No. COA 96-484 FOURTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS
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ROSIE J., on her own behalf, and on behalf of all women similarly situated, RALEIGH WOMEN'S HEALTH ORGANIZATION, and JOHN MARKS, M.D.,	)	
Plaintiffs/Appellants,	)	
v.	)	From DURHAM COUNTY
NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, C. ROBIN BRITT, SR., in his official capacity as Secretary of the North Carolina Department of Human Resources, and JAMES HUNT, in his official capacity as Governor of North Carolina,	)	No. 95 CVS 04741
Defendants/Appellees.	)	

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BRIEF OF AMICI CURIAE
THE AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA LEGAL FOUNDATION, THE SOUTH MOUNTAIN WOMEN'S HEALTH ALLIANCE, NC EQUITY, AND THE NATIONAL ASSOCIATION OF SOCIAL WORKERS ON BEHALF OF ITS NORTH CAROLINA CHAPTER

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This is not a case about the morality, or even the legality, of abortion. The United States Supreme Court has held that women have a fundamental right to make this deeply personal decision. Nor does this appeal have anything to do with paying for purely elective abortions -- so-called "abortions on demand."

Instead, this case pertains only to impoverished women whose health suffers as a result of their pregnancies. The only question for the Court is, as North Carolina has chosen to provide all medical services to its poor, may the legislature arbitrarily deprive these women of their most appropriate medical treatment?

Medicaid funds for abortions except where the life of the mother would be endangered. This legislation's constitutionality was immediately challenged.

In Harris v. McRae, 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980), the United States Supreme Court ruled that the Hyde Amendment did not violate the United States Constitution. Neither the federal government nor a state offends the federal constitution by failing to provide funds for abortions, even those that are medically necessary.[1]

The 5-4 decision in McRae has been widely criticized by commentators and courts alike. Both circles have expressly rejected its holding in favor of Justice Brennan's dissenting opinion. See Doe v. Maher, 40 Conn. Supp. 394, 430, 515 A.2d 134, 152 (1986) ("Justice Brennan's perspective of impingement on the constitutional right of privacy as expressed in his dissent in McRae has clear applicability to our state constitution"); L.H. Tribe, The Abortion Funding Conundrum, Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence, 99 Harv. L. Rev. 330 (1985); M.J. Perry, Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae, 32 Stan. L. Rev. 1113 (1980).

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[1] The term "medically necessary abortion" as used herein has the meaning ascribed by the court in Doe v. Maher, 40 Conn. Supp. 394, 395 n.4, 515 A.2d 134, 135 n.4 (1986): "The court defines medically necessary or therapeutic abortions as follows: abortions necessary to ameliorate a condition that is deleterious to a woman's physical and or psychological health." Such procedures are to be distinguished from nontherapeutic, or elective, abortions which states have no obligation under the United States Constitution to fund. See Maher v. Roe, 432 U.S. 464, 97 S. Ct. 2376, 53 L. Ed. 2d 484 (1977). Neither Plaintiff-Appellants nor Amici ask that this Court recognize a state constitutional right of funding of elective abortions.

constitute a threat to her health." Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 880, 112 S.Ct. 2791, 2822, 120 L. Ed. 2d 674, 716 (1992). By definition, a medically necessary abortion is one where continuing the pregnancy would jeopardize the woman's health. See note 1 above.

North Carolina's Experience With Abortion Funding

From 1973 until 1977, North Carolina provided funds for medically necessary abortions the same as for all other medical services. After the Hyde Amendment was enacted, North Carolina established the State Abortion Fund to pay, without federal assistance, for medically necessary abortions. Over the last ten years, the Fund has ranged in size from $424,000 to $1,375,000 per year. Fiscal Research Division, "State Abortion Fund History of Funding" (2/24/95).

Eighty-four percent of the 4,448 women who found it necessary to use the Fund in Fiscal Year 1993-94 suffered from one or more of the following medical conditions: Multiple Sclerosis, HIV, Chronic Strokes, Thyroid Disease, Serious Seizure Disorder, Placenta Reva, Chronic Bleeding, Diabetes, Toxemia, Sickle Cell, Heart Condition, Acute Stress Reaction, Impaired Emotional Health, Depression, Mental Illness, Emotional Instability, Suicidal Tendencies, Alcohol Addiction, Cocaine Addiction, or Hypertension. State Abortion Fund FY 93-94 Data (Department of Human Resources). Fifteen percent of those who used the Fund did so because they were minors.[3] Id. One percent

[3] Because of the way statistics on minors are kept, there is no way to determine how many of their abortions were medically necessary.

federal poverty level; fifty-eight percent of these families are headed by women. D. Meyer, "Changes in Poverty Assistance Program May Affect North Carolina," States News Service (June 10, 1994); "Women to Discuss, Rank Issues for 1995," News & Record (Greensboro, N.C.) (September 27, 1994). The birth rate for North Carolina women eligible for Medicaid in 1986 and 1987 was twice the overall birth rate. Public Health Reports, United States Department of Health and Human Services (May, 1991).

-- Age: Teenagers in North Carolina are more likely to give birth than teenagers in the rest of the country. Id., p. 65. Simultaneously, the rate of live births to North Carolina women over 35 has nearly doubled from 1980 to 1990. Guild, P.A., Paterson, K., Schectman, R. and Cabe, C., Consensus in Region IV: Maternal and Infant Health and Family Planning Indicators for Planning and Assessment (Chapel Hill: Health Services Research Center 1992).

-- Unintended pregnancies: Approximately forty-five percent of all pregnancies in North Carolina in 1988 were unintended. Beuschler, P.A., Healthier Mothers and Children through Women's Preventive Health Services (Raleigh: State Center for Health Statistics 1989).

-- Lack of family support: Approximately thirty-two percent of all births in North Carolina in 1990 were to unmarried women; of non-white births, sixty-two percent were to unmarried women. North Carolina Reported Pregnancies (Raleigh: State Center for Health Statistics, DEHNR, 1991).

> erythematosus; a woman with pancreatitis; a woman with serious threats to her health from a failed prior attempt at an abortion with subsequent pain, bleeding and probably severe infection; a woman at risk because of a cardiac valve lesion who is also on medication known to have ill effects on pregnancy; a woman whose fetus could not survive outside of the womb because it had anencephaly; a woman who was at risk because she was both hypertensive and asthmatic; a woman who was at risk and whose fetus was also at risk because she had a history of drug abuse and was currently on a methadone program; a woman with a history of psychiatric illness who became emotionally unstable during pregnancy and needed medication for her mental health; and a woman who was at risk because she had sickle-cell anemia which is associated with a high rate of complication during pregnancy.

Doe v. Maher, 40 Conn. Supp. at 434-35, 515 A.2d at 154-55. In fact, the medical reasons prompting North Carolina's women to use the Fund in 1993-94 were remarkably similar. See p. 5-6 above.

From every indication, North Carolina faces a continuing increase in medically necessary abortions. Indeed, the South Mountain Women's Health Alliance saw thirty-five poor women in the past year in need of medically necessary abortions that would have been covered by the Fund, but no longer are.

A. In Interpreting the North Carolina Constitution, North Carolina Courts are Not Bound By Any Federal Court's Interpretation of the Federal Constitution.

The North Carolina Supreme Court has recognized on numerous occasions that "in the construction of the provision of the State Constitution, the meaning given by the Supreme Court of the United States to even an identical term in the Constitution of the United States is, though highly persuasive, not binding upon this Court." Northampton County Drainage District Number One v. Bailey, 326 N.C. 742, 748, 392 S.E.2d 352, 357 (1990); White v. Pate, 308 N.C. 759, 766, 304 S.E.2d 199, 203 (1983) (same); McNeil v. Harnett County, 327 N.C. 552, 563, 398 S.E.2d 475, 481 (1990) ("Decisions by the federal courts as to the construction and effect of the due process clause of the United States Constitution . . . do not control an interpretation by this Court of the law of the land clause in our state Constitution"). Following such reasoning, North Carolina courts have often held that the North Carolina Constitution protects citizens' rights more broadly than does the federal constitution. (See Part II, below)

B. North Carolina Courts Find Interpretations of Other States' Constitutions Particularly Persuasive.

North Carolina courts vigilantly monitor the developing constitutional law of neighboring jurisdictions. The North Carolina Supreme Court has twice overridden its own constitutional jurisprudence in light of sister states' decisions. The fact that geographically remote states have

> 456; Moore v. Sutton, 185 Va. 481, 39 S.E.(2) 348. The Arizona, Florida, Georgia, North Dakota, and Virginia decisions were handed down after the Lawrence case.

Id. at 768, 51 S.E.2d at 733. The court therefore held that "Chapter 92 of the General Statutes is adjudged void for repugnancy to Article I, sections 1, 17, and 31 of the State Constitution." Id. at 772, 51 S.E.2d 736.

In Bulova Watch Co. v. Distributors, 285 N.C. 467, 206 S.E.2d 141 (1974), the North Carolina Supreme Court reconsidered the constitutionality of the North Carolina Fair Trade Act, N.C. Gen. Stat. § 66-52 et. seq., a law the court had upheld in Eli Lilly & Co. v. Saunders, 216 N.C. 163, 4 S.E.2d 528 (1939). Justice I. Beverly Lake, Sr., writing for a unanimous court, justified the court's overruling of Eli Lilly & Co. on the ground that, by 1974, the court had "the advantage of access to another page of history." 285 N.C. at 478, 206 S.E.2d at 149.

As it had done in Ballance, the North Carolina Supreme Court paid close attention to decisions interpreting the constitutions of other states:

> A recent decision of the Supreme Judicial Court of Massachusetts, Corning Glass Works v. Ann & Hope, Inc. of Danvers, 294 N.E.2d 354, holds the non-signer clause of the Fair Trade Act of Massachusetts, which is similar to G.S. 66-56, is an unconstitutional delegation of legislative power, overruling an earlier decision of that Court. To the same effect are: Olin Mathieson Chemical Corp. v. White Cross Stores, Inc. No. 6, 414 Pa. 95, 199 A.2d 266, House of Seagram, Inc. v. Assam Drug Co., 85 S.D. 27, 176 N.W. 491, Dr. G.H. Tichenor Antiseptic Co. V. Schwegmann Brothers Markets, 231 La. 51, 90 So.2d 343. . . . The South Carolina Court has declared the nonsigner clause of that State's Fair Trade Act unconstitutional. Rogers-Kent, Inc. v. General Electric Co., 231 S.C. 636, 99 S.E.2d 665. . . .

285 N.C. at 476-77, 206 S.E.2d at 147-48. In light of the clear trend in other states' constitutional jurisprudence, the court

288, 299 (1991) ("Our state Constitution provides a broader right than the federal Constitution and mandates that a defendant's presence cannot be waived").

In addition to the North Carolina Supreme Court's forays, this Court has not been hesitant to interpret the North Carolina Constitution as granting rights broader than the United States Constitution. State v. Cunningham, 108 N.C. App. 185, 196, 423 S.E.2d 802, 809 (1992) ("We conclude that the information sought by defendant is discoverable pursuant to Section 15A-903(e) and the North Carolina Constitution" even though he "has no federal constitutional right to such discovery"). This Court has also recognized that "the North Carolina Constitution has been interpreted to guarantee a broader right to individuals to keep and bear arms." State v. Fennell, 95 N.C. App. 140, 382 S.E.2d 231 (1989) (Article I, section 30 is more expansive than the Second Amendment).

III. THE STATE'S DENIAL OF FUNDING FOR MEDICALLY NECESSARY ABORTIONS VIOLATES THE EQUAL PROTECTION CLAUSE OF ARTICLE I, SECTION 19 OF THE NORTH CAROLINA CONSTITUTION.

The North Carolina Constitution expressly guarantees its citizens equal protection of the law: "No person shall be denied the equal protection of the laws." N.C. Const. Art. I, sec. 19. As with other portions of the two documents, interpretations of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution are instructive, but not binding upon interpretations of the equal protection provision found in section nineteen.

> The right to choose whether to have an abortion . . . is a fundamental right of all pregnant women, including those entitled to Medicaid reimbursement for necessary medical treatment. As to that group of women, the challenged statute discriminates between those for whom medical care is necessary for childbirth and those for whom an abortion is medically necessary.

Id. at 305, 450 A.2d at 934. Such favoritism cannot be countenanced:

> To justify the discrimination, the State asserts as its compelling interest the protection of potential life. Although that is a legitimate state interest, at no point in a pregnancy may it outweigh the superior interest in the life and health of the mother. Roe v. Wade, supra, 410 U.S. at 163-65, 93 S.Ct. at 731-33. Yet the funding restriction gives priority to potential life at the expense of maternal health.

Id. at 306, 450 A.2d at 935.

Sacrificing women's health in favor of potential life creates additional medical problems:

> Under N.J.S.A. 30:4D-6.1, those needing abortions receive funds only when their lives are at stake. . . . [However], the distinction between life and health may be difficult for even the most discerning physician. In this case, uncontroverted medical evidence established that pregnancy increases the health risks for many women with preexisting diseases such as sickle cell anemia, diabetes or hypertension, as well as heart, kidney, or lung disease. Furthermore, some of these diseases may be health-threatening early in a pregnancy, but life-threatening as the pregnancy approaches full term. Additionally, some medical conditions that endanger a woman's health arise for the first time during pregnancy, while others may go undetected until pregnancy.

Id. at 305-07, 450 A.2d at 934-35. The exacerbation of these difficulties interferes with the exercise of a fundamental right: "When an abortion is medically necessary is a decision best made by the patient in consultation with her physician without the complication of deciding if that procedure is required to protect her life, but not her health." Id.

> and it certainly cannot withdraw benefits if to do so would abridge a constitutionally guaranteed right.

Roe v. Harris, No. 96977, slip op. at 7.

> [W]e hold that when state government seeks to act "for the common benefit, protection and security of the people" in providing medical care for the poor, it has an obligation to do so in a neutral manner so as not to infringe upon the constitutional rights of our citizens.

Women's Health Center of West Virginia, Inc. v. Panepinto, 191 W.Va. at 445, 446 S.E.2d at 667.

Upon finding such discrimination, the states examined whether this lack of neutrality was justified by a compelling government interest. Unanimously, they concluded that the government's asserted interest (in protecting potential life) was not sufficiently compelling. See Right to Choose v. Byrne, 91 N.J. at 306, 450 A.2d at 935 ("at no point in a pregnancy may it outweigh the superior interest in the life and health of the mother').

The North Carolina Constitution's Equal Protection Clause is little different from those of its sister states. When a fundamental right is at issue, North Carolina's Equal Protection Clause requires that courts strictly scrutinize the governmental classification. White v. Pate, 308 N.C. at 766, 304 S.E.2d at 204 ("The upper tier of equal protection analysis requiring strict scrutiny of a governmental classification applies only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class").

If this Court follows the reasoning of the courts of West Virginia, Illinois, Montana, Idaho, Connecticut, New Jersey,

to abortion as a matter of state constitutional law. West Virginia is undeterred by this asserted shortcoming:

> Appellees claim, however, that West Virginia has not recognized a parallel fundamental right to privacy under our state constitution similar to that recognized in Roe. See 410 U.S. at 152-53. Because there is a federally-created right of privacy that we are required to enforce in a non-discriminatory manner, it is inconsequential that no prior decision of this Court expressly determines the existence of an analogous right.

Women's Health Center of West Virginia, Inc. v. Panepinto, 191 W.Va. at 442, 446 S.E.2d at 664.

The West Virginia Supreme Court of Appeals thus turned to the question whether its statute impermissibly interfered with a federal constitutional right:

> Appellants suggest and we agree that for an indigent woman, the state's offer of subsidies for one reproductive option and the imposition of a penalty for the other necessarily influences her federally-protected choice.

Id. at 445, 446 S.E.2d at 667. Quoting Justice Brennan's dissent in Maher, 432 U.S. at 483, the court further noted:

> As a practical matter, many indigent women will feel they have no choice but to carry their pregnancies to term because the State will pay for the associated medical services, even though they would have chosen to have abortions if the State had also provided funds for that procedure, or indeed if the State had provided funds for neither procedure. This disparity in funding by the State clearly operates to coerce indigent pregnant women to bear children they would not otherwise choose to have, and just as clearly, this coercion can only operate upon the poor, who are uniquely the victims of this form of financial pressure.

Id. at 444, 446 S.E.2d at 666. The court therefore held: "[W]e cannot but conclude that the provisions of West Virginia Code § 9-2-11 constitute undue government interference with the exercise of the federally-protected right to terminate a pregnancy." Id. at 445, 446 S.E.2d at 667.

regulation violated Connecticut's due process clause. Id. at 436, 515 A.2d at 154.

Under the Law of the Land Clause, North Carolina courts apply strict scrutiny when reviewing government actions infringing upon individual liberty. See Treants Enterprises, Inc. v. Onslow County, 83 N.C. App. 345, 351-52, 35 S.E.2d 365, 369 (1986), aff'd, 320 N.C. 776, 360 S.E.2d 783 (1987) ("[A] law which burdens certain explicit or implied 'fundamental' rights must be strictly scrutinized. It may be justified only by a 'compelling state interest,' and must be narrowly drawn to express only the legitimate interests at stake.").

If this Court follows the reasoning of a dozen sister states -- that the restriction upon abortion funding interferes with the fundamental right recognized in Roe v. Wade -- then the Court must strictly scrutinize that statute. Should it do so, it must find that the state has no sufficiently compelling interest in requiring a woman to wait until her life is in danger before undergoing treatment that a physician has determined is necessary to protect her health.

This Court should therefore review the restriction under its strict scrutiny test and follow those states that have struck down identical restrictions.

V. THE STATE'S DENIAL OF FUNDING FOR MEDICALLY NECESSARY ABORTIONS VIOLATES THE "INALIENABLE RIGHTS" CLAUSE OF ARTICLE I, SECTION 1 OF THE NORTH CAROLINA CONSTITUTION.

The North Carolina Constitution's Inalienable Rights Clause protects its citizens' "life, liberty, and . . . pursuit of happiness." The North Carolina Supreme Court has held that "an

favor of state-financed childbirth -- regardless of its effect on maternal health. Therefore, the withdrawal of funding has deprived them of their inalienable rights as North Carolina citizens.

VI. THE STATE'S DENIAL OF FUNDING FOR MEDICALLY NECESSARY ABORTIONS VIOLATES THE "BENEFICENT PROVISION FOR THE POOR" CLAUSE OF ARTICLE XI, SECTION 4 OF THE NORTH CAROLINA CONSTITUTION.

A starting point for many of the decisions finding violations of state constitutions was that those states' constitutions did not require that the government do anything for the poor. Roe v. Harris, No. 96977, slip op. at 7 ("There is no substantive constitutional right to state funded medical assistance in Idaho"); Right to Choose v. Byrne, 91 N.J. at 306, 450 A.2d at 935 ("Concededly, the Legislature need not fund any of the costs of medically necessary procedures pertaining to pregnancy"); Jeannette R. v. Ellery, No. BDV-94-811, slip op. at 17 ("the majority of state courts that have reviewed similar issues, have generally held that . . . a state need not subsidize any of the costs associated with child bearing or with health care generally"). Once the state extends a benefit, however, it is required to do so in a neutral manner. See Part III, above.

By contrast, the North Carolina Constitution expressly mandates that the State care for its poor:

> Beneficent provision for the poor, the unfortunate, and the orphan is one of the first duties of a civilized and a Christian state. Therefore the General Assembly shall provide for and define the duties of a board of public welfare.

N.C. Const. art. XI, § 4.

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA LEGAL FOUNDATION, THE SOUTH MOUNTAIN WOMEN'S HEALTH ALLIANCE, NC EQUITY, AND THE NATIONAL ASSOCIATION OF SOCIAL WORKERS ON BEHALF OF ITS NORTH CAROLINA CHAPTER to be served this day by depositing copies thereof in a depository under the exclusive custody and care of the United States Postal Service in postage prepaid envelopes and properly addressed as follows:

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This 22nd day of July, 1996.

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