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OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

CAPTION: IRVING RUST, ETC., ET AL., Petitioners V.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND  
HUMAN SERVICES; and

NEW YORK, ET AL., Petitioners V. LOUIS W. SULLIVAN,  
SECRETARY OF HEALTH AND HUMAN SERVICES

CASE NO: 89-1391 & 89-1392

PLACE: Washington, D.C.

DATE: October 30, 1990

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ALDERSON REPORTING COMPANY

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WASHINGTON, D.C. 20005-5650

202 289-2260

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 IRVING RUST, ETC., ET AL., :

4 Petitioners :

5 v. : No. 89-1391

6 LOUIS W. SULLIVAN, SECRETARY :

7 OF HEALTH AND HUMAN SERVICES; :

8 and :

9 NEW YORK, ET AL., :

10 Petitioners :

11 v. : No. 89-1392

12 LOUIS W. SULLIVAN, SECRETARY :

13 OF HEALTH AND HUMAN SERVICES :

14 - - - - -X

15 Washington, D.C.

16 Tuesday, October 30, 1990

17 The above-entitled matter came on for oral  
18 argument before the Supreme Court of the United States  
19 at 10:01 a.m.

20 APPEARANCES:

21 LAURENCE H. TRIBE, ESQ., Cambridge, Massachusetts;

22 on behalf of the Petitioners.

23 KENNETH W. STARR, ESQ., Solicitor General, Department of

24 Justice, Washington, D.C.; on behalf of the

25 Respondent.

C O N T E N T S

ORAL ARGUMENT OF

PAGE

LAURENCE H. TRIBE, ESQ.

On behalf of the Petitioners

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KENNETH W. STARR, ESQ.

On behalf of the Respondent

27

# PROCEEDINGS

(10:01 a.m.)

Mr. Tribe.

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

QUESTION: Are doctors always involved in Title X programs?



1 role in the picture I think we would assume that its role  
2 is to make sure that nothing relevant is left out.

3 But if any of us were to discover that the government  
4 instead had arranged to have the doctor or the health care  
5 professional omit all information about one legally-  
6 available medical option and give you a referral list that  
7 is clearly tilted in the direction of the other option,  
8 regardless of what dangers there might be to your health,  
9 I would suppose that most of us would conclude that the  
10 government had used its bargaining power to betray a  
11 rather basic trust.

12 Its contract with the doctor, if that really were a  
13 fair description of the situation, would violate its more  
14 fundamental contract with all of us, including the First  
15 and Fifth Amendments.

16 By conditioning Title X grants on the regulations  
17 that we challenge in this case, the government, in the  
18 words of Judge Cardamone, concurring below, sets a trap  
19 for the unwary. The reason, quite simply, is that under  
20 these regulations not even the petitioners' private funds,  
21 sometimes in excess of three times the size of the Federal  
22 grant, may be used to provide uncensored medical  
23 information to the patients enrolled in the petitioners'  
24 Title X family planning clinics.

25 QUESTION: Excuse me. I don't understand that to be

1 the case, so long as those funds are not used in the Title  
2 X program. The Title X program, by the way, is how much  
3 Federal money? It's at least 90 percent, is it?

4 MR. TRIBE: Well, actually, Justice Scalia, the  
5 regulation makes reference to a 90-10 ratio, but, as the  
6 counsel for the Secretary explicitly conceded in oral  
7 argument in the First Circuit at footnote 59 of the  
8 Planned Parenthood brief, it's been a very long time since  
9 they have made any effort to live up with that.

10 The reason has been that as Federal funds have  
11 diminished and as the government, I think quite  
12 understandably, has not wanted to penalize clinics for  
13 growing, the norm now is that the Title X program project,  
14 as defined under 59.2 of the regs, is typically funded at  
15 a level of 50 percent or less, as the Secretary conceded  
16 in the First Circuit, of the Federal funds.

17 So that, for example, in the case of the clinics in  
18 this case, in Westchester-Rockland it's about 23 percent,  
19 in the case of the City of New York it's about 50.

20 QUESTION: Where is the 90-10 pulled from?

21 MR. TRIBE: The 90-10 does have, actually, a  
22 statutory origin, and there is some confusion, I  
23 understand, about whether the statute has been properly  
24 construed by the Secretary of HHS in allowing the reach of  
25 the Federal hand to exceed this 10 percent Federal fisk.

1 But, in any event, there's no dispute that the entire  
2 program -- the family planning program at the Hub in the  
3 Bronx, the family planning program, including, as the regs  
4 call it, the comprehensive coherent set of plans and  
5 program -- including the private money, is encumbered by  
6 these regulations.

7 QUESTION: I suppose we ought to evaluate the Federal  
8 statute and the regulations under the Federal statute on  
9 the basis of what Congress contemplated when it passed it,  
10 and Congress appears to have contemplated a program that  
11 is at least 90 percent Federal money.

12 MR. TRIBE: That has been argued in various courts.  
13 It is still not resolved. I would say that much of our  
14 argument is completely independent of whether the private  
15 funds are 10 percent or 50 percent, because we will be  
16 arguing that in this case the regulations are sufficiently  
17 viewpoint-based that it would not be permissible for the  
18 government to impose them, even as a condition of  
19 expending its own funds.

20 But when I reach that point, Justice Scalia, I think  
21 I will be adding a couple of thoughts about the way in  
22 which those arguments relate.

23 The government actually claims no general authority,  
24 even with its own money, to trick patients about their  
25 medical situation after they have come to trust a doctor

1 in a government-assisted clinic, and they certainly don't  
2 affirmatively claim that with respect to private funds  
3 they have the power to do that.

4 Their basic claim is quite different. Their claim is  
5 that once the client is diagnosed as pregnant the Title X  
6 program, the provision of services, is over, so that the  
7 further discussion that might be had about abortion is  
8 simply outside the scope of the program. I think the  
9 fairest way to respond to that is simply to say that it  
10 just is not the case.

11 Much of section 59.8 of the regulations is expressly  
12 directed to post-conception services, with only abortion  
13 counseling and referral banned. The section details the  
14 kind of information that a Title X client must be given  
15 once pregnancy is diagnosed, and indeed under the original  
16 version of the regulations it had said, and I quote, "no  
17 medical services or counseling after pregnancy is  
18 diagnosed" would be allowed.

19 QUESTION: Certainly the government in its brief, Mr.  
20 Tribe, and perhaps it is wrong, seems to take the position  
21 that this is basically a pre-pregnancy counseling program.

22 MR. TRIBE: That's right, Mr. Chief Justice. We  
23 disagree with that. We think that's incorrect.

24 QUESTION: You say that that was not what Congress  
25 intended, or that's not what has happened in fact?



1           MR. TRIBE: I think neither. That is, President  
2 Bush, when a Member of Congress, was one of the leading  
3 co-sponsors of this law, and he said that the health care  
4 service mechanism that he had in mind was not just a  
5 population control mechanism. It should include an annual  
6 physical examination, and the regulations themselves have  
7 contemplated and the statute has said from the beginning  
8 that one must provide more than just a kind of pregnancy  
9 kit and see you later.

10           And indeed the original version was objected to on  
11 the dramatic ground that it would permit no "counseling  
12 which discourages abortion." The Secretary explained at  
13 53 Federal Register 2926 that that is why the current  
14 version does not contain any language suggesting that the  
15 program finishes when pregnancy is diagnosed.

16           The aim was put very clearly in 52 Federal Register  
17 at 33.2.12, and I quote: "The express purpose" -- and  
18 this is the purpose of the regulations about how the  
19 dialogue after diagnosis is to proceed -- "is to ensure  
20 Title X projects do not provide counseling relating to the  
21 issue of medical indication for abortion." That was the  
22 express purpose.

23           QUESTION: I don't see where this argument is going.  
24 I suppose where is lead is since the only prohibition in  
25 the statute is a prohibition on the use of funds in

1 programs where abortion is a method of family planning,  
2 and since you say that the program doesn't just authorize  
3 family planning but authorizes medical treatment after a  
4 woman is pregnant, then there really is no prohibition  
5 even on the conduct of abortion.

6 MR. TRIBE: No, Justice Scalia. I am sorry. If I  
7 left that impression, I surely did not mean to.

8 QUESTION: Well, it's where your argument leads. I  
9 mean, it seems to me you are painting with a very broad  
10 brush when you say that the program is not just a program  
11 of family planning.

12 MR. TRIBE: No, I didn't say that, Justice Scalia.  
13 The concept of family planning under the program is a  
14 somewhat broader concept than would be suggested by a kind  
15 of truck stop pregnancy test. That is, many of these  
16 women are enrolled throughout their reproductive lives.  
17 When they are diagnosed as pregnant, the statute and the  
18 regulations in fact do not authorize the provision to  
19 these women of the gynecological, obstetrical, prenatal  
20 and other services that they might need.

21 But the idea is that an important part of the program  
22 is not simply to put them out on the street without  
23 advice, without information. It is at that point to have  
24 a discussion with them about the options available, and in  
25 that discussion the regulations are quite clear in

1 specifically prohibiting even neutral discussion about one  
2 option, namely abortion, and at the same time mandating  
3 with respect to the other option in this mutually-  
4 exclusive pair of medical choices, mandating the provision  
5 of a prenatal list, a list of prenatal care centers, which  
6 under the regulations must include all prenatal care  
7 providers in the area, must exclude all clinics  
8 specializing in abortion, and must be limited to clinics  
9 that are committed to the welfare both of the unborn child  
10 and of the mother.

11 So that the message, quite plainly, of your doctor  
12 handing you, after a pregnancy diagnosis, a list of this  
13 sort and saying this is a list of places that will be  
14 concerned with you welfare and that of the unborn child is  
15 basically that your welfare is not endangered by the birth  
16 of the child, and the implicit message is that abortion  
17 needn't concern you. And, indeed, if the woman asks she  
18 may be told that the project does not consider abortion an  
19 appropriate method of family planning.

20 So this is all quite obviously reassuring, but it is  
21 not a --

22 QUESTION: But isn't the program permitted to respond  
23 to a question? Aren't there some abortion agencies  
24 around? Aren't they permitted to identify some in  
25 response to a question?

1 MR. TRIBE: No, they are not, Justice White. That  
2 is, what would be steering and referral in clear violation  
3 of the regulations. They are allowed to say -- they would  
4 be allowed to hand the woman a copy of the regulations, I  
5 suppose, although that might be said to be handing her  
6 material that could be encouraging of abortion. I would  
7 hope not.

8 If they hand her that list -- that is, the  
9 information on how the list is composed -- she will  
10 understand that by coincidence there might be some  
11 abortion providers in the area, but even if they include a  
12 hospital which might, for example, provide abortion, the  
13 Federal Register 53 at page 29.38 says that the referral  
14 must be specifically made to its prenatal care service.  
15 So that if the woman finds the needle in the haystack it's  
16 not going to be by the government's design.

17 Indeed, the Secretary, below, said it was designed to  
18 have no loopholes. And, when asked below whether the  
19 woman could be told that maybe under A in the Yellow Pages  
20 she would find something that could be relevant to her,  
21 the government said no. And two of the three judges below  
22 said that that would probably be, in their view,  
23 impermissible.

24 So this is not a neutral --

25 QUESTION: Is your argument now suggesting that or



1     arguing that the regulations are inconsistent with the  
2     statute?

3             MR. TRIBE: Well, we have argued throughout that the  
4     regulations go way beyond the statute, but I'm now arguing  
5     that, even if they didn't, that a government  
6     command --

7             QUESTION: You're making a constitutional argument  
8     now.

9             MR. TRIBE: That's right. And we're saying  
10    that --

11            QUESTION: Even though perhaps we should deal with  
12    the statutory question first?

13            MR. TRIBE: We'd be entirely happy to have you say  
14    that, to avoid the constitutional question.

15            QUESTION: Or are you just following the ordinary  
16    rule that you're arguing your strongest point first?

17            MR. TRIBE: Well, I don't know whether that's the  
18    best rule. One sometimes wants to wind up and finish with  
19    a bang.

20            (Laughter.)

21            MR. TRIBE: But I think the point is that it's partly  
22    because of the constitutional doubt about these  
23    regulations that we would not suggest that the normal  
24    rules of Chevron in deferring to the HHS are appropriate.  
25    And because of that we would suggest that if the

1 constitutional cloud seems sufficiently ominous one might  
2 simply read the statute the way the Secretary himself read  
3 it for the first 11 years, simply to permit options to be  
4 presented to the woman and perhaps the way it's been read  
5 since '81, namely to require the neutral provision of  
6 options, but not the way these regs read it.

7 QUESTION: Mr. Tribe, do you concede that the way the  
8 Secretary originally interpreted it is constitutional?

9 MR. TRIBE: We think in respect to that, Justice  
10 O'Connor, that permitting options to be presented is  
11 surely constitutional. The part where I am not as certain  
12 -- we were never in a position to challenge it because the  
13 clients that I represent, the City, the State of New York,  
14 and the various clinics do not themselves engage in  
15 encouraging or promoting abortion -- but insofar as that  
16 was a viewpoint-based limitation I suppose an argument  
17 could be made that that part was not constitutional.

18 We do not make that argument here. We do argue that  
19 when in respect to a binary choice about one's medical  
20 fate the government suppresses talk about one branch, even  
21 neutral talk, and mandates steering in the other  
22 direction, that that is the impermissible suppression of  
23 information.

24 QUESTION: And why is that unconstitutional?

25 MR. TRIBE: Because, I guess, as Justice Rehnquist

1 said in his concurring opinion in Bolger v. Youngs Drug,  
2 the central purpose of the First Amendment is to prevent  
3 the suppression of information.

4 QUESTION: So this is a First Amendment argument?

5 MR. TRIBE: It's strictly a First Amendment argument.

6 QUESTION: But is it peculiar to the medical  
7 situation here? Because certainly if the government is  
8 talking about the Secretary of State hiring a press or  
9 public information officer or the press secretary at the  
10 White House, the press secretary or the public information  
11 officer are not free to say look, I want to tell the  
12 reporters everything I know, if the Secretary of State  
13 says you play this down.

14 MR. TRIBE: Some of them don't seem to realize that.

15 (Laughter.)

16 QUESTION: Well, some of them may not realize it, but  
17 I think they'll soon learn.

18 (Laughter.)

19 MR. TRIBE: That's right.

20 QUESTION: Would you agree that is not  
21 unconstitutional?

22 MR. TRIBE: Absolutely, Mr. Chief Justice. The  
23 difference -- it's not peculiar to the medical profession.  
24 The real difference is that some people serve as  
25 mouthpieces for the state -- speechwriters, spokespersons;

1 other people serve as professionals in whom people place  
2 their trust. That's at the other end of the spectrum.

3 And we suggest --

4 (Laughter.)

5 MR. TRIBE: I didn't quite mean it that way. The  
6 point really is that the people in Title X clinics look  
7 like doctors. They are dressed like doctors. They act  
8 like doctors. And, therefore, when they try to speak like  
9 doctors the fact that the government has selectively  
10 shaped their speech has First Amendment significance that  
11 it wouldn't have if everyone looked at them and said,  
12 these are the Solicitor -- I didn't mean the Solicitor  
13 General --

14 (Laughter.)

15 MR. TRIBE: The Surgeon General of the United States.  
16 In other words, these are not the Voice of America. These  
17 are the voice of medical professionals.

18 QUESTION: You don't challenge the statute, though,  
19 do you?

20 MR. TRIBE: No. We think the statute would be  
21 unconstitutional only if it were written specifically to  
22 authorize these regulations; otherwise, excluding abortion  
23 from this funding I think is clearly permissible under  
24 Harris and under McRae.

25 QUESTION: Under the Secretary's former



1 interpretation, the one that you would like us to in  
2 effect go back to, suppose this medical care professional  
3 said, in our view, from your standpoint and your family  
4 situation, abortion is the recommended choice for family  
5 planning, and we urge you to have an abortion and here is  
6 the name of a place where you can obtain that.

7 Is that consistent with the statute?

8 MR. TRIBE: I think not, Justice Kennedy. It seems  
9 to me that this statute is most plausibly implemented by  
10 maximizing the autonomy of the patient and by steering the  
11 patient in neither direction but by suppressing  
12 information in either direction.

13 That is, I would think that the most obviously  
14 constitutional way to implement it is to permit, as the  
15 Secretary did until 1981, or to require, as the Secretary  
16 did from 1981, the provision of a neutral set of options  
17 so that the person can make an intelligent choice.

18 Justice White I think --

19 QUESTION: So that it's wrong to make a  
20 recommendation under the First Amendment?

21 MR. TRIBE: It's not wrong to make a recommendation.  
22 It is, however, consistent with a program designed to  
23 provide information and not designed to steer people  
24 toward any choice to insist that the professional stand  
25 back and play a more passive role.

1           QUESTION: Well, I take it that a doctor could, under  
2 your view, under the statute as now interpreted or as  
3 previously interpreted, strongly recommend contraception.

4           MR. TRIBE: There's no doubt that the doctor could  
5 say -- however, if the --

6           QUESTION: So that's not viewpoint-neutral.

7           MR. TRIBE: Total viewpoint neutrality in this area I  
8 have to concede is difficult to achieve because the very  
9 fact that these are professionals and that laws of  
10 informed consent surround this area means that they can be  
11 required to provide information without which an informed  
12 choice can't be made.

13           As Justice White suggested in his Thornburgh dissent,  
14 the average person has no one but his or her doctor to  
15 look to for these matters. And that is why the American  
16 College of Obstetricians and Gynecologists and the  
17 American Medical Association have concluded that actually  
18 abiding by these regulations would be profoundly  
19 unethical, and that's why we believe it would be  
20 malpractice in a great many states.

21           That is, there are a great many situations  
22 generically in which a woman has no way of knowing when  
23 she comes into the clinic if abortion might be one of the  
24 things that would be medically relevant to her. She might  
25 be quite opposed to it morally, and yet if, for example,

1 she was using a contraceptive method like an IUD which,  
2 when left in place might create a risk of a spontaneous  
3 second trimester and possibly fatal abortion, surely that  
4 is something that she would be entitled to know. And  
5 there a great many women like that.

6 There are, in addition to that, some 590,000 women  
7 who visited Title X clinics in 1988 who had some  
8 background medical complication -- whether cancer or  
9 diabetes or hypertension or multiple sclerosis or chronic  
10 heart disease -- who might have no idea, as most people do  
11 not, that these conditions can sometimes be induced to  
12 recur, can be aggravated by the continuation of a  
13 pregnancy.

14 QUESTION: As a matter of public policy, that may not  
15 be a desirable thing, but the woman is in no worse  
16 position than she would have been in had the Title X  
17 clinic not existed. So long as the clinic makes clear to  
18 her that we do not recommend abortion, we are not in that  
19 business -- here is a list of providers, some of which  
20 providers, by the way, can provide abortion services --  
21 they are not excluded from referral, are they -- only if  
22 their primary business is the --

23 MR. TRIBE: That's correct. Justice Scalia, let me  
24 tell you why I think she is worse off. It really goes  
25 back, in a way, to a point you made in Evans and Ulman.

1 On the question -- well, let me why it struck me at the  
2 time as making a similar point, and I guess the court did  
3 it in Milcovitch. It's really very hard for a disclaimer  
4 to undo the misimpression that can result from something -  
5 - that is, the Evans and Novak column, with its factual  
6 misstatement, shrouded in a disclaimer saying this is  
7 opinion, or the Lorraine Daily Journal or Milcovitch, this  
8 is just opinion.

9 The fact is that if in the context there is something  
10 that might be injuriously misleading to the reader or to  
11 the listener, saying don't trust all of what I say, it may  
12 not be complete, may not be enough, partly because a woman  
13 will have come to rely on this doctor over the years --  
14 some of the women that I met in the clinics that I visited  
15 had gone there for a long time. This is not just a one-  
16 stop thing.

17 Many of the clinics, by statutory design, induce  
18 reliance. So a woman relies on the doctor for a period of  
19 time. The doctor says I see you're eight weeks pregnant.  
20 Here's a prenatal referral list. The woman doesn't have  
21 any idea that her underlying medical condition might make  
22 that pregnancy turn into a really serious threat to her  
23 health. The doctor isn't allowed to tell her that it  
24 might. Under the regulations, that would be promoting the  
25 termination of the pregnancy.



1           She walks out of there with a prenatal referral and -  
2           -

3           QUESTION: Excuse me. Is it clear that the doctor  
4           can't tell her that, that the pregnancy may create a  
5           serious threat to her health?

6           MR. TRIBE: Yes, I think it is clear, Justice Scalia.  
7           The Secretary's explanation --

8           QUESTION: Where is that?

9           MR. TRIBE: Well, the Secretary's official  
10          explanation of the regulations said that they were  
11          designed to prevent any expression of medical indication  
12          for pregnancy, and I don't think there's anything in the  
13          regulations that would suggest that he could warn her in  
14          that way.

15          But, in any event, if she said, well, what should I  
16          do about that --

17          QUESTION: You see, this is an important point you  
18          are on now. I read the regulations as preventing any  
19          referral of abortion or even reference to abortion as a  
20          means of family planning, but I think they draw a clear  
21          line between abortion as a means of family planning and  
22          abortion as a medical necessity. There is a specific  
23          reference to ectopic pregnancy in one of the examplesthat  
24          they give.

25          MR. TRIBE: Yes. It's made clear at 33.2.12 of the

1 Federal Register, Volume 52, that the point of the ectopic  
2 pregnancy example is simply to say that if there is an  
3 imminent threat to life they cannot refer her to someone  
4 who might do an abortion, but to an emergency room.

5 But the reference to abortion as a method of family  
6 planning, Justice Scalia, the words "family planning" I  
7 think have no meaning under the government's reading of  
8 the statute or ours, in this sense. If a therapeutic  
9 abortion, an abortion for reasons of health, were not  
10 encompassed within that concept, then there'd be nothing  
11 in the statute that would even prevent the use of Federal  
12 funds directly for the performance of abortion to protect  
13 the woman's health.

14 And it seems to me that that's clearly not what the  
15 regulations mean. That is, the regulations are clearly  
16 designed not to in any way, as 59.10 says, promote or  
17 encourage abortion. And to tell her that if you remain  
18 pregnant it might hurt your health is surely to promote or  
19 encourage abortion.

20 Let me add, though, that --

21 QUESTION: Suppose, Professor, that the doctor gives  
22 neutral advice or is permitted to give this neutral advice  
23 and provide all the information and then the patient says,  
24 well, look, I've been coming to you. I usually want your  
25 opinion. What should I do about this?

1           You say that the statute may constitutionally prevent  
2 the doctor from answering that question?

3           MR. TRIBE: I guess answering truthfully what his  
4 opinion is in a way that does not steer or encourage her  
5 -- these are lines that are terribly hard to draw, which  
6 is why the government oughtn't to be in the business of  
7 editing these dialogues -- I think is beyond what the  
8 government could forbid.

9           But what it tries to forbid here --

10          QUESTION: Well, the statute would forbid it.

11          MR. TRIBE: Well, I suppose you might --

12          QUESTION: I thought you said the statute was       --  
13 you weren't challenging the statute.

14          MR. TRIBE: The statute would forbid encouraging or  
15 promoting, not necessarily when pressed saying his own  
16 truthful --

17          QUESTION: You don't think saying my opinion is you  
18 should have an abortion is promoting?

19          MR. TRIBE: Justice White, I must say that I think  
20 there is no easy way to figure out where to draw that  
21 line, and insofar as the statute is read to control speech  
22 it raises a profound problem in any event.

23          But the worst problem is created when the regulations  
24 are as viewpoint-based as these are. That is, these  
25 regulations draw a sharp distinction between advocacy and

1 literature distribution which is pro-choice and which is  
2 pro-life. The combined effect of 59.9 and 59.50 is that  
3 it is permissible with the Title X project, quite apart  
4 from this dialogue, to engage in vigorous advocacy and  
5 legislative lobbying in favor of the pro-life position,  
6 not in favor of the pro-choice position.

7 QUESTION: Mr. Tribe, have you made a complete answer  
8 to Justice Kennedy's question of why wouldn't it not be  
9 equally viewpoint-neutral for these people to advise the  
10 use of contraceptives?

11 MR. TRIBE: Why it would not be viewpoint-neutral to  
12 advise?

13 QUESTION: Yes, to take the position that it's  
14 appropriate for the people that visit the clinics to use  
15 contraceptives. Isn't that advocating a viewpoint, too?

16 MR. TRIBE: Well, the point isn't that the  
17 professional cannot advocate a viewpoint. It's that the  
18 government cannot suppress a particular kind of  
19 information in the dialogue, and that it cannot create a  
20 viewpoint-based tilt, even in the expenditure of its  
21 money.

22 And in this case, if I might remind the Court, given  
23 how much private money is also burdened, the case is very  
24 like League of Women Voters.

25 QUESTION: Well, don't the regulations prevent the



1 hiring of advice-givers who say the only form of family  
2 planning you should use is natural birth control? You  
3 should not use artificial birth control. Isn't that  
4 forbidden by the regulations?

5 MR. TRIBE: Well, the regulations do suggest that the  
6 full range of options --

7 QUESTION: More than suggest. It has to provide a  
8 broad range of --

9 MR. TRIBE: But that's like informed consent, Justice  
10 Scalia.

11 QUESTION: Why is it like informed consent? It's  
12 saying you can only give one advice. You cannot advise  
13 the person to use only natural family planning.

14 MR. TRIBE: It's that you must provide the person  
15 with the full range of options. It is not that you  
16 cannot, if asked, tell the person what you think would be  
17 best, but you are not supposed to --

18 QUESTION: I think the full range of options is not  
19 best. I think you should only use one. You are not  
20 allowed to provide that kind of advice. You have to  
21 provide the full range of options.

22 MR. TRIBE: If the Court had before it a challenge,  
23 there is under the statute a conscientious exemption.  
24 That is, someone cannot be forced under these regulations  
25 to give advice that violates his or her conscience or

1 religion. But it's true that any program that has  
2 programmatic requirements will exclude some possible  
3 providers.

4 A drug counseling program plainly is going to exclude  
5 people whose opinion is that there should be no drug  
6 counseling and that everyone should take drugs. But here  
7 it is not as though a plausibly neutral line has been  
8 drawn in terms of the purposes of the program. What's  
9 happened is that truthful information that may be relevant  
10 is being deliberately withheld from people who have every  
11 reason to expect it and that, on top of that, with respect  
12 to advocacy, with respect to the preparation and  
13 distribution of literature, with respect to the leaflets  
14 that are left in the waiting room, there is a censor  
15 overseeing the entire process, saying that if they  
16 advocate abortion or in any way enhance its accessibility  
17 or its availability, the regulations have been violated.

18 QUESTION: You say the First Amendment prevents the  
19 government from refusing to fund pamphlets that promote  
20 abortion?

21 MR. TRIBE: It's not that the government has an  
22 obligation to fund them. But if the government said --

23 QUESTION: Well, I thought you just said pamphlets in  
24 the waiting room that advocated abortion.

25 MR. TRIBE: Paid for by private funds, Mr. Chief

1 Justice. But in TWR, for example, when you wrote that the  
2 line that was drawn by the government with respect to  
3 lobbying was acceptable because veterans and non-veterans  
4 are distinguishable without regard to viewpoint, imagine  
5 in that case if they had said we will subsidize pro-life  
6 lobbying but not pro-choice lobbying.

7 Now the government does not have the power, the Court  
8 has said and held in Speiser v. Randall, to make a  
9 financial benefit available, even if it's a government  
10 subsidy, based on the viewpoint expressed. It's  
11 particularly not permissible for the government, as it  
12 does here, to say that all of the literature and all of  
13 the material, even if paid for, as in the case of many of  
14 these clinics, fully by non-Federal funds, must be  
15 expelled from the project.

16 QUESTION: Well, does it make any difference in  
17 constitutional terms whether these pamphlets in the  
18 waiting room are paid for by private funds or paid for by  
19 Federal funds?

20 MR. TRIBE: I think it makes a difference, Mr. Chief  
21 Justice, whether they attempt to extend their quite  
22 limited power to assure how Federal dollars are spent.  
23 That is, otherwise it could have been said in League of  
24 Women Voters that because the parent organization could  
25 always go off and put the same editorial on CBS or could

1 publish it somewhere else with its own money that its  
2 private money was therefore not encumbered. But this  
3 Court did not take that view.

4 I had meant to save some time for rebuttal.

5 QUESTION: But you haven't. Thank you.

6 MR. TRIBE: Thank you.

7 QUESTION: Thank you, Mr. Tribe.

8 General Starr.

9 ORAL ARGUMENT OF KENNETH W. STARR

10 ON BEHALF OF RESPONDENT

11 MR. STARR: Thank you, Mr. Chief Justice, and may it  
12 please the Court:

13 In light of what we have heard this morning, let me  
14 begin with a few very brief points of clarification.  
15 First, the context. This case involves a Federal program  
16 that is specialized. It is not Medicaid. It is not  
17 community health services. It is a family planning  
18 program and which the Secretary views, consistent with  
19 Congress's intent, as being a term of art.

20 It means, as the conference committee report  
21 suggested, preventive services, preconceptional services.  
22 It does not mean counseling or treating a pregnant woman,  
23 other than as part of her transition out of the family  
24 planning project, the Title X project, to another health  
25 care provider. That is what these regulations were



1 designed to do in response to criticisms leveled at the  
2 program by the General Accounting Office, by the Inspector  
3 General, and then pursuant -- and I think this is  
4 important in terms of the orderliness of the procedure.

5 There was a notice and comment rulemaking here which  
6 was responsive to the very kinds of concerns that had been  
7 identified by the General Accounting Office. That is to  
8 say the Secretary, among other things, had proceeded in a  
9 very informal way. There had never been regulations.

10 There had only been informal memoranda from the Office of  
11 General Counsel which were responding to ad hoc requests  
12 for essentially a no-action kind of letter or advice and  
13 the like.

14 Guidelines were finally promulgated in 1981. Those  
15 guidelines themselves represented a shift in the agency's  
16 position. Frankly, there had been, prior to the notice  
17 and comment rulemaking, great uncertainty and confusion  
18 and indeed I don't overstate it by saying chaos in the  
19 system as to precisely what was permitted and what was  
20 not.

21 And in the notice of proposed rulemaking and  
22 throughout the Secretary made it very clear that this  
23 program was limited.

24 Professor Tribe has quoted from the Federal Register.  
25 Let me share one very brief quote as well. The Secretary

1 said -- this is at 52 Federal Register 33.2.11 -- "as  
2 clearly contemplated by Title X and its legislative  
3 history, family planning is meant to address plans and  
4 methods for facilitating or preventing pregnancy, not for  
5 terminating it. As such, medical services or counseling  
6 relating to pregnancy care after pregnancy diagnosis or  
7 any services relating to abortion as a method of family  
8 planning are outside the scope of activity supported by  
9 Title X funds."

10 QUESTION: General Starr, do you take the position  
11 that the way the program was being run before these  
12 current regulations went into effect somehow did not meet  
13 the requirements of the statute?

14 MR. STARR: I think the answer to that is yes in this  
15 sense, Justice O'Connor. The Secretary did come to the  
16 view that the kind of counseling that was going on was not  
17 in fact consistent with the Secretary's reading of section  
18 1008, and at a minimum with the purpose. What the  
19 Secretary saw as the purpose was not to encourage or  
20 promote abortion, and that was being done.

21 QUESTION: Well, you take the position that  
22 compliance with the memos that had been sent in prior  
23 years in response to questions about providing neutral  
24 information was itself in violation of the statute?

25 MR. STARR: I don't think at the time, Justice

1 O'Connor, for this reason.

2 QUESTION: It would be now, but not then? Is that  
3 what you are saying?

4 MR. STARR: I think so. As odd as that may seem, I  
5 think so in light of the notice and comment rulemaking and  
6 the General Accounting Office report because, Justice  
7 O'Connor, those --

8 QUESTION: Suppose a different rule had been adopted,  
9 one in accordance with the prior memos? Would that be  
10 invalid under the terms of the statute, in your view?

11 MR. STARR: If it had had the effect of promoting or  
12 encouraging abortion, then I believe it would. We would  
13 owe a deference to the Secretary.

14 QUESTION: I'm not sure that's responsive.

15 MR. STARR: I'm sorry.

16 QUESTION: Because the prior memos at least purported  
17 to say viewpoint-neutral information may be given.

18 MR. STARR: That is exactly right. It was thought  
19 that non-directive counseling could in fact be consistent  
20 with the mandate, as those early memos, if you look at our  
21 footnote 3, the Carol Conrad memorandum said very clearly  
22 that promotion and encouragement of abortion is forbidden.

23 We believe, speaking on behalf of the General Counsel  
24 in this informal setting -- this is not the Secretary  
25 speaking; this is not through a notice and comment

1 rulemaking; this is an important lawyer's opinion -- it  
2 was her opinion that non-directive counseling was  
3 consistent with that goal.

4 The Secretary, after a notice and comment rulemaking,  
5 after GAO criticism, after an Inspector General criticism,  
6 said that is not so. And what we want to do is to return  
7 to what this program is about, which is preventive care.

8 QUESTION: But could the Secretary have taken the  
9 position of that earlier response and been within the  
10 meaning of the statute?

11 MR. STARR: I think that's problematic. I have,  
12 frankly, serious doubts that the Secretary could have, but  
13 I don't think we have to resolve that definitively here,  
14 and reasonable minds may differ on that.

15 QUESTION: Well, not if experience had shown that  
16 viewpoint-neutral information really wasn't consistent  
17 with the statute.

18 MR. STARR: Well, especially, Justice White, and  
19 getting back to what this statute is all about, what the  
20 Secretary saw is that this is a statute about preventive  
21 pre-conceptional services, that is to say providing  
22 pregnancy care goes beyond the statute.

23 QUESTION: General Starr, can I ask you, on that very  
24 point, the regulations, at least as quoted in the briefs,  
25 say that once a client served by a Title X project is



1 diagnosed as pregnant, she must be referred for  
2 appropriate prenatal and/or social services by furnishing  
3 a list of available providers that promote the welfare of  
4 the mother and the unborn child.

5 Is that provision authorized by the statute?

6 MR. STARR: Yes, I think so. The Secretary has long  
7 felt that the program must be administered in a humane,  
8 compassionate way that in fact attends to the health needs  
9 of the individual and to refer that person to an  
10 appropriate provider of medical care.

11 QUESTION: So the statute does require some post-  
12 pregnancy counseling?

13 MR. STARR: In the sense of transition, transitional  
14 referral, and providing, I think the regulation goes on,  
15 Justice Stevens, to say --

16 QUESTION: Never mind the regulation. Where does the  
17 statute require that or authorize that, for that matter?

18 MR. STARR: I don't think it requires it. I think  
19 that the Secretary, in his discretion, has determined that  
20 as a matter of common sense interpretation there must be a  
21 transition out of Title X to protect -- in essence to  
22 maintain the status quo until the referral appointment can  
23 be kept.

24 They will assist in keeping the referral appointment.  
25 And to ensure that the status quo is maintained the

1 individual is given necessary information to protect the  
2 health of the mother and of the unborn child.

3 QUESTION: Well, then why would it prohibit giving  
4 necessary health information in that rare case in which  
5 abortion might be medically indicated? I don't understand  
6 the distinction.

7 MR. STARR: If there is an emergency, then it can be.

8 QUESTION: No, it's not an emergency, but it's the  
9 better of two options just from a purely medical point of  
10 view, not for any family planning reason -- just for the  
11 health of the mother. Why can you say in the one case  
12 it's appropriate to have post-pregnancy advice and the  
13 other it's not appropriate -- under the statute only? I'm  
14 not talking constitutionally.

15 MR. STARR: Post-pregnancy advice is terribly  
16 limited. It's terribly limited because of the humanity of  
17 the situation. The individual needs to get to an  
18 appropriate provider of health care. She has, as it were,  
19 graduated from Title X.

20 If the individual is going into detailed options  
21 counseling, providing Spock on baby care and the like,  
22 showing baby care materials and the like, that is beyond  
23 the scope of Title X.

24 QUESTION: But this is not?

25 MR. STARR: I don't think so, and certainly they have

1 not challenged the fact that the individual should be  
2 given enough information to maintain the status quo until  
3 that short period -- and we hope it would be a very short  
4 period -- until she could see a physician who is in fact  
5 outside of the Title X program.

6 QUESTION: I don't understand what you mean by the  
7 status quo. The status quo is she is pregnant.

8 (Laughter.)

9 QUESTION: She doesn't need advice to stay pregnant.

10 (Laughter.)

11 MR. STARR: You are quite right. My choice of terms  
12 is infelicitous. To maintain the circumstances so that  
13 she can in fact get -- that is to say, if she needs  
14 information. You are pregnant. You should now in fact  
15 see an appropriate provider of medical care. Here is  
16 information that you need to know.

17 I'm scheduled to go to a party tomorrow night, and I  
18 tend to be a heavy drinker. It is completely appropriate  
19 for the physician -- and of course this is typically, the  
20 counseling is typically done -- and I think our colleagues  
21 on the other side realize this -- by health care  
22 practitioners, by nurses and nurse practitioners, are  
23 entitled to say here's a list of appropriate care  
24 providers, but at that party don't drink at all because  
25 you may damage your health, you may damage the health of

1 the unborn child.

2 That is appropriate, the Secretary has determined, in  
3 his interpretation of the statute.

4 There is no constitutional problem here by virtue of  
5 the Secretary following the very path that was laid down  
6 by the court in FCC v. League of Women Voters. That is  
7 what the program integrity requirements are all about. So  
8 that to maintain the abortion neutrality of the Title X  
9 program, to keep abortion out of that program entirely,  
10 the Secretary, through the 59.9 integrity regulations,  
11 permits the establishment of a separate vehicle.

12 QUESTION: It isn't an abortion neutrality. It is  
13 the one thing that is singled out that shall not be used  
14 as a means of family planning.

15 MR. STARR: It certainly tilts against abortion:  
16 There is no question about that.

17 But what the program integrity requirements permit is  
18 complete non-neutrality. That is to say, the grantee -  
19 - that is why the Secretary was quite precise in drawing  
20 the line between the Title X program or project and the  
21 grantee. The grantee is at liberty to have an abortion  
22 services clinic and the like to provide abortion-related  
23 information, to provide abortion counseling.

24 And that is exactly what this Court said in League of  
25 Women Voters was in fact permissible, following the lead



1 of what the Court indicated in Reagan v. Taxation with  
2 Representation.

3 QUESTION: But not as part of this program.

4 MR. STARR: Exactly, Justice Kennedy. That is the  
5 precise point. This is a limited program. The  
6 prohibition runs only to the program, and that is what  
7 takes this out of the unconstitutional conditions line of  
8 cases.

9 QUESTION: Suppose the medical care provider in the  
10 Title X program ascertains that the woman is pregnant.  
11 That provider has a regular practice of engaging in  
12 performing therapeutic abortions. Can he say I want you  
13 to make an appointment with me tomorrow at my other  
14 office, and I am going to give you some advice?

15 MR. STARR: Not if in that latter capacity that  
16 provider's principal purpose or principal business is the  
17 providing of abortions.

18 QUESTION: Then you are saying that this Title X  
19 grantee can still engage in abortion. It's really  
20 meaningless. This woman might find them out. She might  
21 not.

22 MR. STARR: But the list that can be provided,  
23 Justice Kennedy, I wouldn't focus on that one provider.  
24 The list is to be in fact a global list, leaving out only  
25 one kind of entity, and that is entities whose principal

1 business is the providing of abortions. There can in fact  
2 be providers on that list who do provide abortions, in  
3 response to Justice White's question.

4 QUESTION: Well, the lady asks the doctor in one of  
5 these Federally-funded organizations, asks the doctor,  
6 well, could you tell me where I can get an abortion. And  
7 he says no, I can't tell you where to get an abortion.  
8 But I'll tell you I'm going to refer you, give you a list  
9 of health care providers, and some of those people can  
10 answer questions that I can't answer.

11 Is that all right?

12 MR. STARR: That is correct. That is entirely  
13 correct. In fact, part of the theme that we have heard,  
14 Justice White, is that there is distortion, there is  
15 trickery. There should be none at all. If the program is  
16 proceeding with integrity, as it should, it will be up  
17 front with the clients of the Title X project and say we  
18 do not counsel with respect to abortion as a method of  
19 family planning.

20 We do not refer to clinics whose principal business  
21 is the providing of abortions. What we are going to give  
22 you, now that you have been diagnosed as pregnant, is a  
23 comprehensive list and on this list are appropriate  
24 providers of medical care to protect the health of the  
25 mother and the unborn child. And on that list there can

1 in fact be providers who do provide abortions.

2 QUESTION: General, what do you say the statute and  
3 the regs permit in a situation in which the object is not  
4 simply to preserve the status quo but the situation in  
5 which the Title X physician in the course of his  
6 consulting or examination concludes that the mother is  
7 pregnant and in fact is in some imminent danger to health?

8 In that case, do you take the position that either  
9 the statute or the regs permit the Title X physician to  
10 say you are in danger to health as a result of your  
11 pregnancy and one appropriate response to that would be to  
12 have an abortion and I will refer you to a hospital or a  
13 physician who can provide it? Would that place the  
14 program in violation of either the statute or the regs?

15 MR. STARR: Part B does, Part A does not. To say in  
16 Part A of your hypothetical your health is in danger, you  
17 do need treatment, that is absolutely fine, and to refer  
18 the person to an emergency provider of medical services is  
19 fine. To actually go forward, as I understand the  
20 hypothetical, and to counsel you need an abortion is  
21 beyond the mandate.

22 And the person can say, the health care provider can  
23 say, I'm not going to trick you. I'm not going to deceive  
24 you. This is important. Here is a list. In fact, I need  
25 to get you over for emergency care, but I am not at

1 liberty to be counseling with respect to the appropriate  
2 medical treatment.

3 QUESTION: Even in that case he's not counseling for  
4 the purposes of family planning. He is in fact acting as  
5 a physician for the purpose of preventing an imminent risk  
6 or removing an imminent risk to the patient's health. Why  
7 does that violate the statute or the regs?

8 MR. STARR: The problem is the context, that that  
9 advice is being given in the context of a Title X family  
10 planning program. And in fact the Secretary reasonably  
11 reads the 1008 prohibition that the goal that Congress had  
12 in what was inherently a controversial program is let's  
13 not bring abortion and the abortion controversy into the  
14 program. We have made the decision to bring  
15 contraceptives in.

16 QUESTION: But isn't he going a step further? Isn't  
17 he saying, if he follows the position that you have just  
18 outlined, isn't he saying that in fact if a Title X  
19 physician sees a professional, a standard professional  
20 need or obligation to give advice for the purpose of  
21 protecting the health of his patient from imminent danger,  
22 and in giving that advice he is not giving it for the  
23 purposes of family planning but simply for those  
24 traditional purposes, that too is forbidden?

25 Doesn't that go beyond the statute and the regs?



1 MR. STARR: I don't think so, Your Honor, because at  
2 that point the person, the physician in your hypothetical  
3 -- I think it is an extreme hypothetical, but accepting it  
4 and facing it -- I think in that hypothetical the  
5 physician has transcended the boundaries of Title X.

6 His Title X hat, family planning services, is on.  
7 Once he steps out of that hat and begins treating the  
8 individual's pregnancy, he is providing a different kind  
9 of medical care beyond the scope of Title X, quite apart  
10 from abortion.

11 QUESTION: The Secretary requires him to do that, as  
12 Justice Stevens' question earlier demonstrated. I mean,  
13 it's the Secretary that says you have to provide this kind  
14 of medical care in the regs.

15 MR. STARR: That you have to provide medical care  
16 that is needed during that interim period -- I won't use  
17 status quo -- during the interim period when an  
18 appointment is to be made. The key is make an  
19 appointment, and that's what I think the regulations  
20 suggest. Make an appointment with an emergency provider  
21 of services, and you can assist the person in making sure  
22 that that emergency appointment is in fact kept.

23 QUESTION: But in my hypothetical the interim period  
24 may be extraordinarily short. For all we know, the high  
25 blood pressure is going to result in a stroke within the

1 next hour, and it seems to me that you are telling us that  
2 in those circumstances -- to be sure that is not what  
3 Title X was concerned with, but in those circumstances --  
4 the physician cannot perform a normal professional  
5 responsibility which is outside of the object of Title X  
6 funding, even though that responsibility does not violate  
7 the prohibition against using abortion counseling for  
8 family planning.

9 I think you are telling us that in that circumstance,  
10 simply because it is outside the object of Title X, the  
11 Secretary in effect may preclude professional speech.

12 MR. STARR: I don't think that the program is  
13 prescribing professional speech, if I accept your  
14 hypothetical as not in fact permitting what the Secretary  
15 contemplated to take place. Here is what the Secretary  
16 contemplated -- that in cases in which emergency care is  
17 required -- that's, I think, what we are dealing with -- a  
18 Title X project shall be required only to refer the client  
19 immediately to an appropriate provider of emergency  
20 medical services.

21 QUESTION: It's one thing to say it may be required  
22 only to do that. It's another thing to say that he may be  
23 precluded, the physician may be precluded from something  
24 else, even though it does not violate the condition that  
25 Title X may not use abortion for family planning.

1 MR. STARR: That may very well be. That may very  
2 well be.

3 QUESTION: May I expand on that? Supposing the case  
4 is not one of emergency at the time of the conference but  
5 in the doctor's professional judgment unless steps are  
6 taken within 30 days there is a danger of an emergency,  
7 and he thinks the appropriate way of avoiding that danger  
8 is to at least consider abortion as an option.

9 What is he supposed to do under the regulations?

10 MR. STARR: I'm sorry. I missed the last part of the  
11 hypothetical.

12 QUESTION: What is the doctor's -- how much freedom  
13 does the doctor have to explain to the patient that in the  
14 next 30 days you ought to have some tests to see whether  
15 or not it's appropriate to have an abortion, because that  
16 may be the only way to avoid a risk that is not today an  
17 emergency but may become an emergency in three weeks?

18 MR. STARR: I think that the physician is at liberty  
19 to provide medical information that is necessary, and so I  
20 think that the physician in that hypothetical could  
21 respond, provide that physician's best medical judgment,  
22 as long as the physician does not in fact steer the  
23 patient in the direction of an abortion, but, rather,  
24 steers the patient in the direction of an appropriate care  
25 provider.

1 QUESTION: Well, but may the physician -- I don't  
2 want to use the word "steer" -- may the physician, as a  
3 part of his or her explanation of the problem, say that  
4 the reason I want you to see some other professional is I  
5 think it may be appropriate to avoid this danger by  
6 getting an abortion?

7 MR. STARR: I think that, in my judgment, that goes  
8 beyond what is permitted under Title X.

9 QUESTION: Well, is it permitted for him to give any  
10 other medical judgment? Is he permitted to do anything  
11 but refer? I mean, suppose he -- is he permitted to give  
12 the judgment, in my opinion, you should have the following  
13 course of treatment?

14 MR. STARR: He should not in fact, Justice Scalia, be  
15 in the business of treating pregnancy and caring for the  
16 person in her pregnant condition.

17 QUESTION: I thought he can only refer.

18 MR. STARR: Exactly right.

19 QUESTION: And in the event of an emergency of the  
20 sort Justice Souter was referring to he can refer even to,  
21 as I read the regulations, even to an agency whose  
22 principal business is abortion.

23 MR. STARR: I don't think that the regulations by  
24 their terms rule that out. It simply says emergency and  
25 an appropriate provider of emergency services.



1 At that point, the health of and welfare of the  
2 mother are paramount, and the physician must in fact make  
3 the appropriate referral to an emergency provider.

4 QUESTION: Let me ask one other question. Again  
5 assuming it is not an immediate emergency but a concern  
6 about 30 days from now, could the doctor say I just  
7 happened to notice this, I think you ought to have your  
8 tonsils taken out? I'm serious about that.

9 MR. STARR: Yes. I think that the physician can in  
10 fact alert the individual to a potential medical problem.

11 QUESTION: And suggest the proper solution, in his or  
12 her judgment?

13 MR. STARR: I think at that point the physician may  
14 very well be going beyond what Title X is all about. As  
15 an enforcement matter, as a practical matter --

16 QUESTION: It's no longer family planning, but is it  
17 something that the statute would prohibit the doctor from  
18 doing?

19 MR. STARR: I think it goes beyond the terms of the  
20 statute. Whether an enforcement action would be brought  
21 is quite another thing.

22 QUESTION: That's not my question. Do you think the  
23 statute would prohibit the doctor from giving medical  
24 advice that is not specifically authorized by the statute  
25 or contemplated within the notion of family planning? He

1 just sees a problem with the patient and says, look, I  
2 think this is what you should do.

3 My understanding is he can give any medical advice he  
4 wants to, except that he cannot say that I think an  
5 abortion is indicated.

6 MR. STARR: I disagree with that. On your tonsils  
7 example, it seems to me that under a de minimis approach  
8 that is unobjectionable. With respect to --

9 QUESTION: Well, say it's appendix or say it's major  
10 surgery, you ought to have a bypass operation. There are  
11 a lot of things that are -- if it's important, can he do  
12 it and unimportant not? Is that your notion?

13 MR. STARR: No. I think that the physician is simply  
14 going beyond what Title X is all about.

15 QUESTION: I understand he's going beyond what's been  
16 authorized. I'm asking if it violates either the statute  
17 or the regulations to give that kind of medical advice.

18 MR. STARR: I think it will violate the terms of the  
19 grant, because the grant is in fact -- they are funding  
20 this physician to provide Title X services.

21 QUESTION: So if he gave that kind of medical advice  
22 you could withdraw the grant for the future?

23 MR. STARR: In terms of what -- oh, I didn't say that  
24 at all.

25 QUESTION: Suppose I thought --

1 MR. STARR: Not at all. There may have been --there  
2 are all kinds of violations.

3 QUESTION: What are the consequences if violating the  
4 regulation about abortion? What can happen to the doctor  
5 for doing that?

6 MR. STARR: The program may be the subject of an  
7 audit and then appropriate action taken, which could  
8 include not renewing the grant.

9 QUESTION: Could the same action be taken if he gave  
10 advice to have a tonsillectomy, and, if not, why not?

11 MR. STARR: Well, it might, because the individual is  
12 at that point transcending Title X.

13 QUESTION: I presume you would certainly terminate  
14 the grant if indeed that were the regular practice, that  
15 people were coming in to get family planning advice simply  
16 because at the end of it the doctor said, by the way,  
17 while you're here, let me look at your tonsils. And they  
18 were regularly treating people or giving advice about all  
19 sorts of medical conditions. You would probably terminate  
20 the program in that event, I would assume.

21 MR. STARR: That is precisely why I was suggesting  
22 the possibility of a de minimis exception. That is to say  
23 there is no rule that --

24 QUESTION: With respect to abortion consultation,  
25 that is much more likely to happen regularly than is

1 advice about tonsils.

2 MR. STARR: Individuals are coming in, exactly, for  
3 the purpose of receiving family planning.

4 QUESTION: Well, does it happen regularly that when a  
5 pregnant person comes in that there's a medical need  
6 unrelated to family planning problems? I thought you said  
7 that was the rare exception.

8 MR. STARR: Well, the individual can again be  
9 referred out. I think we're talking about here is what  
10 you should do. In your hypothetical, Justice Stevens, as  
11 I understand it, the physician is saying I am here as a  
12 Title X physician, but I am telling you to go have your  
13 tonsils out. The individual is, it seems to me, at that  
14 point practicing beyond the scope of the program.

15 QUESTION: Just if a doctor sees a medical problem,  
16 is the doctor permitted to tell the patient about the  
17 existence of the problem, with the normal recommended,  
18 what his professional advice is. I guess you are saying  
19 no, that he cannot.

20 MR. STARR: He certainly is able to say I have  
21 spotted a tonsils problem and you should go have it  
22 attended to. It is not the purpose of this project to  
23 tell you exactly what you should do, but we will assist  
24 you in finding an appropriate health care provider.

25 Last point that I would like to make on the



1 unconstitutional conditions point. Much has been said  
2 about Perry against Sindermann and the line of cases that  
3 suggest that the government cannot in fact require someone  
4 to give up a liberty as a condition for a particular kind  
5 of benefit -- Speiser against Randall and the like.

6 That, as I was saying before the colloquy, about what  
7 the regulations permit, is exactly why the Secretary has  
8 the program integrity requirements, to permit these kinds  
9 of services to be permitted through a separate vehicle,  
10 and by virtue of that there is in fact no extension of the  
11 prohibition beyond the program itself. The prohibition is  
12 entirely program-specific, and by virtue of that there is  
13 no unconstitutional condition that is being mounted or  
14 imposed upon these individuals and on these clinics.

15 Above all, as this Court has said time and again, the  
16 law assumes a robust common sense, and a robust sense that  
17 individuals are in fact free to determine whether to  
18 participate in a government program or not. The Secretary  
19 fashioned a program that was true to Congress's intent, as  
20 reflected in 1008 and in the statements of legislators and  
21 the conference committee report, that this program, to  
22 have integrity, must in fact be a preventive services pre-  
23 conceptional program.

24 I thank the Court.

25 CHIEF JUSTICE REHNQUIST: Thank you, General Starr.

1           The case is submitted.

2           (Whereupon, at 11:01 a.m., the case in the above-  
3 entitled matter was submitted.)

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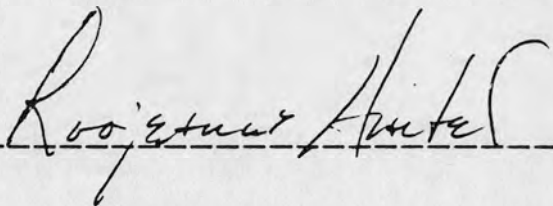
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## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that  
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electronic sound recording of the oral argument before the  
Supreme Court of The United States in the Matter of:*

Irving Rust, ETC., ET AL., Petitioner v. Louis W. Sullivan,  
Secretary of Health and Human Services; and New York, et al.,  
Petitioners v. Louis W. Sullivan, Secretary of Health and  
Human Services - Docket Nos. 89-1391 & 89-1392

*and that these attached pages constitutes the original transcript  
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