

IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

PATRICIA R. HARRIS, SECRETARY OF
HEALTH AND HUMAN SERVICES, APPELLANT

v.

CORA McRAE, ET AL.

PATRICIA R. HARRIS, SECRETARY OF
HEALTH AND HUMAN SERVICES, APPELLANT

v.

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION

JASPER F. WILLIAMS AND EUGENE F. DIAMOND,
APPELLANTS

v.

DAVID ZBARAZ, ET AL.

JEFFREY C. MILLER, ACTING DIRECTOR, ILLINOIS
DEPARTMENT OF PUBLIC AID, APPELLANT

v.

DAVID ZBARAZ, ET AL.

UNITED STATES OF AMERICA, APPELLANT

v.

DAVID ZBARAZ, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT
COURTS FOR THE EASTERN DISTRICT OF NEW YORK
AND THE NORTHERN DISTRICT OF ILLINOIS

**MOTION FOR LEAVE TO FILE BRIEF AND
BRIEF OF CERTAIN ORGANIZATIONS AS AMICI AND
AMICAE CURIAE IN SUPPORT OF PETITIONS FOR
REHEARING**

(Attorneys names on inside cover)

LAUREN C. ANDERSON

c/o National Conference of Black Lawyers
126 West 119th Street
New York, New York 10026
(212) 864-4000

HAYWOOD BURNS

c/o Center for Legal Education
& Urban Policy
City College of New York
New York, New York 10031
(212) 690-5425

ARTHUR KINOY

c/o School of Law—Newark
S.I. Newhouse Center
15 Washington Street
Newark, New Jersey 07102
(201) 648-5521

CATHERINE G. RORABACK

P.O. Box 935
Canaan, Connecticut 06108
(203) 824-5121

Attorneys for amici and amicae curiae.

The following organizations respectfully move for leave to file the attached brief as amici curiae in support of the petitions for rehearing in these cases: ^{*/}

ABORTION RIGHTS COUNCIL OF MINNESOTA
ALLIANCE OF REPRODUCTIVE RIGHTS-CINCINNATI
ALLEGHENY REPRODUCTIVE HEALTH CENTER
AMERICAN ACADEMY OF CHILD PSYCHIATRY
AMERICAN BAPTIST CHURCHES
AMERICAN ASSOCIATION OF UNIVERSITY WOMEN
AMERICAN ETHICAL UNION
AMERICANS FOR DEMOCRATIC ACTION
AMERICAN FRIENDS SERVICE COMMITTEE
AMERICAN HUMANIST ASSOCIATION
AMERICAN INDIAN HEALTH CARE ASSOCIATION
AMERICAN JEWISH CONGRESS
AMERICAN PSYCHIATRIC ASSOCIATION
AMERICAN PSYCHOLOGICAL ASSOCIATION
AMERICAN PUBLIC HEALTH ASSOCIATION
ASIAN-AMERICAN LEGAL DEFENSE AND EDUCATION FUND
ASIAN and PACIFIC WOMEN'S CAUCUS OF WASHINGTON STATE
ASIAN WOMEN UNITED
ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW
THE ASSOCIATION OF LEGAL AID ATTORNEYS OF THE CITY OF NEW YORK, DISTRICT 65, UAW
ASSOCIATION OF PLANNED PARENTHOOD PHYSICIANS

^{*/} Organizational statements of interest are contained in the Appendix to this Brief.

ASSOCIATION OF RAZA MENTAL HEALTH ADMINI-
STRATORS, DIRECTORS AND ADVOCATES
ASSOCIATION FOR WOMEN IN PSYCHOLOGY
ATHLETIC ASSOCIATION FOR WOMEN
ATLANTIC COUNTY WOMEN'S CENTER - ABUSE CENTER
BAY AREA WOMEN AGAINST RAPE
BERKELEY WOMEN'S HEALTH COLLECTIVE
BIRTHWAYS
BLACK AMERICAN LAW STUDENTS ASSOCIATION
BLACK PANTHER PARTY
BLACK WOMEN'S AGENDA
B'NAI BRITH WOMEN
BOSTON AREA CHAPTER OF THE NEW
AMERICAN MOVEMENT
BOSTON MOBILIZATION FOR SURVIVAL
BOSTON PEOPLE'S ORGANIZATION
BOSTON WOMEN'S HEALTH BOOK COLLECTIVE
BUENA VISTA WOMEN'S SERVICES
BUFFALO WOMEN'S LIBERATION UNION
CALIFORNIA RAZA HEALTH ALLIANCE
CALIFORNIA RURAL HEALTH FEDERATION
CALIFORNIA UNION OF HEALTHCARE PROFES-
SIONALS, SEIU, LOCAL 723, AFL-CIO
CALIFORNIA URBAN INDIAN HEALTH CENTERS, INC.
CALIFORNIA WOMEN LAWYERS
CALIFORNIA WOMEN'S HEALTH NETWORK
CATHOLICS FOR A FREE CHOICE
CEDAR RAPIDS CLINIC FOR WOMEN
CENTER FOR ELIMINATION OF VIOLENCE IN
THE FAMILY
CENTER FOR MEDICAL CONSUMERS
CENTER FOR WOMEN POLICY STUDIES
CENTRO PARA IMMIGRANTAS
CHARLES HOUSTON BAR ASSOCIATION
CHELSEA WOMEN'S HEALTH TEAM
CHICANA FORUM
CHICANA SERVICE ACTION CENTER
CHICO FEMINIST WOMEN'S HEALTH CENTER
CHILDREN BY CHOICE COALITION OF SAN MATEO COUNTY

CHRISTIAN CHURCH (DISCIPLES OF CHRIST)
DEPARTMENT OF CHURCH WOMEN OF THE
DIVISION OF HOMELAND MINISTRIES
CITIZENS COMMITTEE FOR CHILDREN OF NEW
YORK, INC.
CLEVELAND PRO-CHOICE ACTION COMMITTEE
CLEVELAND RAPE CRISIS CENTER
COALITION OF LABOR UNION WOMEN
COALITION FOR ABORTION RIGHTS EQUALITY
COALITION FOR ABUSED WOMEN, INC.
COALITION FOR A PEOPLE'S ALTERNATIVE
in 1980
COALITION FOR CHOICE
COALITION FOR THE MEDICAL RIGHTS OF
WOMEN/COMMITTEE TO DEFEND REPRODUC-
TIVE RIGHTS
COLUMBIA COUNTY WOMEN'S RESOURCE CENTER
COMISION FEMENIL MEXICANA NACIONAL
COMMITTEE FOR ABORTION RIGHTS AND AGAINST
STERILIZATION ABUSE
COMMITTEE OF INTERNS AND RESIDENTS
COMMITTEE TO END STERILIZATION ABUSE
COMMUNITY HEALTH ADVOCATES
COMMUNITY LAW PROJECT
COMMUNITY SERVICE SOCIETY
CONNECTICUT WOMEN'S EDUCATION AND LEGAL
DEFENSE FUND, INC.
COORDINATING CENTER FOR WOMEN IN CHURCH
AND SOCIETY, THE UNITED CHURCH OF
CHRIST
COUNTY WELFARE DIRECTORS ASSOCIATION
DETROIT ALLIANCE FOR A RATIONAL ECONOMY
DISTRICT 65- UAW
DISTRICT 1199, NATIONAL UNION OF HOSPITAL
AND HEALTH CARE EMPLOYEES, AFL-CIO
DOMESTIC VIOLENCE PROJECT
EDUCATION FOR FREEDOM OF CHOICE IN OHIO

EMERGE: A MEN'S COUNSELING SERVICE ON
DOMESTIC VIOLENCE
EMORY UNIVERSITY CENTER FOR WOMEN'S
INTEREST LAW
EQUAL RIGHTS ADVOCATES, INC.
FAMILY ADULT SHELTER
FAMILY PLANNING COUNCIL OF WESTERN
MASSACHUSETTS, INC.
FANNY LOU HAMER HEALTH CLINIC
FEDERALLY EMPLOYED WOMEN, INC.
FEDERATION OF ORGANIZATIONS FOR
PROFESSIONAL WOMEN
FEDERATION OF PROTESTANT WELFARE AGENCIES
FEMINIST HEALTH WORKS
FEMINIST PARTY
FEMINIST WOMEN'S HEALTH CENTER (ATLANTA)
FINANCIAL WOMEN'S ASSOCIATION OF NEW YORK
FOUNDERS CLINIC, INC.
FREEDOM OF CHOICE - MIAMI VALLEY
FREEDOM OF CHOICE - OHIO
GAY AND LESBIAN ADVOCATES AND DEFENDERS
GAY POLITICAL CAUCUS
GRAND JURY PROJECT
HARRIS COUNTY DEMOCRATS
HARRIS COUNTY WOMEN'S POLITICAL CAUCUS
HEALTH COALITION FOR AFFIRMATIVE ACTION
HEALTHRIGHT, INC.
HUMAN SERVICES ALLIANCE
INDIAN RIGHTS ASSOCIATION
INSTITUTE OF THE BLACK WORLD
INTERNATIONAL SOCIALIST ORGANIZATION
INTERNATIONAL UNION OF ELECTRICAL, RADIO
AND MACHINE WORKERS, AFL-CIO-CLC
INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA
JUVENILE RIGHTS PROJECT
LAS AMIGAS, INC.
LAS MUJERES FOR POLITICAL ACTION
LATINAS IN HEALTH AND HUMAN SERVICES
LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL

LEAGUE OF WOMEN VOTERS OF THE U.S.A.
LESBIAN/GAY CAUSE OF BUTTE COUNTY
LOS ANGELES FEMINIST WOMEN'S HEALTH CENTER
LOS ANGELES CHILDBIRTH CENTER
LOUISIANA CENTER FOR THE PUBLIC INTEREST
MAINE RIGHT TO CHOOSE
MASSACHUSETTS COALITION OF BATTERED
WOMEN'S SERVICE GROUPS
MASSACHUSETTS LAW REFORM INSTITUTE
MEMPHIS CENTER FOR REPRODUCTIVE HEALTH
METHODIST FEDERATION FOR SOCIAL ACTION
MEXICAN-AMERICAN LEGAL DEFENSE AND
EDUCATIONAL FUND
MEXICAN-AMERICAN WOMEN'S NATIONAL ASSO-
CIATION
MICHIGAN CITIZENS LOBBY
MICHIGAN LEGAL SERVICES
MICHIGAN WELFARE RIGHTS ORGANIZATION
MIDWEST HEALTH CENTER FOR WOMEN
MIDWEST WOMEN'S CENTER
MIN AN HEALTH CENTER
MS. FOUNDATION FOR WOMEN, INC.
MUJERES LATINAS EN ACCION
MULTNOMAH BAR ASSOCIATION/LEGAL AID
SERVICE
NATIONAL ABORTION FEDERATION
NATIONAL ABORTION RIGHTS ACTION LEAGUE
NATIONAL ALLIANCE FOR OPTIONAL PARENT-
HOOD
NATIONAL ALLIANCE AGAINST RACIST AND
POLITICAL REPRESSION
NATIONAL ASSOCIATION FOR THE ADVANCEMENT
OF COLORED PEOPLE
NATIONAL ASSOCIATION OF COMMISSIONS
FOR WOMEN
NATIONAL ASSOCIATION OF FARMWORKER
ORGANIZATIONS

NATIONAL ASSOCIATION OF SOCIAL WORKERS
NATIONAL BAR ASSOCIATION
NATIONAL CAPITAL TAY-SACHS FOUNDATION
NATIONAL CENTER ON WOMEN AND FAMILY LAW
NATIONAL COMMITTEE ON HOUSEHOLD
EMPLOYMENT
NATIONAL CONFERENCE OF BLACK LAWYERS
NATIONAL CONFERENCE OF PUERTO RICAN WOMEN
NATIONAL COUNCIL OF CHURCHES OF CHRIST
IN THE U.S.A.
NATIONAL COUNCIL OF JEWISH WOMEN
NATIONAL EMPLOYMENT LAW PROJECT STAFF
ASSOCIATION
NATIONAL FAMILY PLANNING AND REPRODUCTIVE
HEALTH ASSOCIATION
NATIONAL FEDERATION OF TEMPLE SISTERHOODS
NATIONAL GAY TASK FORCE
NATIONAL LAWYERS GUILD
NATIONAL LEGAL AID AND DEFENDER ASSO-
CIATION
NATIONAL PUERTO RICAN FORUM
NATIONAL ORGANIZATION FOR WOMEN
NATIONAL ORGANIZATION FOR WOMEN LEGAL
DEFENSE AND EDUCATION FUND
NATIONAL ORGANIZATION OF LEGAL SERVICES
WORKERS
NATIONAL URBAN LEAGUE, INC.
NATIONAL WOMEN'S CONFERENCE OF THE
AMERICAN ETHICAL UNION
NATIONAL WOMEN'S HEALTH NETWORK
NATIONAL WOMEN'S POLITICAL CAUCUS
NATIONAL WOMEN'S STUDIES ASSOCIATION
NEW JERSEY ASSOCIATION OF BLACK EDUCATORS
NEW YORK COALITION CONCERNED WITH
ADOLESCENTS AND THEIR FAMILIES
NEW YORK MOBILIZATION FOR SURVIVAL

NEW YORK WOMEN FOR CRIMINAL JUSTICE, INC.
NORMENS EQUITY ACTION LEAGUE, HOUSTON
CHAPTER
NORTHWEST WOMEN'S HISTORY PROJECT
NOVA HEALTH SYSTEM, DBA REPRODUCTIVE
SERVICES
OMNI HEALTH CENTER
OPTIONS FOR WOMEN OVER FORTY
OREGON FEDERATION OF NURSES, LOCAL 5017
OREGON LEGAL SERVICES
OREGON WOMEN'S LAW CAUCUS
ORGANIZATION OF WOMEN FOR LEGAL AWARENESS
PARK SLOPE SAFE HOMES PROJECT
PEOPLE'S ALLIANCE
PHYSICIAN'S FORUM
PITTSBURGH FREE CLINIC, INC.
PLANNED PARENTHOOD FEDERATION OF AMERICA,
INC.
PORTLAND MENTAL HEALTH PROJECT
PORTLAND STATE UNIVERSITY WOMEN'S STUDIES
CERTIFICATE PROGRAM
PORTLAND WOMEN'S HEALTH CENTER
PORTLAND WOMEN'S RESOURCE CENTER
PORTLAND YWCA WOMEN'S RESOURCE CENTER
PREGNANCY CONSULTATION CENTER
PRETERM CLEVELAND
PRO-CHOICE COALITION
PROJECT RETURN FOUNDATION, INC.
PUERTO RICAN LEGAL DEFENSE AND EDUCATION
FUND
RAPE AND ASSAULT COMMITTEE FOR THE
NASHUA AREA, INCL
RELIGIOUS COALITION FOR ABORTION RIGHTS
RELIGIOUS LEADERS FOR A FREE CHOICE
REPRODUCTIVE RIGHTS NATIONAL NETWORK
REPRODUCTIVE SERVICES
SAN FRANCISCO LAWYERS' COMMITTEE FOR
URBAN AFFAIRS
SAN FRANCISCO WOMEN'S CENTER/WOMEN'S
BUILDING

SAN FRANCISCO WOMEN'S HEALTH CENTER
 SCHENECTADY COMMUNITY ACTION PROGRAM, INC.
 SOCIAL SERVICES EMPLOYEES UNION, LOCAL
 371, DC 37, AFSCME
 SOJOURNER TRUTH CENTER FOR WOMEN
 SOMERVILLE WOMEN'S CENTERS
 SOUTHERN POVERTY LAW CENTER
 SUMMIT MEDICAL CENTER
 SUPPORT CENTER
 TALLAHASSEE FEMINIST WOMEN'S CENTER
 ULSTER COUNTY COALITION FOR FREE CHOICE
 UNION OF AMERICAN HEBREW CONGREGATIONS
 UNION W.A.G.E.
 UNITED CHURCH BOARD FOR HOMELAND MINISTRIES
 UNITARIAN UNIVERSALIST ASSOCIATION
 UNITARIAN UNIVERSALIST SERVICE COMMITTEE
 UNITARIAN UNIVERSALIST WOMEN'S FEDERATION
 UNITED ELECTRICAL, RADIO & MACHINE
 WORKERS OF AMERICA
 UNITED NEIGHBORHOOD HOUSES
 UNITED PRESBYTERIAN CHURCH IN THE U.S.A.
 UNITED SYNAGOGUE OF AMERICA
 UNITED WELFARE LEAGUE
 WASHINGTON SQUARE LEGAL SERVICES, INC.
 WAYNE COUNTY NEIGHBORHOOD LEGAL SERVICES
 WELFARE ACTION COALITION
 WELFARE RECIPIENTS LEAGUE, INC.
 WESTCHESTER COALITION FOR LEGAL ABORTION
 WESTCHESTER PEOPLE'S ACTION COALITION, INC.
 WESTERN NEW YORK COALITION FOR FREEDOM
 OF CHOICE
 WESTSIDE MOTHERS
 WESTSIDE WOMEN'S CLINIC
 WAR RESISTER'S LEAGUE
 WOMEN AGAINST ABUSE
 WOMEN AGAINST PORNOGRAPHY
 WOMEN AGAINST VIOLENCE AND PORNOGRAPHY
 IN MEDIA

WOMEN AND CHILDREN'S RIGHTS COALITION
 CITIZENS GROUP
 WOMEN'S CRISIS SERVICE
 WOMEN FOR WOMEN OF CINCINNATI, INC.
 WOMEN'S HEALTH CONCERNS COMMITTEE
 WOMEN-IN-CRISIS/COUNSELING AND ASSISTANCE
 WOMEN IN HEALTH ROUNDTABLE
 WOMEN IN POLITICS
 WOMEN IN SELF-HELP
 WOMEN LAWYERS ASSOCIATION OF LOS ANGELES
 WOMEN LAWYERS ASSOCIATION OF MICHIGAN
 WOMEN ORGANIZED AGAINST RAPE
 WOMEN ORGANIZING FOR REPRODUCTIVE CHOICE
 WOMEN U.S.A.
 WOMEN'S ACTION ALLIANCE
 WOMEN'S ADVOCATES
 WOMEN'S BAR ASSOCIATION OF MASSACHUSETTS
 WOMEN'S CAUCUS FOR ART, HOUSTON CHAPTER
 WOMEN'S CENTER
 WOMEN'S CENTER OF MID-MINNESOTA
 WOMEN'S COALITION
 WOMEN'S COMMISSION IN EXILE
 WOMEN'S EQUITY ACTION LEAGUE EDUCATIONAL
 AND LEGAL DEFENSE FUND
 WOMEN'S HEALTH SERVICES, INC. (CONNECTICUT)
 WOMEN'S HEALTH SERVICES, INC. (PITTSBURGH)
 WOMEN'S HEALTH SERVICES (SANTA FE)
 WOMEN'S INTERNATIONAL LEAGUE FOR PEACE
 AND FREEDOM
 WOMEN'S LAW CENTER
 WOMEN'S LAW FUND
 WOMEN'S LAW PROJECT
 WOMEN'S LEAGUE FOR CONSERVATIVE JUDAISM
 WOMEN'S RESOURCE AND SURVIVAL CENTER
 WOMEN'S RESOURCE CENTER (CALIFORNIA)
 WOMEN'S RESOURCE CENTER (ST. LOUIS)
 WOMEN'S RIGHTS ACTION GROUP
 WOMENSPACE

WOMEN'S STUDIES COLLEGE, STATE UNIVERSITY
OF NEW YORK, BUFFALO
WOMEN'S WORK PROJECT
WORKERS WORLD PARTY/YOUTH AGAINST WAR
AND FASCISM
WORKING WOMEN'S INSTITUTE
YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF
GREATER PITTSBURGH
YWCA OF THE U.S.A. - NATIONAL BOARD
YWCA OF NEW YORK CITY
YWCA OF SYRACUSE, ONANDAGA COUNTY (N.Y.)
YWCA OF PONTIAC-NORTH OAKLAND (MICHIGAN)
YWCA BATTERED WOMEN'S PROGRAM
YWCA WOMEN'S CRISIS SERVICE OF MANCHESTER
YWCA WOMEN'S TRADE CENTER
YOUTH PRIDE, INC.
ZERO POPULATION GROWTH

The consent of the attorneys for all the parties in these cases has been obtained and letters to this effect have been forwarded to the Clerk of the Court. Amici have been advised to proceed by way of motion, however, in light of the fact that Rule 36 effective June 30, 1980, does not provide a procedure for the filing of amicus briefs in regard to petitions for rehearing.

Amici are 286 civil rights, labor, church, health, professional and community service organizations whose work, constituencies and interests are gravely affected by the decisions in this case. Amici ask leave to file this brief because of the extraordinary importance of this case in terms of its consequences for the lives of women and children and its implications for the principles of equal

justice. Amici believe that their brief will contain a more complete analysis of the errors in the majority's opinions than contained in the petitions of the parties.

Amici urge that special circumstances exist for granting this motion: the fact that expedition of the appeal appears to have deprived the Court of time necessary thoroughly to consider the complex record and issues before it, that the cases were decided by a bare majority, and that the ruling appears to be an unprecedented departure from the principles of equal justice previously applied by the Court.

Dated: New York, N.Y.
July 25, 1980

Respectfully submitted,

LAUREN C. ANDERSON
c/o National Conference of
Black Lawyers
126 West 119th Street
New York, N.Y. 10026
(212) 864-4000

HAYWOOD BURNS
c/o Center for Legal Education and Urban Policy
City College of New York
New York, N.Y. 10031
(212) 690-5425

ARTHUR KINOY
c/o School of Law-Newark
S.I. Newhouse Center
15 Washington Street
Newark, New Jersey 07102
(201) 648-5521

CATHERINE G. RORABACK
P.O. Box 935
Canaan, Connecticut 06108
(203) 824-5121

Attorneys for Amici and
Amicae Curiae

Table of Contents

	<u>page</u>
INTEREST OF THE AMICI	2
INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. THE MAJORITY'S DECISIONS ARE INCONSISTENT WITH THE CON- STITUTION'S RECOGNITION THAT PUBLIC ASSISTANCE PROGRAMS CREATE AN ENTITLEMENT TO IMPARTIAL TREATMENT	7
II. THE MAJORITY DECISIONS AP- PROVE A DOUBLE STANDARD OF MINIMAL CONSTITUTIONAL ACCEPTABILITY	12
III. THE MAJORITY OPINIONS IGNORE THE CONSTITUTIONAL PRINCIPLE THAT DENIAL OF A STATUTORY ENTITLEMENT IS COERCIVE IN FACT	16
IV. THE MAJORITY OPINIONS IGNORE THE CONSTITUTIONAL PRINCIPLE THAT GOVERNMENT MAY NOT WITH- HOLD STATUTORY ENTITLEMENTS TO THWART THE EXERCISE OF CONSTITUTIONAL RIGHTS	21
CONCLUSION	25
APPENDIX: Organizational State- ments of Interest	al - al69

Table of Cases and Authorities

<u>Case</u>	<u>page</u>
<u>Board of Regents v. Roth,</u> 408 U.S. 564 (1972)	7,10
<u>Brown v. Board of Education,</u> 347 U.S. 483 (1954)	19
<u>Califano v. Jobst,</u> 434 U.S. 47 (1977)	22
<u>Dred Scott v. Sanford,</u> 60 U.S. (19 How.) 393 (1856)	3
<u>Elrod v. Burns,</u> 427 U.S. 347 (1976)	9,10,21
<u>Frontiero v. Richardson,</u> 411 U.S. 677 (1973)	19
<u>Frost & Frost Trucking Co. v. Railroad Commission,</u> 271 U.S. 583 (1925)	7
<u>Fullilove v. Klutenick,</u> ___ U.S. ___, 48 U.S.L.W. (1980)	19
<u>Goldberg v. Kelly,</u> 392 U.S. 254 (1970)	7,8,9,16
<u>Goldsmith v. United States Board of Tax Appeals,</u> 270 U.S. 117 (1926)	7
<u>Graham v. Richardson,</u> 403 U.S. 365 (1971)	10

Table of Cases and Authorities - cont'd

<u>Case</u>	<u>Page</u>
<u>Griggs v. Duke Power Co.,</u> 401 U.S. 424 (1971)	19
<u>Maher v. Roe,</u> 432 U.S. 464 (1977)	passim
<u>Memorial Hospital v. Maricopa County,</u> 415 U.S. 250 (1974)	7,16,17
<u>Perry v. Sinderman,</u> 408 U.S. 593 (1972)	7,9
<u>Railway Express Agency v. People of the State of New York,</u> 336 U.S. 106 (1949)	26
<u>Roe v. Wade,</u> 410 U.S. 113 (1973)	passim
<u>San Antonio School District v. Rodriguez,</u> 411 U.S. 1 (1973)	26
<u>Shapiro v. Thompson,</u> 394 U.S. 618 (1969)	7,17,22
<u>Sherbert v. Verner,</u> 374 U.S. 398 (1963)	7,17
<u>Slochower v. Bd. of Higher Education,</u> 350 U.S. 551 (1956)	7
<u>Speiser v. Randall,</u> 357 U.S. 513 (1958)	7,21

Table of Cases and Authorities - cont'd

<u>Case</u>	<u>Page</u>
<u>United States v. Jackson,</u> 390 U.S. 570, 581 (1968) . . .	22
<u>United States Department of</u> <u>Agriculture v. Moreno,</u> 413 U.S. 528 (1973)	22
<u>Williamson v. Lee Optical Co.,</u> 348 U.S. 483, 491 (1955) . . .	15

Other Authorities

Stevens & Stevens, "Medicaid: Anatomy of a Dilemma," 35 Law & Contemporary Problems, 348 (1970)	11
--	----

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

JASPER F. WILLIAMS AND EUGENE F. DIAMOND,
APPELLANTS

v.

DAVID ZBARAZ, ET AL.

JEFFREY C. MILLER, ACTING DIRECTOR, ILLINOIS
DEPARTMENT OF PUBLIC AID, APPELLANT

v.

DAVID ZBARAZ, ET AL.

UNITED STATES OF AMERICA, APPELLANT

v.

DAVID ZBARAZ, ET AL.

PATRICIA R. HARRIS, SECRETARY OF
HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

CORA MCRAE, ET AL.

PATRICIA R. HARRIS, SECRETARY OF
HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION

BRIEF OF CERTAIN ORGANIZATIONS AS
AMICI AND AMICAE CURIAE IN SUPPORT
OF PETITION FOR REHEARING

INTEREST OF THE AMICI

The 286 local and national organizations ^{1/} which join this brief represent a broad spectrum of American society. They include organizations serving the health needs of women, welfare recipients, minority, and women's groups organized to seek equal justice; associations of professional women and men; labor organizations; community groups; church and lay organizations; advocates for the health and legal rights of the poor; and groups organized to defend abortion and reproductive rights.

Despite widely differing beliefs on the subject of abortion, amici share the conviction that the personal liberty recognized in Roe v. Wade and protected

^{1/} Organizational statements of interest are contained in the Appendix to this Brief.

against state interference must be protected for all women -- rich and poor alike. They join in this brief to express their deep concern that, if left to stand, the majority decisions in McRae and Zbaraz will not only have devastating consequences for the lives of hundreds of thousands of poor women, children and families, but also sanction the erosion of the principles of equal justice.

INTRODUCTORY STATEMENT AND
SUMMARY OF ARGUMENT

The promise of the Civil Rights Amendments is the promise of equal justice and one Constitution for all. The majority opinions, however, create a double standard of health care and separate Constitutions -- one for the rich and one for the poor. Just as Dred Scott v. Sanford/re-
60 U.S. (19 How.) 393 (1856),
fused citizenship to Black people, these

opinions strip the poor of meaningful citizenship under the fundamental law. Not only do they fail to recognize the coercive impact that selective provision of benefits has on the exercise of constitutional rights. They also fail to apply to the deprivation of welfare entitlements the same standard of minimal constitutional acceptability -- rational relationship to a legitimate state interest -- by which the guarantee of impartial justice is tested in every other sphere and in regard to matters of far less constitutional consequence. Along with Mr. Justice Marshall, amici "do not believe that a constitution committed to the equal protection of the laws can tolerate this result." Harris v. McRae, slip op. at 12 (concurrence).

Amici ask the Court to reconsider the thorough and indisputable factual findings

of the District Court which demonstrate that an unwanted and complicated pregnancy is for many poor women the most severe physical and mental health crisis of their younger years. Amici ask the Court to reconsider a ruling which deems it reasonable for the state to "encourage" the continuation of dangerous pregnancies by the poor alone and pay a doctor to preside over a woman's death or disablement, but not to perform the one service that could have averted these tragedies. Amici ask the Court to reconsider a ruling which opens the door to wholesale use of government programs not to benefit the poor, but rather deliberately to destroy their basic civil rights and jeopardize their survival and welfare.

ARGUMENT

Both the majority opinions and the concurring opinion of Mr. Justice White failed to grapple with the principle that the existence of the Medicaid program creates an entitlement to non-discriminatory treatment. While amici believe that the Court erred in Maher v. Roe, 432 U.S. 464 (1977) for the reasons stated in dissenting opinions of Mr. Justices Brennan, Blackmun and Marshall, the failure of the instant decisions to address the differences between this case and Maher from an equal protection perspective represent an unprecedented departure from the basic tenets of constitutional protection for the poor.

I. THE MAJORITY'S DECISIONS ARE INCONSISTENT WITH THE CONSTITUTION'S RECOGNITION THAT PUBLIC ASSISTANCE PROGRAMS CREATE AN ENTITLEMENT TO IMPARTIAL TREATMENT.

The Court has long held that public benefits -- whether they be in the form of a license to practice one's profession, the right to do business, the right to retain public employment, eligibility for tax exemption, unemployment compensation, or other public assistance -- are constitutionally protected entitlements, whose granting and taking away is subject to constitutional limitations.^{2/}

^{2/} See, e.g., Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117 (1926); Frost & Frost Trucking Company v. Railroad Commission, 271 U.S. 583 (1925); Slochower v. Bd. of Higher Education, 350 U.S. 551 (1956); Perry v. Sinderman, 408 U.S. 593 (1972); Bd. of Regents v. Roth, 408 U.S. 564 (1972); Speiser v. Randall, 357 U.S. 513; Sherbert v. Verner, 374 U.S. 398 (1963); Shapiro v. Thompson, 394 U.S. 618 (1969); Goldberg v. Kelly, 392 U.S. 254 (1970); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).

This is nowhere more clearly stated than in Goldberg v. Kelly, 397 U.S. 254 (1970), where by the majority of the eight, the Court recognized that property rights -- so diligently protected by the framers of the Constitution -- must, in our modern age, encompass government largesse in the form of welfare benefits for the poor.^{3/}

^{3/} It may be realistic today to regard welfare entitlements as more like "property" than a "gratuity." Much of the existence of the wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that

(s)ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and the lawyer their professional licenses, the worker his union membership, contract and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government; subsidies to farmers and businessmen, routes to airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals. Such services of security, whether private or public, are no longer regarded as luxuries

footnote continued on next page.

The consistent teaching of this Court, summarized recently in Elrod v. Burns, 427 U.S. 347 (1976), refuses to characterize public benefits as a mere "privilege" rather than a "right" for the purpose of constitutional protections:

' For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely.' 408 U.S. at 597, 92 S. Ct. at 2697. Perry and Keyishian properly recognize one such impermissible reason: The denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly.

footnote continued from preceding page.

or gratuities, to the recipients they are essential, fully deserved and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced. Reich, "Individual Rights and Social Welfare: The Emerging Legal Issues," 74 Yale L.J. 1245, 1255 (1965).

Goldberg v. Kelly, 397 U.S. 254 at 262, n. 8.

"[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." Keyishian v. Board of Regents, 385 U.S. at 605-606, 87 S. Ct. at 685. . . "[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or as a "privilege." Sugarman v. Dougall, 413 U.S. 634, 644, 93 S. Ct. 2842, 2848, 37 L. Ed. 2d 853 (1978) (quoting Graham v. Richardson, 403 U.S. 365, 374, 91 S. Ct. 1848, 1853, 29 L. Ed. 2d 534 (1971)).

Id. at 360-362. See also Elrod v. Burns, 427 U.S. at 374 (Stewart, J., concurring); Board of Regents v. Roth, 408 U.S. 564, 571, n. 9 (1972).

By treating Medicaid-eligible pregnant women as no worse off than they would be if there were no Medicaid program, the majority opinions here ignore the principle of statutory entitlement. Harris v. McRae, slip op. 15, 17. The rationale that a woman "continues as before to be

dependent on private sources" id. at 474 -- articulated in Maher, 432 U.S. at 474, in the context of a program which the Court defined as not including elective services -- does not apply in a context where the desired service is medically necessary and, by definition, part of the statutory entitlement. The premise that the poor are no worse off in the private sector than if no program existed is not only untrue as a matter of fact.^{4/} As a matter of law this premise would completely nullify the constitutional safeguards against discriminatory, arbitrary or illegitimate ex-cissions in all public welfare programs or other benefits schemes.

^{4/} As a result of the Medicaid program and its predecessors, both hospitals and physicians reduced their own private contributions to medical care for the indigent. See Stevens and Stevens, "Medicaid: Anatomy of a Dilemma," 35 Law & Contemporary Problems 348 (1970).

Amici urge reconsideration of this extension of Maier to justify denial of an existing statutory entitlement here.

II. THE MAJORITY DECISIONS APPROVE A DOUBLE STANDARD OF MINIMAL CONSTITUTIONAL ACCEPTABILITY.

These decisions sanction as constitutionally reasonable and legitimate an unspeakably cruel sacrifice of the lives and health of poor women. They do this by ignoring the consequences of health-threatening pregnancies and by accepting, for the first time, that there can be two standards of minimal constitutional permissibility.

Roe v. Wade recognized several constitutional principles which a fortiori apply here notwithstanding the difference recognized in Maier between the regulatory and funding context. First, Roe v. Wade

rejected the contentions that a fetus is a person under the written Constitution, 410 U.S. at 156-159, and that the state may accord it the value of an actual human being Id. at 159-162. Second, Roe v. Wade held that it is impermissible for the state to seek to protect fetal life at the expense of maternal life or health. Id. at 164. The essence of this ruling is that while the protection of potential life is legitimate -- and after viability, compelling -- it remains illegitimate to pursue this interest at the expense of maternal health or life. Id. at 155.

Thus, with respect to laws which sacrifice a woman's life or health for the sake of fetal life, Roe v. Wade articulates what is minimally acceptable under the Constitution. Id. at 163-164. Legitimacy or minimal acceptability is a constant; it does not vary with the kind

of legislation involved.^{5/}

The majority fails to appreciate that the difference between normal as opposed to dangerous childbearing is decisive if the minimal standard applied in Roe v. Wade is to govern. Moreover, the majority also does not even deal with the fact that the evaluation of the fetus as actual human life which underlies the Hyde Amendment is the very one deemed illegitimate in Roe v. Wade.

^{5/} For this reason, the interest balancing in Roe v. Wade is controlling in this case, where maternal health and life is at stake, in contrast to Maher, where the legitimacy of the interest in potential life was not undermined by a similar health impact. Compare Harris v. McRae, Slip op. at 3 (White, J., concurring).

Thus, under these decisions, the poor are denied the protection of the most elemental concepts of constitutional acceptability. The majority opinions suggest that regulation of commercial interests may draw greater constitutional protection than does regulation of the statutory entitlement of the poor to the health care^{6/} necessary to their self-preservation. These decisions, if allowed to stand, threaten to destroy the promise of a single Constitution for all.

^{6/} In Roe v. Wade, Mr. Justice Rehnquist, dissenting, considered that a prohibition on abortion, when a woman's life is in jeopardy, would be invalid under Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955). The majority ignores, however, the undisputed facts that the Hyde Amendment's exclusion of medically-necessary abortions jeopardizes women's lives and, thus, appears to sanction complete elimination of the entitlement to Medicaid for abortion. Thus even the minimal Lee Optical standard is not being applied to protect the poor.

III. THE MAJORITY OPINIONS IGNORE
THE CONSTITUTIONAL PRINCIPLE
THAT DENIAL OF A STATUTORY
ENTITLEMENT IS COERCIVE IN
FACT.

This Court has traditionally taken judicial notice of the practical necessity of welfare benefits to the survival and basic needs of the poor, recognizing that this heightens rather than diminishes the need to protect such entitlements.

Memorial Hospital v. Maricopa County, 415 U.S. at 259; Goldberg v. Kelly, 397 U.S.

at 264. The Court has also routinely noticed the deterrent or coercive effect in fact of deprivations of such benefits on the exercise of fundamental rights.

Sherbert v. Verner, 374 U.S. at 404;

Shapiro v. Thompson, 394 U.S. at 629;

Memorial Hospital v. Maricopa County, 415

U.S. at 257-258. By contrast here, the

majority ignores the demonstrated fact

that the denial of medically-necessary

abortion coerces poor women to forego safe,

legal abortion to protect their health.

The distinction drawn by the majority between regulation which is defined as coercive, and funding which is not, improperly extends the due process analysis of Maher and resurrects a premise -- repugnant to the entitlement principle -- that poverty is the fault of the poor. Harris v. McRae, slip op. at 17. This distinction flies in the face of the Court's recognition in

Goldberg v. Kelly that government shares responsibility for the creation of poverty and benefits from its alleviation:

From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. This perception, against the background of our traditions, has significantly influenced the development of the contemporary public assistance system. Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.'

Id. at 264-265. (footnote omitted).

In this case the contribution of government to the existence of an impoverished population is particularly obvious. For

example, increasing numbers of people are dependent on Medicaid today because government has opted to increase unemployment in response to economic crisis. Women and minorities are disproportionately indigent because of past and present governmental policies which have promoted and permitted discrimination on the basis of race and sex.^{7/} Indeed, it is hardly coincidental that the brutal toll of the Hyde Amendment falls upon a class which is disproportionately female and disproportionately members of minority groups.^{8/} And conversely, it is painfully clear that the

^{7/} See, e.g., Brown v. Bd. of Education, 347 U.S. 483 (1954); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Fullilove v. Klutenick, ___ U.S. ___, 48 U.S.L.W. 4979 (June 24, 1980); and Frontiero v. Richardson, 411 U.S. 677 (1973).

^{8/} As Mr. Justice Marshall noted in Maher v. Roe, 432 U.S. at 459, n. 3, "Blacks and other non-white groups are heavily overrepresented among both

footnote continued on next page.

Hyde Amendment will operate each year to condemn thousands of poor women and their children to an inescapable cycle of poverty, disease and dependency.

It is, thus, completely unjustifiable to permit the state to disclaim responsibility for the concrete impact of discriminatory denials of essential

footnote continued from preceding page.

abortion patients and Medicaid recipients. In 1975, about 13.1% of the population was nonwhite . . . yet 31% of women obtaining abortions were of minority race." (citations omitted). Moreover, 39% of Black women rely on Medicaid for their health care needs compared to 7% of white women. Plaintiffs-Appellees' Brief at 44, n. 66. The abortion to live birth ratio is nearly two times higher among Blacks than whites and the maternal mortality rate will be even more disproportionate as a result of the Hyde Amendment. Ibid. In 1972, maternal mortality for minorities was 490% higher than for the corresponding white population. The disparity declined until 1975 when it was 76%. In 1976, maternal mortality for minorities rose again to 327% higher than for whites. Ibid. Women are also disproportionately recipients of Medicaid. In 1977, for every man there were 1.8 women. Maher v. Roe, 432 U.S. at 460, n. 4 (Marshall, J., concurring).

benefits on the ability of the poor to exercise their constitutional rights or even to survive. Moreover, it is extremely dangerous to do so. The method of coercion -- whether it be through selective funding or criminal proscription -- is irrelevant if the principle that the state cannot seek to do indirectly that which it cannot do directly is to survive. Elrod v. Burns, 427 U.S. at 359, n. 13; Speiser v. Randall, 357 U.S. at 526.

IV. THE MAJORITY OPINIONS IGNORE THE CONSTITUTIONAL PRINCIPLE THAT GOVERNMENT MAY NOT WITHHOLD STATUTORY ENTITLEMENTS TO THWART THE EXERCISE OF CONSTITUTIONAL RIGHTS.

If the majority followed the settled teaching that a law which has "no other purpose. . . than to chill the assertion of constitutional rights by penalizing

those who choose to exercise them. . .
[is] patently unconstitutional," United States v. Jackson, 390 U.S. 570, 581 (1968), it could not have sustained the Hyde Amendment. See Shapiro v. Thompson, 394 U.S. at 631; United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973); cf. Califano v. Jobst, 434 U.S. 47 (1977).

The Court should rehear this case in order to examine the legislative history and the findings of the District Court with respect to the purpose of the Hyde Amendment. These make crystal clear that the proponents of restriction sought to use the coercive effect of denying abortion funding to prevent poor women from exercising their right to choose abortion and preserve their health.

The majority's failure to examine the legislative purpose here leaves the poor

vulnerable to deliberate efforts to destroy their constitutional rights whenever funding programs are involved. This failure is particularly serious in the context of reproductive rights.

If today the state can thwart exercise of the right to abortion, what protection is there against a reverse Hyde Amendment which would provide Medicaid coverage of abortion and sterilization only? Without the intervention of this Court, rights as precious and fundamental as those involving childbearing are a nullity for the poor.

Finally, for the majority to ignore the clear purpose and devastating consequences of the denial of coverage for medically-necessary abortions gives the state virtually untrammelled power to use selective funding to manipulate and de-

stroy the lives of the poor. If in order to protect fetal life, poor women can be refused a necessary medical alternative and thereby be made to suffer dangerous pregnancies or turn to dangerous illegal abortions, why cannot the state limit other health care options to coerce the poor into becoming guinea pigs for dangerous medical or social experimentation purportedly to benefit other full human beings? The power to withhold a necessary welfare benefit in order to "encourage" an activity which is, by definition, dangerous to the recipient is a frightening and illegitimate one. To sanction this power with respect to the poor alone is completely at odds with the fundamental law of the land.

CONCLUSION

By a bare majority and under conditions of great haste, this Court has sanctioned the legislative imposition of enormous suffering upon poor women and departed from time-honored constitutional principles without discussing either the practical consequences or legal implications of its ruling.

Under our constitutional scheme, the Court owes a special duty to the class of indigent pregnant and disproportionately minority women who are the sole victims of the effort to reverse Roe v. Wade. They are "saddled with such disabilities[,]... subjected to such a history of purposeful unequal treatment, . . . [and] relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

San Antonio School District v. Rodriguez,
411 U.S. 1 at 28 (1973).

Heightened scrutiny, though constitutionally appropriate here, is not required. The principle of equal justice is sufficient to invalidate the Hyde Amendment. As Mr. Justice Jackson wrote in Railway Express Agency v. People of the State of New York, 336 U.S. 106 at 112-113 (1949) (concurring):

The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

WHEREFORE, Amici respectfully urge that the Court grant the petition for rehearing.

Dated: New York, N.Y.
July 25, 1980

Respectfully submitted,

LAUREN C. ANDERSON
c/o National Conference of
Black Lawyers
126 W. 119th Street
New York, N.Y. 10026
(212) 864-4000

HAYWOOD BURNS
c/o Center for Legal Education
and Urban Policy
City College of New York
New York, N.Y. 10031
(212) 690-5425

ARTHUR KINOY
c/o School of Law-Newark
S.I. Newhouse Center
15 Washington Street
Newark, New Jersey 07102
(201) 648-5521

CATHERINE C. RORABACK
P.O. Box 935
Canaan, Connecticut 06108
(203) 824-5121

Attorneys for Amici and Amicae
Curiae