

QUESTION: Mr. Crosby, are you going to get to the cosmetic point which they put a lot of reliance on?

MR. CROSBY: Your Honor, I think the cosmetic point is disposed of simply by saying that, as Mr. Watkins indicated, that at the point where a doctor -- it is not a doctor's decision. In other words, a doctor does not address him or herself to a twisted nose.

Nothing else is going to happen. The person will continue to have a twisted nose. Unlike the pregnancy example where the state has admitted in their argument that the condition of pregnancy requires medical services and if there is no reason especially given this Court's announcements in --

QUESTION: When they say that the twisted nose is not medically required to be straightened --

MR. CROSBY: Correct.

QUESTION: -- that is -- isn't that their position?

MR. CROSBY: Yes, and I agree with that, your Honor.

QUESTION: And you see no connection.

MR. CROSBY: I see the connection to the extent that they are trying to use that example to limit the abortion that they will cover under their Medicaid program by saying it

has to be necessary at the time of utilization and this is why I referred it earlier as a smokescreen in terms of the requirement of medical necessity.

The state has no legitimate reason, especially given the Court's position in Roe v. Wade, Doe v. Bolton to assert that an abortion service is any more or less necessary or childbirth services is any more or less necessary than the other.

QUESTION: Because once a woman is more or less pregnant, it is clear that the services of the physician are going to be medically necessary, either by reason of a miscarriage, a live birth or an abortion.

MR. CROSBY: Correct, your Honor, and that this statute has to be interpreted in terms of what the state can do under the guise of medical necessity with that in mind.

QUESTION: Does the fact that medical services are necessary mean that any particular medical service, namely, an abortion, is in that category?

MR. CROSBY: Not -- depending on how we look at medical necessity, your Honor. What we are saying is that at that point is that it is a particular service, that is, an alternative treatment for a condition that at point, when the state begins to draw the guidelines, as they have, that they are impermissibly interfering with that physician's discretion.

Now, if you are out of the area of where you are

talking about your --

QUESTION: How do they interfere with a physician's discussion when, as the state has suggested, that if the physician informs the state that it is medically necessary for the protection of health or life, that the state doesn't challenge that. It is the affirmative policy of the state to reimburse for those services.

MR. CROSBY: I had never heard that before today, your Honor.

QUESTION: I think it is the state's program.

MR. CROSBY: I would point out that many of the things that we heard today I was hearing for the first time in terms of what the state program will cover. I would submit to the Court that if the state program was as all-encompassing as it was presented to the Court today, that I would see no reason why they had contested the temporary restraining order in the first instance.

Clearly, there are grave restrictions. They did not admit that any of the women, any of the Respondents, were entitled to an abortion. They fought reimbursement for the abortion in every single case. I would submit in terms of the issue of necessity as it relates back to the Court's announcements in Doe v. Bolton that, in fact, under that analysis, the only abortion services that could be classified as unnecessary would be those where the woman was not pregnant or where the

abortion services were not going to operate to the best interests of the woman, that is, where she perhaps did not consent or was not aware of what was going on in terms of the medical services.

QUESTION: Well, do we have a live case here? How about the particular Plaintiff that filed this action in the district court?

Would they meet the Pennsylvania requirements or would they not?

MR. CROSBY: I don't believe they would have, your Honor.

QUESTION: Well, then, I take it the state was justified on the terms it now argues in contesting the temporary restraining order.

It may not have done it on those grounds but certainly it was justified, if its policy would have been -- as now announced -- would have been infringed by the temporary restraining order.

MR. CROSBY: Correct, Mr. Justice Rehnquist.

QUESTION: Are you not arguing that the state is required to reimburse for every abortion on demand? Isn't that what your argument comes down to?

MR. CROSBY: I don't believe so, your Honor. Keep in mind that under the medical assistance program, no one is guaranteed services. What we are doing is analyzing -- in

other words, the state doesn't ensure that I, as a potential recipient, am going to have a doctor. They can't be sure that the doctor or doctors in my community are even going to participate so we are not, in that sense, talking about abortion on demand.

The final point is that Respondents are still talking about services performed by physicians to the extent that --

QUESTION: Well, let's change the question to elective abortion, then. Perhaps that is a little less loaded.

MR. CROSBY: Call it elective abortion, your Honor.

QUESTION: Elective abortions, you say the state must pay for.

MR. CROSBY: What we say, your Honor, is that under the statute there is no distinction between elective abortion and any other abortion.

QUESTION: Well, then, your answer to my question must be affirmative, is it not?

MR. CROSBY: Except in the two ways that we single out. It is still a decision for the patient in consultation with the doctor.

QUESTION: Well, you don't have an elective abortion unless the woman elects. That is what sets this train of events in motion, is it not? If she doesn't elect, there are no problems.

MR. CROSBY: I could concede, your Honor, of a physician where a doctor did not -- excuse me, a patient, where [patient] a doctor did not elect to have the abortion but because of very obvious factors to the doctor, that he would advise the patient to go through with an abortion and they can include many, many factors, as the Court recognized.

It could be that, four years into the future that the existence of the unwanted child is just going to totally disrupt the woman's existence so we are still saying that it is a joint decision.

QUESTION: Mr. Crosby, you indicate that the necessity issue should be decided against a background of some state interest supporting necessity.

Would you say that a state interest in saving the lives of the unborn fetus is totally illegitimate?

MR. CROSBY: I would submit, your Honor, that legitimate statutory purposes have to be defined in the context of the Constitution. To the extent that that interest is unconstitutional --

QUESTION: Well, it is not a compelling interest to undergo, but is it a totally illegitimate interest that should be entirely ignored? I think that is --

MR. CROSBY: To the same degree as in Roe, your Honor, that is, that that interest could be asserted after the point of viability under the --

QUESTION: Before that, there is no interest whatsoever? Is that -- did you have to take that position?

MR. CROSBY: Correct.

QUESTION: I think you do and that would be your position, then?

MR. CROSBY: Yes, it would be our position, your Honor, because, again, the interest has to be interpreted vis-a-vis the constitutional --

QUESTION: So for the first trimester, there is absolutely no state interest whatsoever in saving the life of the unborn.

MR. CROSBY: Correct.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Watkins?

REBUTTAL ARGUMENT OF NORMAN J. WATKINS, ESQ.

MR. WATKINS: Three points, Mr. Chief Justice.

May it please the Court:

First, the reason that my brother opponent is hearing a lot of this for the first time is, of course, because he has raised a lot of it for the first time at this late date.

I might point out in answer to Mr. Justice Rehnquist's question, we, indeed, do have a lot of controversy because Plaintiffs themselves admitted -- and I am quoting from pages one and two of my reply brief -- "In a stipulation filed with

the Court, 'Continuance of the pregnancy did not threaten the health or life of the mother --' referring to some of the Plaintiffs in this case. So there is no question but that the Plaintiffs in this case were seeking an elective, non-medically-necessary abortion, however that term is defined.

Obviously, these stipulations were of Plaintiffs' counsel. There can be no question at this point that we have a live controversy.

Secondly, counsel asserts that the family planning services requirement of Title XIX is broad enough to cover abortions. It may well be. The question is not whether it is broad enough to cover abortions. The question is, does it mandate abortions?

In fact, I would inform the Court that HEW -- which, by the way, has taken a position supporting the Commonwealth to the Solicitor General in this case -- HEW will not reimburse abortions as a family planning device -- logically, because the reimbursement rate is quite higher, 90 percent for a family planning device and it is substantially lower in the other portions of the act.

Respondents are arguing that pregnancy requires "medical services"and I quote my opponent, and the only question is whether or not the pregnancy is going to be terminated.

That is not the only question. The question is whether or not the services are sought by the physician or

sought by the patient, whether or not they are elective or whether or not they are medically required.

If they are the latter, we pay.

If they are the former, we don't and this is consistent throughout the entire program with the exception of family planning, which is by definition a preventive medical care program.

QUESTION: It would be awful hard for a physician to operate on anybody if he didn't come to him.

MR. WATKINS: That is correct, Mr. Justice Marshall.

QUESTION: So I don't understand your point.

MR. WATKINS: The point is that a pregnant woman going to a physician for examination of pregnancy, she has the option, clearly, to say, "I want to terminate this pregnancy."

QUESTION: Or, to go through to childbirth.

MR. WATKINS: Or to go through the childbirth. But the physician --

QUESTION: That is also medical.

MR. WATKINS: That is correct.

QUESTION: That is why she went to the physician.

MR. WATKINS: That is correct. But the physician, under Pennsylvania's Medicaid program, has the option of choosing all the pregnancy-related services that he, in his medical judgment, determine are necessary for the preservation of that woman's health.

In this case, the physicians and the Plaintiffs by their own admission did not need an abortion for the preservation of their health.

QUESTION: Mr. Watkins, how do you respond to his argument that the whole purpose of the medical necessity requirement is fiscal and that in order to avoid the unnecessary expenditure of funds and that here, the abortion would be the less-expensive of the alternatives?

MR. WATKINS: Well, first I would say that we are bound by the equality requirements that I mentioned at the outset of my argument and that if we made an exception in the abortion case because abortion happened to be cheaper than full-term delivery services, that we would probably be violating those very provisions of the act.

We must have a consistent program and consistency in this case is medical necessity.

QUESTION: Mr. Watkins, let me ask you one other question about the liveness of the controversy. The stipulation you referred to certainly shows you have a controversy between the lawyers on both sides.

I still have a reservation in my mind as to whether you have a controversy between the clients. Did you try this case in the district court?

MR. WATKINS: No, I did not, Mr. Justice Rehnquist. However, the Plaintiffs in this case filed affidavits of their

own in which they -- at least in -- and I point out in a footnote in my brief, my main one -- at least two of them affirmatively stated that they did not seek abortions for health reasons.

QUESTION: Well, why would a plaintiff who wanted to obtain an abortion funded with federal and state funds affirmatively state that she couldn't meet one of the qualifications?

MR. WATKINS: I can only assume -- one, I assume it was true and two, I assume that --

QUESTION: She wanted to test --

MR. WATKINS: She wanted to test the statutory and the constitutional fabric of her contention. But first and foremost I submit, and I certainly hope it was true.

QUESTION: Perhaps it might be more accurate to say that she didn't give the legal questions any thought one way or the other, but that her attorneys did.

MR. WATKINS: That, I couldn't say, your Honor.

That I couldn't say. All we can do is deal with the facts as they are put before us and here the facts are very clear. Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:37 o'clock a.m., the case was submitted.]