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Renee B. v. Florida Agency for Health Care Administration

MR. CHIEF JUSTICE: GOOD MORNING, AND WELCOME TO THIS ORAL ARGUMENT CALENDAR OF THE FLORIDA SUPREME COURT. WE, OF COURSE, ACKNOWLEDGE THE PRESENCE OF THE TEACHERS WHO HAVE PARTICIPATED IN THE JUSTICE TEACHING INSTITUTE THIS WEEK, AND WE ARE CERTAINLY GLAD TO HAVE YOU AND, ALSO, THOSE JUDGES WHO HAVE GIVEN SO MUCH OF THEIR TIME AND EFFORT, TO BE PART OF THIS PROGRAM THAT THE COURT IS VERY PROUD TO HAVE ONGOING, TO HELP WITH THE DISSEMINATION OF INFORMATION, CONCERNING THE COURT, THROUGHOUT THE STATE AND THE PUBLIC AND PRIVATE SCHOOLS. THROUGHOUT FLORIDA. THE CASE THAT WE HAVE FOR ORAL ARGUMENT THIS MORNING IS RENEE B. VERSUS FLORIDA AGENCY FOR HEALTH CARE ADMINISTRATION. MS. JONES.

MAY IT PLEASE THE COURT. BONNIE SCOTT JONES, FOR THE PLAINTIFFS APPELLANT. THIS CASE CHALLENGES THE STATE'S CREATION AFTER MED DADE PROGRAM -- OF A MEDICAID PROGRAM THAT SUBORDINATES A WOMAN'S CONSIDERATION OF HEALTH AND POTENTIAL LIFE. THIS POLICY CREATES --

LET ME INTERRUPT FOR A MINUTE AND SAY THAT I NEGLECTED TO ANNOUNCE THAT JUSTICE PARIENTE IS -- JUSTICE PARIENTE IS RECUSED IN THIS MATTER.

THANK YOU, YOUR HONOR.

WIDE-RANGING ACCESS OF HEALTH CARE SERVICE FOR THE POOR ARE MEDICALLY NECESSARY, INCLUDING ALL SERVICES RELATING TO CHILDBIRTH AND ALL SERVICES RELATING TO MEN'S HEALTH NEEDS.

CAN YOU GIVE US A THUMBNAIL SKETCH, REALLY, OF THE FACTUAL SETTING, REALIZING THE FACTS AREN'T IN DISPUTE, BUT IN TERMS OF THE FEDERAL PROGRAM, AND THEN AS RECEIVED BY THE STATE, AND THEN WHAT THE STATE HAS DONE WITH THAT PROGRAM, WITH REFERENCE TO THIS ISSUE.

SURE, YOUR HONOR. THE FEDERAL GOVERNMENT -- MEDICAID IS A JOINT FEDERAL STATE PROGRAM, IN WHICH -- PROGRAM, IN WHICH THE FEDERAL GOVERNMENT REQUIRES JOINT SERVICES BE COVERED AND THIS STATE REQUIRES ADDITIONAL SERVICES. TO THE EXTENT THAT SERVICES ARE REQUIRED TO BE COVERED BY THE GOVERNMENT, THE FEDERAL GOVERNMENT PROVIDES MATCHING FUNDS TO THE STATE FOR STATE SERVICES. STATES ARE FREE TO INCLUDE ADDITIONAL PROGRAMS, BUT IF THOSE PROGRAMS AREN'T IN THE FEDERAL FUND, THEY CAN'T, OF COURSE, GET MATCHING FUNDS. IT GENERALLY PROVIDES FOR MEDICAL HEALTH CARE, AND THROUGH APPROPRIATIONS, BILLS, IT HAS PASSED WHAT IS CALLED THE HYATT AMENDMENT, WHICH RESTRICTS FEDERALLY-FUNDED AND ON PORTIONS TO -- ABORTIONS TO WHERE THE WOMAN'S LIFE WAS IN DANGER. THE MAJORITY OF STATES, IN FACT, EXPAND BEYOND THE HYATT AMENDMENT. WHAT THE STATE HAS DONE, THROUGH THE THREE REGULATIONS THAT ARE CHALLENGED IN THIS CASE, THEY HAVE RESTRICTED THEIR MEDICAID COVERAGE FOR ABORTIONS IN CASES WHERE, AGAIN, THE WOMAN'S LIFE IS IN DANGER OR THE PREGNANCY IS THE RESULT OF RAPE OR INCEST. IN TERMS OF ALL OTHER HEALTH SERVICES, MEDICALLY-NECESSARY HEALTH SERVICES, THE STATE PAYS FOR THE SERVICES. I BELIEVE THE ONLY EXCEPTION THAT EXISTS TO THAT IS FOR CERTAIN ORGAN TRANSPLANTS. OTHER THAN THAT, IF YOUR DOCTOR DETERMINES THAT YOU NEED A SERVICE TO PRESERVE YOUR HEALTH, IT WOULD BE COVERED BY, BOTH, THE FEDERAL AND STATE PROGRAMS.

JUSTICE LEWIS.

YOU HAD INDICATED, IN THE TERMS PROVIDED TO THE COURT, THE PHRASE "VIRTUALLY ALL" ARE COVERED. DO WE COVER SUCH THINGS AS STEM CELL RESCUE FOR PATIENTS AND ALL OF THESE OTHER KINDS OF SERVICES, OR DO WE HAVE OTHER KINDS OF AREAS WHERE MEDICALLY NECESSARY TREATMENTS ARE NOT COVERED?

AS FAR AS THIS RECORD INDICATES, THE ONLY OTHER PROCEDURE THAT IS NOT SUBJECT TO THE MEDICALLY-NECESSARY STANDARD, ARE CERTAIN KINDS OF ORGAN TRANSPLANTS, AND THE STATE HAS NOT INDICATED WHICH, AND I DON'T BELIEVE IT IS IN THE RECORD WHICH. OTHER THAN THAT, EVERY SERVICE WOULD BE SUBJECT TO THE MEDLEY ---MEDICALLY-NECESSARY TREATMENT, AND IT WOULD BE UP TO THE PHYSICIAN, WHETHER THE SERVICE WAS MEDICALLY NECESSARY FOR THE PATIENT.

UNDER MEDICAID, CAN THE STATE PUT REASONABLE RESTRICTIONS ON WHAT KIND OF MEDICAL SERVICES WILL BE PROVIDED?

CERTAINLY. IT DOES THAT, THROUGH THE STANDARD OF MEDICAL NECESSITY. WHAT IT SAID THAT IT WANTS TO PROVIDE IS PRENATAL CARE AND THEREFORE THAT IT WILL ONLY PROVIDE CARE THAT IS MEDICALLY NECESSARY, AND IT LISTS A NUMBER OF FACTORS BY WHICH THE FIZ PHYSICIAN MUST -- PHYSICIAN MUST DETERMINE WHETHER THE CARE IS MEDICALLY NECESSARY FOR THE PATIENT. OTHER THAN THAT, THEY CAN PUT A CAP ON THE MONEY THAT IS SPEND ON -- THAT IS SPENT ON PARTICULAR SERVICES. THAT HASN'T BEEN DONE IN THIS CASE.

EXCUSE ME. GO AHEAD.

CAN YOU THINK OF ANY OTHER EXAMPLES OF ITEMS THAT ARE EXCLUDEED THAT PERTAIN TO ONE GROUP OF PEOPLE, ONE SECTION OF THE POPULOUS, ANYTHING LIKE THAT.

THERE IS REALLY NOTHING LIKE. THAT THE ONLY OTHER EXCLUSION ARE THESE CERTAIN ORGAN TRANSPLANTS WHICH, AS FAR AS I KNOW, ARE SORT OF NEEDED THROUGHOUT THE POPULATION. THEY DON'T PERTAIN TO ONE PARTICULAR GROUP, RATHER THAN ANOTHER.

YOUR ARGUMENT IS, REALLY, LIMITED TO A STATE CONSTITUTIONAL ARGUMENT.

THAT'S CORRECT.

AS OPPOSED TO THE HITE AMENDMENT HAS MET CONSTITUTIONAL MUSTER, UNDER THE FEDERAL CONSTITUTION.

THAT'S CORRECT, YOUR HONOR, UNDER HARRIS VERSUS McCRAE, THE UNITED STATES SUPREME COURT HAS UPHELD THE HITE AMENDMENT, UNDER THE FEDERAL CONSTITUTION.

AND YOUR FIRST ARGUMENT HAS TO DO WITH PRIVACY.

CORRECT, YOUR HONOR. PLAINTIFFS ALLEGE THAT THIS SCHEME, THE FUNDING SCHEME CHALLENGED HERE, VIOLATES THE RIGHT TO PRIVACY IN THREE DIFFERENT WAYS. FIRST, IT COME ERZ PREGNANT WOMEN TO FOREGO ABORTIONS, BY OFFERING THEM ACCESS TO ONE SERVICE BUT NOT ANOTHER SERVICE, WHEN, BY DEFINITION, THEY CAN'T AFFORD HEALTH CARE ON THEIR OWN. THIS IS NOT ONLY THE EFFECT OF THE PROGRAM, AS THE FACTS SHOW --

THE PRIVACY PROVISION OF THE STATE CONSTITUTION IS KEY TO THE WORDS -- IS KEYED TO THE WORDS "GOVERNMENT INTRUSION", IS IT NOT?

THAT'S CORRECT, YOUR HONOR.

WHAT WE HAVE HERE IS A SITUATION IN WHICH THE LEGISLATURE HAS MADE A DECISION THAT IT WAS NOT GOING TO FUND CERTAIN PROCEDURES. CORRECT?

THAT'S CORRECT.

NOW, ISN'T THAT KIND OF THE OPPOSITE OF GOVERNMENT INTRUSION, IN THAT THE LEGISLATURE IS NOT INTRUDING INTO ANYONE'S DECISION-MAKING. THEY ARE JUST TAKING A STAND THAT THEY ARE NOT GOING TO DO CERTAIN THINGS BY THE GOVERNMENT.

I DON'T THINK THAT IS TRUE, YOUR HONOR, AND THE REASON IS THIS. THE STATE OF FLORIDA HAS NOT SAID, TO WOMEN, YOU ARE ON YOUR OWN. MAKE YOUR OWN DECISIONS ABOUT PREGNANCY AND DEAL WITH IT YOURSELF. THEY HAVE CREATED THIS WIDE-RANGING PROGRAM OF HEALTH SERVICES AND SAID, TO WOMEN, WE WILL TAKE CARE OF YOU DURING PREGNANCY. WE WILL TAKE CARE OF YOU, IF YOU GO THROUGH CHILDBIRTH, BUT IF YOU DECIDE TO HAVE AN ABORTION, BECAUSE YOUR DOCTOR HAS TOLD YOU YOU NEED ONE, IN ORDER TO AVOID HEALTH RISKS, YOU ARE ON YOUR OWN, SO WE WILL TAKE CARE OF YOU, AS LONG AS YOU FOREGO THAT ABORTION AND SACRIFICE YOUR OWN HEALTH OR POTENTIAL LIFE, SO OTHERWISE YOU ARE ON YOUR OWN. IT HAS STEPPED INTO THE WOMAN'S DECISION. IT HASN'T JUST STAYED OUT OF THE ISSUE.

BUT THERE ISN'T A CONSTITUTIONAL RIGHT TO HAVING ANY OF THESE MEDICAL PROCEDURES PAID FOR.

THAT'S CORRECT, BUT THERE IS A FUNDAMENTAL RIGHT TO PRIVACY AND TO NOT HAVE UNWARRANTED INTRUSIONS ON ONE'S DECISIONS, BOTH FUNDAMENTAL DECISIONS RELATED TO PERSONAL AUTONOMY AND DECISIONS RELATING TO MEDICAL CARE AND ONE'S OWN BODY, AND BY STEERING WOMEN TOWARDS ONE OPTION AVAILABLE TO THEM AND AWAY FROM ANOTHER, THE PROGRAM INTRUDES ON THAT RIGHT.

WELL, FOLLOWING UP ON JUSTICE WELLS' QUESTION, COULD YOU EXPLAIN TO US, FIRST OF ALL, THE SUPERFICIAL APPEARANCE OF THIS APPEARS TO BE IT IS A FAILURE OF THE STATE OF FLORIDA TO ACT. THAT IS YOU SAY THE PROGRAM COMES TO THE STATE OF FLORIDA INTACT, WITHOUT THE FUNDING FOR THE ABORTIONS, EXCEPT IN THE CASE OF THE LIFE OF THE MOTHER OR SEXUAL BATTERY. SO, AND YOU SAY THE STATES, THEN, HAVE THE OPTION TO FUND THE MEDICALLY-NECESSARY ABORTIONS, AND THE STATE HAS CHOSEN NOT TO DO THAT, SO DO WE TAKE THIS AS A SITUATION IN WHICH THE STATE HAS CHOSEN NOT TO ACT, OR DO YOU CONTEND IT IS A SITUATION WHERE THE STATE HAS ACTED AFFIRMATIVELY BUT HAS DISCRIMINATED AGAINST POOR PEOPLE, IN THE WAY THAT THEY HAVE ACTED? I NEED YOU TO DIRECTLY ADDRESS THAT. BECAUSE ON THE SURFACE, CERTAINLY, IT APPEARS YOU ARE SAYING THAT THE PROGRAM PROVIDES CERTAIN BENEFITS WITHOUT THIS BENEFIT, WHEN IT GETS TO THE STATE, AND IT IS UP TO THE STATE TO DECIDE, AND THE STATE, HERE, HAS CHOSEN NOT TO ACT, IN ESSENCE, AND SO COULD YOU EXPLAIN, HERE, WHAT YOUR POSITION IS. IS IT THAT THE STATE VIOLATES THE PRIVACY RIGHTS, BY NOT ACTING, OR IS IT THAT THE STATE HAS ACTED AND HAS DISCRIMINATED?

THE STATE MOST CERTAINLY HAS ACTED. THE PROGRAM DOESN'T COME TO THE STATE, WITHOUT THOSE BENEFITS. CERTAIN MONEY COMES INTO THE STATE, WITHOUT COVERING ABORTIONS, BUT THE STATE, ITSELF, CREATES A MEDICAID PROGRAM, AND THIS STATE'S MEDICAID PROGRAM WOULD COVER MEDICALLY-NECESSARY ABORTIONS, BUT FOR THE THREE REGULATIONS THAT CARVE OUT THIS SPECIAL EXCEPTION FOR ABORTIONS. ABSENT THOSE THREE REGULATIONS, WHICH ARE AN AFFIRMATIVE ACT OF THE STATE, THE STATE COVERS ALL MEDICALLY-NECESSARY SERVICES FOR ELIGIBLE INDIVIDUALS, SO THEY HAVE TAKEN THE VERY AFFIRMATIVE STEP OF EXCLUDING MEDICALLY-NECESSARY CARE, WHEN IT INVOLVES AN ABORTION.

COULD THE STATE WITHDRAW BENEFITS OR JUST DECIDE WE ARE NOT GOING TO PROVIDE ANY BENEFITS FOR ALL REPRODUCTIVE SERVICES?

YES, IT COULD.

IT CAN. BUT THE REVERSE CANNOT BE TRUE. YOU CANNOT FUND ONE AND NOT THE OTHER. THAT IS THE DISTINCTION.

THAT'S CORRECT. THIS COURT ADDRESSED A SIMILAR ISSUE, IN THE DEPARTMENT OF EDUCATION VERSUS LEWIS, WHERE THE STATE HAD GIVEN MONEY FOR HIGHER EDUCATION, AND, OF COURSE, THE STATE WAS NOT UNDER AN OBLIGATION TO GIVE THAT MONEY, BUT WHETHER IT GAVE THE MONEY, THE STATE SAID -- SORRY, THE COURT SAID YOU CAN'T, THEN, USE THIS MONEY TO INDUCE THE WAIVER OF CONSTITUTIONAL RIGHTS. WHAT THE MONEY WOULD HAVE DONE WOULD HAVE PERMITTED CERTAIN SPEECH TO BE MADE ON CERTAIN VIEWPOINTS AND NOT FUND SPEECH ON OTHER VIEWPOINTS, AND THE COURT SAID EVEN THOUGH ALL YOU ARE DOING IS NOT FUND CERTAIN VIEWPOINTS, WHAT YOU ARE DOING WITH THIS PROGRAM IS COERCING THE EXERCISE OF RIGHTS.

COULD THE STATE MAKE THAT DECISION, IF IT WENT THROUGH CERTAIN STRICT SCRUTINY, INTERMEDIATE SCRUTINY, OR RATIONAL RELATIONSHIP TESTS? IF IT OBSERVED THESE, COULD IT, THEN, MAKE THAT TYPE OF DECISION?

ARE YOU ASKING ME WHETHER, IF THE STATE FOUND A COMPELLING INTEREST TO TREAT THIS DIFFERENTLY, WOULD IT BE PERMISSIBLE?

YES. IF IT FOUND A COMPELLING STATE INTEREST, COULD IT, THEN, MAKE THE DETERMINATION THAT CHILD-BEARING IS PREFERRED BY THE STATE OF FLORIDA, OVER ABORTIONS? AND THEREFORE WE WILL FUND THE TWO DIFFERENTLY?

IT COULD DO SO, IF IT HAD A COMPELLING INTEREST AND THE SCHEME WAS THE LESS INTRUSIVE MEANS OF SERVING INTEREST. HOWEVER, THE ONLY INTEREST SERVED HERE IS THE STATE'S INTEREST IN PRESERVING LIFE, AND THAT CANNOT JUSTIFY THE FUNDING SCHEME. FOR INSTANCE PRESERVATION OF POTENTIAL LIFE IS NOT A COMPELLING ONE, AND THIS IS A -- IF THERE IS A COMPELLING INTEREST, THEN THE STATE COULD DO IT, BUT IN THIS CASE THERE IS NOT A COMPELLING INTEREST, BECAUSE THERE IS NOT A COMPELLING VIABILITY, NOR IS IT EXCLUDES I HAVE PURSUANT TO PRESERVATION OF WOMEN'S HEALTH, BECAUSE THAT IS THE ONLY TIME THAT IT IS PURSUED, UNDER THIS PROGRAM.

ONE OF THE ARGUMENTS THAT IS MADE HERE IS, IN THE SITUATION SUCH AS TW, WHERE WE ARE TALKING ABOUT THE CHILD GETTING THE CONSENT OF THE PARENT, BEFORE GETTING AN ABORTION, THE STATE HAD STEPPED IN AFFIRMATIVELY AND PUT SOME BARRIER IN THE PERSON'S RIGHT TO HAVE AN ABORTION, AND IN THIS SITUATION, AS I UNDERSTAND THAT ARGUMENT, IS THAT THE STATE HAS NOT PUT ANY BARRIER BETWEEN THE PREGNANT PERSON AND THEIR PHYSICIAN, THAT THEY CAN, STILL, HAVE AN ABORTION. WE ARE JUST NOT GOING TO FUND IT. DO YOU SEE THAT THERE IS A DIFFERENCE, BETWEEN THE STATE COMING IN AND ACTUALLY PUT AGO BARRIER THERE, AS OPPOSED TO JUST SAYING YOU CAN DO IT. WE ARE JUST NOT GOING TO PAY FOR IT.

THERE IS A DIFFERENCE IN DEGREE, CONCEPTUALLY. I AGREE WITH THAT. HOWEVER, I THINK THE STATE HAS COME IN HERE AND INFLUENCED THE WOMAN'S ABILITY TO EXERCISE A CHOICE, BY TELLING HER, OKAY, WE UNDERSTAND YOU HAVE NO MONEY. YOU CAN'T OBTAIN MEDICAL CARE ON YOUR OWN. YOU ARE PREGNANT. YOU HAVE A PREGNANCY THAT IS SERIOUSLY DANGEROUS TO YOUR HEALTH, AND WHAT WE ARE GOING TO DO IS WE ARE GOING TO DO EVERYTHING IN OUR POWER TO CAUSE YOU TO HAVE TO CARRY THAT CHILD TO TERM, DESPITE WHATEVER WISHES

YOU AND YOUR DOCTOR HAVE TO PRESERVE YOUR HEALTH.

LET ME MOVE YOU QUICKLY, TO THE 1998 AMENDMENT TO THE FLORIDA CONSTITUTION, ON YOUR ARGUMENT, WHICH ESSENTIALLY IS AN EQUAL PROTECTION ARGUMENT, UNDER -- IS IT YOUR POSITION THAT THE LANDSCAPE DRAMATICALLY CHANGED, WITH THAT AMENDMENT? FROM THE TIME WHEN THIS SUIT WAS FILED IN '93?

I WOULDN'T CALL IT A DRAMATIC CHANGE. THE LANDSCAPE, I THINK THAT SEX DISCRIMINATION WAS ALREADY SUBJECT TO INTERMEDIATE SCRUTINY BY THIS COURT, PRIOR TO THE PASSAGE OF THAT AMENDMENT. WE BELIEVE THAT THAT AMENDMENT RAISED THE LEVEL OF SCRUTINY TO STRICT SCRUTINY. HOWEVER, I DON'T THINK IT REALLY POSES A DISPOSITIVE ISSUE IN THIS CASE, BECAUSE I THINK THAT THE SEX CHRFBCKTS CREATED -- CLASSIFICATION CREATED BY THE PROGRAM CAN'T BE JUSTIFIED UNDER ANY LEVEL OF REVIEW, BECAUSE WOMEN AND MEN ARE IDENTICALLY SITUATED, WITH RESPECT TO BOTH THEIR NEED FOR HEALTH --

BUT DON'T YOU HAVE TO HAVE SOMETHING THAT IS UNIQUE TO THE FLORIDA CONSTITUTION, BECAUSE THAT, OBVIOUSLY, HAS NOT CARRIED, TODAY, IN THE U.S. SUPREME COURT.

YOUR HONOR, THE UNITED STATES SUPREME COURT HAS NOT CONSIDERED A CHALLENGE TO THIS KIND OF PROGRAM'S DISCRIMINATION ON THE BASIS OF SEX. WHAT HARRIS VERSUS McCRAE CONSIDERED WAS A CLASSIFICATION BASED ON POVERTY, WHICH IS NOT ARGUED IN THIS CASE. OUR ARGUMENT FOR SEX DISCRIMINATION IS THAT THE PROGRAM GIVES DIFFERENT BENEFITS TO MEN AND TO WOMEN, BY GIVING MEN ALL CARE THAT THEY NEED, UPON A SHOWING OF MEDICAL NECESSITY, WHILE SUBJECTING SOME WOMEN'S CARE TO THE SHOWING OF LIVEN DANGERMENT. IN ADDITION, THAT DIFFERENTIAL TREATMENT IS PREMISED ON THE UNWILLING STEREOTYPE THAT WOMEN MUST BE WILLING TO SACRIFICE THEIR OWN HEALTH, IN ORDER TO REAR CHILDREN. SO THAT POSITION HAS TO BE JUSTIFIED IN MEN'S AND WOMEN'S DIFFERENCE AND THE PROGRAM. THERE IS NONE. THEY ARE EQUALLY NEEDY OF GETTING MEDICALLY-NECESSARY HEALTH CARE AND THEY ARE EQUALLY DESERVING OF GETTING THAT HEALTH CARE. MAY I RESERVE THE REST OF MY TIME?

YOU MAY. MR. ROBERTS.

MAY IT PLEASE THE COURT. I AM BILL ROBERTS, REPRESENTING THE FLORIDA AGENCY FOR HEALTH CARE ADMINISTRATION HERE.

WILL FLORIDA PAY FOR A VASECTOMY?

YES, IT WILL.

DOESN'T THAT POSE A DISCRIMINATION PROBLEM, UNDER THE TREATING MEN AND WOMEN ALIKE?

WELL, IT, ALSO, PAYS FOR HYSTERECTOMIES, YOUR HONOR. THE CLASSIFICATION, HERE, IS BASED ON THE MEDAL PROCEDURE. -- MEDICAL PROCEDURE, NOT UPON THE PERSON. THE PROBLEM WITH THIS IS YOU ARE WRESTLING WITH BIOLOGY. THERE ARE CERTAIN MEDICAL PROCEDURES THAT ARE UNIQUE TO MEN AND WOMEN. MEDICAID DOES NOT COVER BIRTH CONTROL PILLS FOR MEN. IT IS NOT MEDICALLY INDICATED.

LET ME START YOU OUT WITH TWO BASIC PROPOSITIONS, THAT WOMEN HAVE THE RIGHT TO HAVE AN ABORTION OR CAREY THE FETUS TO TERM. WOULD YOU AGREE THAT THAT IS A PRETTY FUNDAMENTAL RIGHT?

YES.

THE SECOND RIGHT, WOMEN HAVE THE RIGHT TO MEDICALLY NECESSARY SERVICES, UNDER MEDICAID, ON A NONDISCRIMINATORY BASIS. WOULD YOU AGREE THAT IS A PRETTY FUNDAMENTAL RIGHT?

I BELIEVE THAT THEY -- YES, JUDGE.

OKAY. ACCEPTING THAT PREMISE, THEN, CAN THE STATE INTERFERE WITH THESE TWO RIGHTS, WITHOUT DEMONSTRATING A COMPELLING STATE INTEREST. AND HAS IT DONE SO IN THIS INSTANCE?

THE THRESHOLD QUESTION THAT IS AT STAKE HERE, THE STATE HAS NOT INTERFERED. THE STATE HAS DONE NOTHING TO RESTRICT ABORTIONS IN THE STATE HERE. THE REGULATIONS DO NOT IMPOSE ANY NEW REQUIREMENTS ON WOMEN WHO SEEK ABORTIONS. IT DOES NOT REQUIRE ANY EXTRA PAYMENT AFTER FEE OR ANYTHING LIKE THAT.

BUT AREN'T YOU IGNORING REALITY, WHEN YOU SAY THE STATE HAS NOT IMPOSED SOMETHING IN ADDITIONAL BURDEN, UPON A CLASS OF WOMEN? THAT IS THE REALITY OF IT, HERE, ISN'T IT? AND WE ARE ARGUING ABOUT WHETHER THE STATE CAN DO IT OR NOT. THE REALITY IS THAT IT IS ONEROUS.

THE REALITY IS IT IS POVERTY THAT PREVENTS A WOMAN FROM RECEIVING AN ABORTION. THE STATE DID NOT CREATE THE POVERTY AND IS NOT CONSTITUTIONALLY REQUIRED TO DO AWAY WITH THE POVERTY. IT IS NOT THE STATE'S ACTION THAT IS PREVENTING A WOMAN FROM GETTING AN ABORTION IN THIS CASE. IT IS THE POVERTY THAT HAS EXISTED FOREVER.

WELL, ISN'T THIS WHOLE PROGRAM DESIGNED TO ALLEVIATE POVERTY? HOW CAN THE GOVERNMENT BE CONSISTENT, IF IT IS GOING TO PROVIDE A PROGRAM TO ALLEVIATE POVERTY, INsofar AS POVERTY INTERFERING WITH THE PROVIDING OF MEDICAL CARE -- OF MEDICAL CARE AND THEN DO IT ON A DISCRIMINATORY BASIS? ISN'T THAT THE WHOLE PURPOSE OF THIS PROGRAM HERE, IS TO HELP TO BE SURE THAT POOR PEOPLE ARE NOT DISCRIMINATED AGAINST, IN TERMS OF PROVIDING MEDICAL SERVICES.

I DON'T THINK THAT THE PROGRAM, ITSELF, SAYS THAT PEOPLE WON'T BE DISCRIMINATED AGAINST. THE PURPOSE OF THE PROGRAM IS TO PROVIDE MEDICAL ASSISTANCE TO PEOPLE WHO CANNOT OTHERWISE AFFORD IT.

POOR PEOPLE.

POOR PEOPLE.

SO IT IS DIRECTED TOWARDS POVERTY.

YES. BUT IT WAS NEVER MEANT TO ALLEVIATE THE ENTIRE SYSTEM OF POVERTY. IT WAS NEVER MEANT TO COVER EVERYTHING. IT DOES NOT COVER EVERYTHING.

BUT ISN'T THE REALITY, HERE, THAT THERE REALLY IS A PURPOSE, HERE, LEAVING OUT THIS, THAT IS THAT THE PURPOSE, HERE, IS TO DISFAVOR ABORTION?

-- DISFAVOR ABORTION? AREN'T WE PLAYING GAMES, BY SAYING THAT ISN'T THE PURPOSE OF THIS?

I THINK THE REAL PURPOSE IS TO FAVOR CHILDBIRTH.

CHILDBIRTH OVER WHAT?

CHILDBIRTH, WELL, ABORTION IS THE OPPOSITE OF CHILDBIRTH.

THE REGULATION, ITSELF, TIPS THE SCALE IN FAVOR OF CHILDBIRTH. THAT IS GOING TO BE PAID FOR. MEDICALLY-NECESSARY ABORTION IS NOT, INSERT CIRCUMSTANCES, SO HAVEN'T YOU REGULATED ITSELF, THE STATE?

THE STATE IS NOT PROHIBITED FROM FAVORING CERTAIN POSITIONS. I THINK THAT HAS BEEN ESTABLISHED IN THE SUPREME COURT DECISIONS.

BUT DO THEY HAVE TO JUSTIFY THAT, I THINK, IS PROBABLY THE QUESTION. OR CAN THEY JUST ARBITRARILY PAY?

IF YOU HAVE TO GET INTO THE JUSTIFICATION, I DON'T THINK IT GETS THAT FAR, BUT THE STATE HAS A COMPELLING INTEREST HERE. THE PRESERVATION OF LIFE.

SO IF THE STATE -- LET ME GIVE YOU A SORT OF HYPOTHETICAL. IF THE STATE TOOK THE POSITION THAT WE ARE GOING TO FAVOR DIFFERENT SEX RELATIONSHIPS OVER SAME-SEX RELATIONSHIPS, AND IF THERE WAS, SAY, HIV WAS CONTRACTED ONLY BY PEOPLE WHO ENGAGE IN SAME-SEX RELATIONSHIPS, COULD THE STATE, THEN, UNDER ITS MEDICARE/MEDICAID PROGRAMS, SAY THAT WE WILL NOT EXTEND FUNDING TO PERSONS WHO CONTRACT HIV?

IT COULD, AS LOCK AS IT DID NOT -- AS LONG AS IT DID NOT INTERFERE WITH THE RIGHTS OF THOSE PEOPLE.

WELL, HOW DO YOU NOT INTERFERE WITH THE RIGHTS OF THOSE PEOPLE, IF THEY DON'T HAVE THE WHEREWITHAL TO GET THESE MEDICATIONS, THIS MEDICAL TREATMENT, AND THE PURPOSE OF THE PROGRAM IS TO HELP THEM GET MEDICAL TREATMENT?

THERE IS DUAL PURPOSES HERE. THE PURPOSES OF THE REGULATIONS AT STAKE HERE ARE TO PRESERVE LIFE. I THINK THAT HAS BEEN ESTABLISHED IN OTHER CASES THAT HAVE TREATED THIS. THESE REGULATIONS PRESERVE RIGHTS -- PRESERVE LIFE IN A NARROW MANNER.

IS THERE ANYTHING WRONG WITH THE GOVERNMENTAL INDICATING ITS FUNDS, IN SUCH A FASHION THAT IT FORCES PATIENTS TO MAKE CERTAIN DECISIONS?

IF THEY WERE TRULY BEING FORCED, PERHAPS THERE WOULD BE SOMETHING WRONG. I POINT OUT THAT ALL OF THE REPRESENTATIVE PLAINTIFFS HERE RECEIVED ABORTIONS.

LET'S SAY TO TIP THE SCALES AND PUT A -- PUTTING PRESSURE ON THEM TO MAKE A GIVEN DECISION, IS THERE ANYTHING WRONG WITH THAT?

THE STATE OF THE STATE IS ENTITLED TO FAVOR CERTAIN POSITIONS. I POINT TO THE SUPREME COURT CASES THAT, US SUPREME COURT CASES THAT HAVE TREATED THIS ALREADY.

IS THERE ANY EXPLANATION, WITHOUT ANY PREREQUISITE, THE STATE CAN ALLOCATE ITS FUNDS, IN SUCH A FASHION THAT ITS CITIZENS PRACTICALLY, IN ORDER TO AVAIL THEMSELVES OF ANY OF THE OPPORTUNITIES THROUGH THE STATE, THE STATE DOES NOT HAVE TO MAKE CERTAIN DECISIONS AND THERE IS NOTHING WRONG WITH THAT. DOES THAT JUSTIFY YOUR POSITION?

IT IS A FUNDING DECISION. THERE IS NO CONSTITUTIONAL RIGHT TO THE FUNDING OF SUBSTANTIVE RIGHT. THAT DOES NOT APPEAR IN OUR CONSTITUTION.

YOU MENTIONED, A MINUTE AGO, IN ANSWER TO JUSTICE WELLS'S QUESTION, AND YOU SAID THAT VASECTOMIES ARE FUNDED UNDER THIS PROGRAM, BUT THEN YOU ADDED BUT SO ARE HIS

RECKT TOMORROWS. -- HYSTERECTOMIES. IS IT YOUR POSITION THAT THE STATE COULD REFUSE TO FUND HYSTERECTOMIES AND CHILDBIRTH EXPENSES AND OTHER EXPENSES OF WOMEN ACROSS THE BOARD AND TO FUND ALL MALE MEDICAL NEEDS RELATED TO SEX AND NOT VIOLATE THE LAW?

YES. IT IS OUR POSITION. I THINK IT IS DISCUSSED IN MY BRIEF THAT IT DOES NOT VIOLATE A RIGHT.

SO THE STATE COULD SAY WE ARE NOT GOING TO PROVIDE WOMEN WITH ANY MEDICAL SERVICES, UNDER THIS PLAN, AND WE ARE JUST GOING TO PROVIDE MEDICAL SERVICES TO MEN.

AS LONG AS IT IS A FUNDING DECISION, THE STATE IS ENTITLED TO DO THAT.

IS BIRTH CONTROL FOR WOMEN FUNDED, OR DOES THE RECORD, HERE, REFLECT THAT IT IS FUNDED, UNDER MEDICAID?

I DON'T THINK THE RECORD SHOWS, BUT I CAN SAY THAT BIRTH CONTROL FOR WOMEN IS FUNDED.

HOW IS THAT CONSISTENT WITH THE STATE'S POLICY FOR LIFE?

I THINK THAT THE DIFFERENCE, THERE, IS BIRTH CONTROL PREVENTS LIFE FROM FORMING, AT THE INCEPTION. ONCE THERE HAS BEEN INCEPTION, LIFE BEGINS.

LET ME ASK YOU ABOUT A REMEDY. IF WE WERE TO DETERMINE THAT THIS THE STATUTE WAS UNCONSTITUTIONAL, BECAUSE IT VIOLATES EITHER PRIVACY OR EQUAL PROTECTION, WHAT WOULD BE THE REMEDY OF THE COURT? REQUIRE THE STATE TO FUND THESE ABORTIONS OR TO CUT OUT ANY FUNDING FOR MALE OR FEMALE REPRODUCTIVE SERVICES?

THE REMEDY IS PROBLEMATIC, TO A CERTAIN EXTENT, BECAUSE IF THE STATE IS REQUIRED TO FUND ABORTIONS, THE STATE WOULD HAVE TO SET UP A WHOLE NEW ENTITLEMENT PROGRAM, SPECIFICALLY TO FUND ABORTIONS FOR MEDICAID-ELIGIBLE WOMEN. IT WOULD NO LONGER COME UNDER THE RUB RICK OF MEDICAID, BECAUSE MEDICAID IS A JOINT FEDERAL-STATE PROGRAM. THERE WOULD BE NO FEDERAL FINANCIAL PARTICIPATION IN SUCH A PROGRAM.

WHAT HAS HAPPENED IN OTHER STATES, WHERE THEIR HIGH COURTS HAVE RULED?

IN OTHER STATES, THE STATES HAVE CREATED A BRAND NEW ENTITLEMENT PROGRAM, PAID OUT OF GENERAL REVENUE OF THE STATE.

IT JUST DOESN'T MEET THE TEST THAT THE STATE WOULD FUND VIAGRA, SAY, FOR MEN, BUT FOR WOMEN, A MEDICALLY-NECESSARY PROCEDURE WOULD NOT BE FUNDED UNDER MEDICARE, AND THE STATE WOULD, THEN, TAKE THE POSITION THAT WE CAN ARBITRARILY DO THIS, SO IS THAT WHAT THIS AMOUNTS TO?

IT A DECISION AMONG MEDICAL PROCEDURES. MEDICAL NECESSITY IS AN ELASTIC CONCEPT. IT DIFFERS FROM DOCTOR TO DOCTOR. IT DIFFERS FROM PATIENT TO PATIENT. VIAGRA IS FUNDED FOR MEN, BECAUSE IT IS MEDICALLY-INDICATED FOR MEN, NOT FOR WOMEN.

WE ARE NOT ARGUING MEDICALLY NECESSARY. LET'S TAKE THAT AS A GIVEN. THAT THAT IS UNIFORMLY UNDISPUTED BY PEOPLE IN THE PROFESSION. THAT IS SOMETHING ELSE, WHETHER IT IS MEDICALLY MESSES AREA OR NOT -- MEDICALLY NECESSARY OR NOT.

I WOULD HAVE TO DISAGREE. THIS IS A MEDICAL FUNDING PROGRAM. THE STATE HAS TO MAKE DECISIONS --

VIAGRA IS MEDICALLY NECESSARY, MORE THAN A WOMAN'S HEALTH, WHEN IT IS RELATED TO AN ABORTION? IS THAT THE STATE'S POSITION?

I THINK THAT ASSUMES THAT ABORTION IS THE ONLY OPPOSITE, AND EVEN THE RECORD, HERE, THE PLAINTIFFS PROVIDED, SHOWS ABORTION IS JUST ONE AMONG OPTIONS. ONE OF THE EXPERTS SAY THIS IS AN OPTION I CAN'T GIVE TO MY PATIENT OR RECOMMEND FOR MY PATIENT, BECAUSE THEY WON'T BE ABLE TO PAY FOR IT.

WHAT, THEN, IS THE LIMITATION? I MEAN, THE STATE HAS INSTITUTED THIS PROGRAM. ARE THERE NO LIMITATIONS ON WHAT THE STATE CAN EXCLUDE?

AS LONG AS THEY DO NOT VIOLATE A RIGHT, AND AS I SAID, THE RIGHT TO PRIVACY IS NOT VIOLATED HERE. EQUAL PROTECTION IS NOT VIOLATED. ALL MEDICALLY -- PREGNANT WOMEN ARE TREATED THE SAME. THERE IS NO DISPARATE TREATMENT, WITHIN THE CLASS.

WOULD YOU ADDRESS THE PELL AT'S -- THE APPELLATE'S POSITION, AND I WILL ASK THEM, WHEN WE THEY COME UP ON REBUTTAL HERE. WITH REGARD TO THIS APPLICATION AND THE FEDERAL/STATE JOINT CONCEPT, BECAUSE WE KNOW THAT WE HAVE A FEDERAL PROGRAM, AND THE STATES CAN OPT INTO THAT OR NOT. THANK IS A FAIR BASIS, AND WHETHER WE AGREE OR DO NOT AGREE WITH WHAT THE FEDERAL GOVERNMENT HAS FUNDED, THEY HAVE FUNDED WHAT THEY HAVE FUNDED, AND APPARENTLY THAT HAS WITHSTOOD JUDICIAL SCRUTINY. WHERE DOES THAT PUT THE STATE? MUST STATE FUND BEYOND THE FEDERAL PROGRAM OR WHAT IS THE RELATIONSHIP. COULD THE STATE SAY I DON'T WANT THE FUND? WE KNOW YOU HAVE TO FUND AT LEAST WHAT THE FEDERAL GOVERNMENT COVERS. BUT WHAT IS THE RELATIONSHIP? IS THERE A DIFFERENCE, BECAUSE THIS IS A STATE, A FEDERALLY-FUNDED REIMBURSE SYSTEM, AS OPPOSED TO JUST A STATE-INITIATED?

IT WOULD BE A NEW PROGRAM. THE STATE MAY CHOOSE TO APPROPRIATE FUNDS FOR ANOTHER ENTITLEMENT PROGRAM, TO SUPPLY MEDICAL SERVICES IN WHATEVER REALM OR TO WHATEVER PERSON IT WANTS TO, BUT IT WOULD NO LONGER BE MEDICAID.

SO JUST MIRRORING THE FEDERAL PROGRAM WILL MEET CONSTITUTIONAL MUSTER, WOULD BE THE POSITION, THEN.

I AM SORRY. I DON'T UNDERSTAND THAT.

IF IT JUST MIRRORS, YOU PROVIDE EXACTLY WHAT THE FEDERAL GOVERNMENT WILL REIMBURSE, THEN THAT MUST MEET CONSTITUTIONAL MUSTER. MUST BE THE -- IT MUST BE THE POSITION.

THAT'S CORRECT. AND I SAY THAT THE STATES ARE LIMITED SOMEWHAT. I THINK IT IS DISCUSSED IN MY BRIEF THAT THE HITE AMENDMENT, ITSELF, INDICATES THAT THE STATE WAS NOT MEANT TO USE ITS MATCHING FUNDS TO PAY FOR SOMETHING NOT INCLUDED IN THE FEDERAL PROGRAM.

IN ANSWERING JUSTICE LEWIS'S QUESTION, THE STATE'S CONSTITUTION, INDIVIDUAL CONSTITUTION OF THE STATES, DO NOT PLAY INTO THAT AT ALL?

WELL, THAT IS, NO, I NEVER INTENDED THAT. OF COURSE THE STATE HAS TO FOLLOW THE DICTATES OF ITS OWN CONSTITUTION. BUT IT HAS TO, ALSO, IF IT WANTS TO HAVE A MEDICAID PROGRAM, COMPLY WITH WHAT THE FEDERAL GOVERNMENT REQUIRES. OTHERWISE IT IS NO LONGER MEDICAID AND WON'T RECEIVE MATCHING FUNDS.

SO DOES OUR STATE MEDICAID PROGRAM EXACTLY MIRROR THE FEDERAL, WHAT THE FEDERAL GOVERNMENT REQUIRES? WE DON'T INCLUDE ANYTHING THAT THE FEDERAL GOVERNMENT EXCLUDES?

YES. THE FEDERAL GOVERNMENT REQUIRES THE MEDICAID STATE PLAN TO INCLUDE CERTAIN THINGS, AND SO IT INCLUDES WHAT IT REQUIRES, AND DOES NOT INCLUDE EXTRAS. THERE ARE SOME THAT ARE ABSOLUTELY REQUIRED, AND THERE ARE SOME THAT ARE OPTIONAL SERVICES. AND THE STATE COVERS ALL THE REQUIRED ONES AND SOME OF THE OPTIONAL SERVICES.

DO YOU AGREE, WHEN WE COULD GIVE MORE THAN THE HITE AMENDMENT GIVES, WOULDN'T IT?

UNDER A SEPARATE FUNDING PROGRAM, IF THE LEGISLATURE APPROPRIATES IT AND -- REQUIRES IT AND APPROPRIATES THE FUNDS TO IT.

WHY WOULDN'T IT JUST FALL UNDER THE MEDLEY ---THE MEDICALLY-NECESSARY PORTION OF THE STATE PROGRAM? AS I UNDERSTAND IT, WE HAVE THESE RULES THAT SAY THAT YOU ONLY FUND THE ABORTION THAT IS ARE LIFE-THREATENING OR RESULT OF RAPE AND INCEST, CORRECT?

CORRECT.

AND, BUT, THE OVERALL PROGRAM SAYS, BASICALLY, THAT WE WILL -- THAT MEDICAID WILL COVER MEDICALLY-NECESSARY PROCEDURES. SO I GUESS I AM ASKING YOU IF THOSE RULES ARE STRICKEN, DOES IT FALL BACK TO THE GENERAL MEDICALLY-NECESSARY PROVISION OF THE MEDICAID LAW?

THRESHOLD QUESTION. IT, FIRST, HAS TO BE MEDICALLY NECESSARY, BEFORE THE STATE WILL COVER IT, BUT NOT ALL MEDICALLY-NECESSARY PROCEDURES ARE COVERED. CERTAIN ORGAN TRANSPLANTS ARE NOT COVERED. DIET PILLS AREN'T COVERED. MEN HAVE HEART PROBLEMS BECAUSE THEY GAIN WEIGHT AROUND THE MIDDLE. THEY DON'T GET DIET PILLS TO HELP THEM REDUCE.

BUT AS I UNDERSTAND WHAT, FOLLOWING UP ON JUSTICE QUINCE'S QUESTION, THAT WHAT YOUR POSITION IS, IS THAT THE ONLY WAY THAT IT CAN STAY WITHIN THE BOUNDS OF THIS MEDICAID, WHICH IS A FEDERAL MATCHING TYPE OF PROGRAM, IS TO STAY WITHIN THE BOUNDS OF THE HITE AMENDMENT. IS THAT CORRECT?

THAT'S CORRECT.

AND THAT OTHERWISE THERE WOULD HAVE TO BE SOME ORDER OR SOME BASIS UPON WHICH THE LEGISLATURE WOULD BE REQUIRED TO EITHER ABANDON ALL MEDICAID PROGRAMS OR PASS SOME OTHER TYPE OF FUNDING FOR -- TO COVER THIS TYPE OF PROCEDURE, WHICH IS OUTSIDE THE BOUNDS OF THE HITE AMENDMENT.

IF I UNDERSTAND YOUR QUESTION CORRECTLY, THAT IS NOT CORRECT. THE STATE CAN CONTINUE TO HAVE THE MEDICAID PROGRAM, BUT IF IT WANTS TO FUND PROCEDURES OUTSIDE OF THE HITE AMENDMENT, IT WOULD HAVE TO CREATE A SEPARATE ENTITLEMENT PROGRAM FOR THOSE SPECIFIC PROCEDURES.

CAN IT REFUSE TO FUND A PROCEDURE -- PROCEDURES THAT ARE WITHIN THE HITE AMENDMENT?

YES, BECAUSE IT IS PERMISSIVE.

THE HITE AMENDMENT IS PERMISSIVE.

IT STATES THAT IT SHALL ONLY FUND CERTAIN ABORTIONS. IT IS PERMISSIVE IN THE RESPECT THAT IT WILL FUND ABORTIONS IN THREE SEPARATE SITUATIONS.

CAN -- IF THIS STATUTE OR THIS RESTRICTION IS RULED UNCONSTITUTIONAL, CAN -- YOU HAVE

SAID THE REMEDY WOULD BE TO ESTABLISH A NEW FUNDING PROCEDURE, BUT COULD THE LEGISLATURE CUT OUT ALL FUNDING FOR REPRODUCTIVE SERVICES TO MEN AND TO WOMEN?

WELL, THAT WAS THE SECOND PART OF MY ANSWER, WHICH I WASN'T ABLE TO FINISH BEFORE. THAT IS AN ALTERNATIVE.

AND THAT WOULD NOT VIOLATE THE HITE AMENDMENT OR THE FUNDING PROCESSES UNDER THAT.

NO. I THINK THE PROBLEM THAT HAS BEEN EXPRESSED HERE IS THE FUNDING OF CHILDBIRTH AND NOT CERTAIN ABORTIONS. SO THE CORRECTED AX, YOU COULD CORRECT THE ACTION -- THE CORRECTED ACTION, YOU COULD CORRECT THE ACTION BY NOT FUNDING CHILDBIRTH ANY LONGER.

THANK YOU. FOR THE COURT'S INDULGENCE.

COULD I CLARIFY ONE THING. DID YOU SAY THAT STATE FUNDING OF MEDICALLY-NECESSARY ABORTIONS IS NOT FUNDED NOW? WOULD IT HAVE TO BE STATE FUNDS?

TOTALLY FEDERAL REVENUE. OUTSIDE OF THE HITE AMENDMENT, IT WOULD GET FEDERAL FUNDS.

SO THE HITE AMENDMENT WOULD PROHIBIT THE USE OF FEDERAL-MATCHING FUNDS.

THANK YOU.

THANK YOU, MR. ROBERTS. MS. JONES. MS. JONES, WOULD YOU PLEASE ADDRESS THE FOLLOW-UP TO JUSTICE LEWIS'S QUESTION, IN THE ISSUE OF WHETHER THIS COURT CAN, IN SOME WAY, WITHOUT VIOLATING SEPARATION OF POWERS, REQUIRE AN APPROPRIATION BY THE LEGISLATURE FOR ANY SPECIFIC TYPE OF PROCEDURE.

YES, YOUR HONOR. I BELIEVE JUSTICE LEWIS'S QUESTION WAS WHETHER THE STATE IS REQUIRED TO FUND ANYTHING BEYOND THE CATEGORIES REQUIRED BY THE FEDERAL GOVERNMENT. THE ANSWER TO THAT WOULD BE YES, TO THE EXTENT THE STATE CONSTITUTION REQUIRES IT TO DO SO. AS TO THE QUESTION OF THE SEPARATION OF POWERS --

WHERE? I WOULD LIKE A RESPONSE. WHERE, IN THE CONSTITUTION, DOES IT REQUIRE FUNDING FOR ANY OF THE SUBSTANTIVE RIGHTS THAT ARE WITHIN THE STATE CONSTITUTION? I GUESS WE WOULD NEED TO GET ONTO THAT QUESTION THEN.

IT DOES NOT REQUIRE FUNDING OF RIGHTS. WHAT IT DOES REQUIRE IS FOR THE STATE TO REFRAIN FROM UNWARRANTED INTRUSION ON RIGHTS, AND WHAT THIS PROGRAM DOES IS INTRUDES ON THE RIGHT TO PRIVACY. IN RESPONSE TO THE QUESTIONS ABOUT SEPARATIONS OF POWERS, FIRST OF ALL THE HITE AMENDMENT IS NOT PERMISSIVE. THE STATES TO HAVE -- DO HAVE TO COMPLY WITH THE HITE AMENDMENT. THEY DO HAVE TO FUND ABORTIONS IN THE INSTANCES THAT ARE STATED IN THERE, AND THEY ARE PERMITTED TO DO SO IN THE MEDICAID PROGRAM.

ARE THEY PERMITTED TO FUND MORE THAN WHAT IS IN THE HITE AMENDMENT?

NO. THEY ARE PERMITTED TO FUND MORE BUT NOT LESS. THEY CAN'T ASK FOR MATCHING FUNDS, BUT THEY ARE ALLOWED TO INCLUDE THAT WITHIN THE MEDICAID FUNDS, AND MOST OF THE STATES COVER BEYOND THE HITE AMENDMENT, INCLUDING FLORIDA, WHICH COVERS, UNDER ITS LIFE EXCEPTION, COVERS MORE ABORTIONS THAN THE HITE AMENDMENT. BECAUSE THE HITE AMENDMENT COVERS MORE LIMITED. IT ONLY COMPLIES, IF IT IS A PHYSICAL INJURY AND THERE

ARE CONDITIONS ABOUT WHAT CONDITION THE WOMAN'S HEALTH MUST BE IN, TO BE COVERED.

WHAT ABOUT YOUR OPPONENT'S POSITION, THOUGH, THAT, IF THERE IS SOMETHING FUNDED, IN RESPECT TO ABORTIONS THAT ARE OUTSIDE THE PARAMETERS OF THE HITE AMENDMENT, THAT THAT IS NOT MEDICAID? THAT THAT IS SOME OTHER TYPE OF -- THEY WOULD HAVE TO DO IT UNDER SOME OTHER TITLE.

HARRIS VERSUS McCRAE EXPLICITLY STATES THAT THE INDIVIDUAL STATES ARE PERMITTED TO PAY FOR ABORTIONS IN THEIR MEDICAID PROGRAM THAT ARE MEDICALLY NECESSARY. THEY SIMPLY CAN'T SEEK MATCHING FUNDS. IT IS STATED EXPLICITLY, IN A FOOTNOTE IN THE HARRIS MAJORITY OPINION.

BUT ISN'T THE NOT SEEKING MATCHING FUNDS A TREMENDOUS ECONOMIC INDUCEMENT TO THE STATE TO SAY, YES, WE ARE GOING TO USE ALL OF THE FEDERAL MONEY THAT WE CAN GET, AND THAT THAT IS GOING TO BE A VERY EFFICIENT PROGRAM FOR US, BUT WE ARE NOT GOING TO CHOOSE TO SPEND ANY ADDITIONAL FUNDS FOR OTHER PROCEDURES, BEYOND WHAT THE FEDERAL GOVERNMENT HAS AGREED TO MATCH FOR US. WOULDN'T THAT ORDINARILY BE A VERY RATIONAL DECISION BY A STATE LEGISLATURE, JUST TO CHOOSE TO TAKE WHAT THE FEDERAL GOVERNMENT AGREES TO MATCH?

I HAVE TWO RESPONSES TO THAT. ONE IS RATIONAL INTERESTS AREN'T ENOUGH HERE. YOU NEED A COMPELLING INTEREST, BECAUSE OF THE RIGHT TO PRIVACY BEING INVOLVED. BUT IN ADDITION, THIS IS NOT A COST-SAVING MEASURE. THE COSTS OF CARRYING A PREGNANCY AND GOING TO CHILDBIRTH ARE EXTREMELY HIGH, COMPARED TO THE COSTS OF ABORTION, AND THAT IS NOT INCLUDING THE COSTS TO PRESERVE THIS WOMAN WHO HAS THE MEDICALLY-NECESSARY NEED FOR ABORTION AND IS GOING TO GO THROUGH A COMPLICATED PREGNANCY, SO THERE IS NO MONEY SAVING INVOLVED HERE, DESPITE WHAT THE STATE CONTENTS. THE MONEY THAT HAS ALREADY BEEN GIVEN IS ADEQUATE.

SO IF THESE REGULATIONS OR RULES ARE STRICKEN, THERE IS NOTHING ELSE THAT YOU NEED TO DO THAT, IN FACT, THESE TYPE OF PROCEDURES WOULD BE COVERED, UNDER THE EXISTING PROGRAM?

THAT'S CORRECT. IF THE THREE RULES WERE STRICKEN, THE TERMS OF THE STATE STATUTES GOVERNING MEDICAID WOULD COVER MEDICALLY NECESSARY ABORTIONS, LIKE IT COVERS ALL OTHER MEDICALLY-NECESSARY PROCEDURES. I WOULD JUST LIKE TO MAKE ONE FINAL POINT, WHICH IS IN RESPONSE TO A QUESTION I WAS ASKED EARLIER ABOUT, WELL, IF THIS IS JUST FUNDING, HOW DOES IT INTRUDE ON A WOMAN'S RIGHT? I THINK THE STATE HAS ANSWERED THAT QUESTION BY ARGUING THAT THE INTEREST THAT IS SERVED HERE IS THE STATE'S INTEREST IN POTENTIAL LIFE. THE ONLY WAY THAT THIS PROGRAM CAN SERVE AN INTEREST IN POTENTIAL LIFE IS IF IT CAUSES A WOMAN WHO, ABSENT THE PROGRAM, WOULD UNDERGO AN ABORTION, TO CARRY A CHILD TO TERM, SO BIAS EARTHING THAT INTEREST, THE STATE IS CONCEDING THAT IT HAS A COURSE OF EFFECT UPON FUNDAMENTAL RIGHTS, AND IF IT DIDN'T HAVE A SCHEME EFFECT, THEN THE GOAL WOULD HAVE BEEN PUT FORWARD. I AM OUT OF TIME. THANK YOU VERY MUCH.

THANK YOU, COUNSEL, FOR YOUR ASSISTANCE WITH THIS CASE. THE COURT WILL BE IN RECESS. THE MARSHAL: PLEASE RISE.