COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK COUNTY NO. 2231

MARY MOE, KAREN KOE and PAULA POE, individually and on behalf of other persons similarly situated, and PHILLIP STUBBLEFIELD, individually and on behalf of other persons similarly situated,

Plaintiffs

V.

THE SECRETARY OF ADMINISTRATION AND FINANCE, THE SECRETARY OF HUMAN SERVICES, THE COMMISSIONER OF PUBLIC WELFARE AND THE COMPTROLLER OF THE COMMONWEALTH,

Defendants

ON RESERVATION AND REPORT
BRIEF FOR PLAINTIFFS

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QUESTIONS PRESENTED

1. May the General Court constitutionally impose conditions on abortion services, such as those which the challenged enactments impose, when it has imposed no such conditions on other services within the scope of the Commonwealth's Medicaid program:

   (1) Do the challenged enactments create a classification cognizable under the Equal Protection Clause of the Declaration of Rights?

   (2) Do the challenged enactments create a classification based on sex cognizable under the Equal Rights Amendment?

   (3) If the answer to either (1) or (2) is yes, what is the standard which the Commonwealth must meet in order to justify the statutory classification?

2. Does the fact that an appropriations measure is challenged affect the Court's jurisdiction over the subject matter of this action?

3. Do the plaintiffs have an adequate remedy at law?

4. Does this Court lack subject matter jurisdiction over the claim which the plaintiffs assert against the Governor of the Commonwealth?

5. If the plaintiffs prevail, are they entitled to a remedy which extends the scope of the Commonwealth's Medicaid program to include the benefits they desire, or is the Court only permitted to nullify the statutes which the plaintiffs challenge?

6. Should the defendants prevail, are they entitled to recover either at law or in equity any payments made to or on behalf of the plaintiffs pursuant to this Court's interlocutory orders?

7. Did the Court properly grant preliminary relief barring the defendants from implementing the appropriations restrictions and should such relief be continued pending the final resolution of this case on its merits?

PROCEEDINGS BELOW

This case comes before the Court in the form of certain questions of law which have been reserved and reported by Justice Benjamin Kaplan on July 30, 1980, pursuant to Mass. R.Civ.Pro. 64.

On July 9, 1980, a complaint, with attached affidavits, was filed seeking a declaratory judgment that certain statutory restrictions on the funding of abortions under the Massachusetts Medical Assistance plan [hereinafter "Medicaid"]are unconstitutional, and seeking a preliminary and permanent injunction, enjoining the enforcement of these restrictions. Appendix [hereinafter A.] 3. The statutes involved are G.L. c.29 §20B, added by St. 1979, c. 268 §1 and various appropriations measures including, inter alia, St. 1979, c. 393 §2, Item 4402-5000 and 1980, c.329 §2, Item 4402-5000. These enactments prohibit the payment of Medicaid funds for abortions which are "not necessary to prevent the death of the mother."

The complaint alleges inter alia, that these statutory restrictions, by effectively excluding all abortion services from coverage, under an otherwise

extremely liberal and comprehensive Massachusetts Medicaid plan, violate two provisions of the Massachusetts Constitution -- namely, the Equal Protection Clause, Pt. 1, Article X, and the Equal Rights Amendment, Pt. 1, Article I (as amended by Article 106, approved November 2, 1976).

The plaintiffs are three women identified by pseudonyms, Mary Moe, Karen Koe and Paula Poe, and Philip Stubblefield, a physician. Each of the female plaintiffs is a citizen of the Commonwealth of Massachusetts, Medicaid eligible, pregnant, and each, after consultation with her physician, desires to obtain an abortion. In none of these cases has the consulting physician certified that the abortion meets the statutory standard, namely, that it is "necessary to prevent the death of the mother." However, in the case of at least one plaintiff, Karen Koe, the consulting physician has certified that the abortion is "medically necessary."[1/] A. 11, 12, 53-56.

[1/] Koe, during the period of time that she has been pregnant (but before she was aware of her condition) had an operation for the repair of a cerebral aneurysm. As part of that treatment, she took certain medications, including morphine and dilantin, and received x-rays.

Plaintiff Stubblefield is a licensed physician and a board certified obstetrician and gynecologist, currently on the medical staff of the Boston Hospital for Women.

The action is brought on behalf of two classes: 1) women who are Medicaid eligible, pregnant, and who desire to obtain an abortion but for whom an abortion is not necessary to prevent death; and 2) all physicians and other Medicaid providers whose patients are women who desire to obtain abortions and who are willing to perform all abortions, including those which cannot be characterized as necessary to prevent the death of the patient.

The defendants named in the complaint are Edward J. King, the Governor of the Commonwealth, Edward T. Hanley, the Secretary of Administration and Finance, Charles F. Mahoney, the Secretary of Human Services, John D. Pratt, the Commissioner of Public Welfare, and Robert Sheehan, the Comptroller of the Commonwealth.

The defendants filed an opposition to the motion for a temporary restraining order, an answer to the complaint, and an amendment to that initial answer including a counterclaim. The plaintiffs moved to

dismiss the counterclaim.

On July 23, 1980, the Court granted temporary relief to the plaintiffs extending through August 1, 1980, consisting of the following, inter alia: The Court enjoined the implementation of the challenged enactments insofar as they prohibited the funding of abortions for pregnant Medicaid eligible women whose physicians have determined that an abortion is medically necessary, even though not necessary to avert their death. The Court denied relief with respect to women whose abortions could not be characterized as "medically necessary." In addition, the Court dismissed the Governor of the Commonwealth from the action. A. 112.

The Court provisionally certified two classes: a) Medicaid eligible pregnant women who desire abortions and whose physicians have determined that an abortion is medically necessary, even though not necessary to prevent their death; and b) physicians who are willing to perform abortions in the circumstances indicated in (a) above.

On July 30, 1980, the Single Justice reserved and reported the case to the Full Bench for its

consideration. A. 128, 131.

On the following day, the Single Justice issued an order extending the preliminary injunction entered on July 23, 1980 until further order of the Court or further order of the Full Bench. A. 139.

STATEMENT OF THE FACTS

A. THE MASSACHUSETTS MEDICAID PLAN

Massachusetts provides its low income citizens with one of the most comprehensive health care programs of any state in the United States.[2/] It not only covers the treatment and cure of illness but also emphasizes prevention and rehabilitation, in order "to maintain [the] quality of life, and to restore people to independent living and self support." Foreword to the Medicaid Fee Schedule for Physicians and Dentists, Commonwealth of Massachusetts, Department of Public Welfare, dated January 1, 1974.[3/]

[2/] In 1976, total Medicaid spending per person in Massachusetts was 70% higher than the national average largely as a result of the more inclusive Massachusetts Medicaid package. Medicaid Case Management Grant Application, June 29, 1979, pp. 4-5.

[3/] For example, 106 C.M.R. 450.202(a) and G.L. c. 151B §4,¶10 provide that "no provider of medical services participating in the Medicaid program may deny any service to a recipient eligible for such service unless the provider would at the same time and under similar circumstances deny the same services to a patient who is not a Medical Assistance Recipient." No distinctions are to be made between fee-paying and medicaid patients with respect to the services provided.

The breadth of the program is apparent in the general listing of services which include, but are not limited to, the following: in-patient hospital services; out-patient hospital services; physician's services; skilled nursing facility services for individuals aged 21 or over; other laboratory and x-ray services; early and periodic screening, diagnosis and treatment services for recipients under the age of 21 [hereinafter "EPSDT program"]; family planning services and supplies. In addition to these services, which are mandated by federal law,[4/] the Commonwealth provides the following, inter alia: podiatry services, intermediate care facility services; prescription authorized hearing aids; basic dental services for adults; home medical care; restorative services (including physical therapy, occupational therapy, speech therapy, and audiological services); special services for children, etc.[5/]

[4/] 42 C.F.R. 440.210.

[5/] G.L. c. 118E §6; Physician Packet and Hospital Packet; Department of Public Welfare, Physician Manual (Revised Fee Schedule), dated March 1, 1980, as amended by Transmittal Letter PHY-3; Physician Manual (continued)

Consistent with the broad goals of the program, services are included which may facilitate good health, even though they may be characterized as "elective."[6] Examples are legion: physician's services, for instance, include rhinoplasty (plastic surgery of the nose); correction of bowlegs or knock knees; plastic restoration of eyebrows and even electrolysis.[7] In-patient hospital services

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5-continued from previous page/ (Fee Schedule Charges), dated June 1980 and Transmittal Letter PHY-2; Physician Manual (Revised Laboratory Fee Schedule) dated July 1980.

[6] Even the term "medically necessary" is defined quite broadly in the Medicaid regulations: "reasonably calculated to prevent, diagnose, prevent the worsening of, alleviate, correct, or cure conditions in the recipient that endanger life, cause suffering or pain, cause physical deformity or malfunction, threaten to cause or to aggravate a handicap or result in illness or infirmity; and there is no other equally effective course of treatment available or suitable for the recipient requesting the service that is more conservative or substantially less costly." 106 C.M.R. 450.204.

More significantly, the Department of Public Welfare pays recipients an incentive to encourage participation in Health Maintenance Organizations [hereinafter "HMO's"] where there is an HMO in the recipient's area. HMO's emphasize preventive health care, routine check-ups, educating members away from crisis care.

[7] These examples come from the pamphlet entitled "Medicaid Fee Schedule for Physicians and Dentists," known as the "Yellow Book," and the documentary materials described in n.5.

specifically includes elective surgery with certain limitations.[8/]

Moreover, prior to 1978, there were no distinctions between what good health and necessary medical care meant for females as distinguished from males. Male-specific operations of all sorts, whether elective or not, and far more complicated and costly than abortions, were included, e.g. vasectomies and prostatectomies.

The breadth of the program is perhaps nowhere more clear than in the category of "family planning services." Family planning services are defined as "those medical, educational, and social services which assist recipients (regardless of age and sex) in exercising freedom of choice with regard to the size of their families and the spacing of children." Massachusetts Public Assistance Policy Manual [hereinafter "MPAPM"], Ch. VII, §R, Pt. 1, p. 1.[9/] They include contraceptive care "through diagnosis,

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[8/] See n. 12 below.

[9/] Department of Public Welfare regulations governing the Medicaid program are currently written in three formats: Chapter VII of the MPAPM; Title 106 of the Code of Massachusetts Regulations [CMR], c. 450.000 et seq.; and the Medicaid Provider Manual

(continued)

treatment and counseling, as well as the provision of drugs, supplies and devices." Sterilization services--whether characterized as therapeutic or nontherapeutic (elective) -- are also provided.[10/] Moreover, before the latest enactments, abortion services were listed virtually without exclusion or limitation (see below, section B) to enable recipients to plan the "timing and spacing of children." Ch. VII, MPAPM, Pt. 1, p. 2.

Within each category of service, wide latitude is given to the treating physician to determine the appropriate course of treatment in consultation with the patient/recipient. The only relevant principles of

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9-continued from previous page/ Series. The Department of Public Welfare is in the process of converting all of the regulations governing the Medicaid program to the CMR and Provider Manual formats, eventually rendering Ch. VII of the MPAPM obsolete.

10/A sterilization is therapeutic when it occurs as a necessary part of the treatment of an existing illness or injury or is medically indicated and performed in conjunction with surgery on the male or female genito-urinary tract. 106 C.M.R. c. 485.002(a).

limitation are those that are consistent with considerations of cost,[11] and with good medical practice.[12] In no situation is a physician

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[11] For example, reimbursement in some areas is precluded because the item or service is reimbursable pursuant to another section of the plan or available at no charge from another agency. E.g., MPAPM, Ch. VII §B, Pt. 2, p. 2. See also, §J. In addition, several procedures are designated "Prior Approval." In virtually all of these situations, there is a review of the cost of certain expensive types of procedures or of treatment of long duration such as nursing care in a recipient's home (reimbursable when such services are less costly than institutional placement), visits to a speech therapist beyond twenty-five visits. MPAPM, Ch. VII §S, Pt. 1, p. 1; MPAPM, Ch. VII, §G, Pt. 1, p. 3. But the prior approval system is implemented by physicians; and with the exception of cosmetic surgery (see n. 12 below), none of the medical services which require prior approval are considered "physicians' services" under the Plan (the category for abortions). Rather, theyrather fall in the more regulated areas, such as durable medical equipment or nursing care. In a few cases, such as cosmetic surgery, where there is deemed to be a question whether a procedure would be likely to be medically necessary under most circumstances, prior approval is required to ensure that recipients receive good quality medical care. See n. 12, infra.

[12] Limitations to enforce good medical practice are illlustrated by the Consultation Program for Elective Surgery. MPAPM, Ch. VII, §C, Pt. 4, p. 1. If a recipient desires elective surgery such as the excision of varicose veins, she must receive a consultation from a qualified specialist. If the consultant considers the surgery to be deferrable, the recipient can only have the surgery reimbursed if she receives a second consultation. However, two factors should be noted. The determination of when surgery is deferrable does not depend upon a rigorous definition of medical necessity. Surgery is not considered deferrable "when postponement of the procedure for six months or more is likely to jeopardize the patient's

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foreclosed from prescribing a given medical alternative; in no situation is anything like a life-endangering standard imposed. Indeed, precisely the opposite is the case.[13] The principle of physician

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12-continued from previous page/ life or essential function or cause severe pain." MPAPM, Ch. VII, §C, Pt. 4, p. (emphasis added). 1.

Moreover, even if a second consultant determines that the surgery is deferrable, the recipient may still be reimbursed. The purpose of the second consultation is to make certain that the recipient has received sufficient information to make an informed decision. The regulations are quite clear: "The decision as to whether to undergo the surgery in question is the recipient's and his/her physicians." (MPAPM, Ch. VII, §C, Pt. 4, p. 1). (emphasis added). (The only areas in which elective surgery is wholly excluded are dental services, podiatry services and restorative services.)

In addition, even cosmetic surgery, which can be performed in a physician's office and therefore qualified as a physician's service, is allowable where good medical practice calls for it. All the physician need do is to make a written request demonstrating the medical necessity of the particular form of the treatment recommended under the particular circumstances. The Department maintains a consultant list of physician advisors whoreview the assertion, and determine whether prior approval should be granted. The Department provides no written standards to its physician advisors on which they must base their determination of medical necessity. The theory of the physician-based prior approval program is that the physician advisors will apply the generally acceptable medical standards of the community in making their decision concerning the medical necessity of the particular requested procedure.

13/Another example: Although there is a limitation on tinted lenses or two pairs of glasses instead of bifocals, the optometrist or opthalmologist nas discretion to advise either and the service will be paid. MPAPM, Ch. VII, §I, Pt. 1, p. 2.

discretion is central to the entire plan. The Massachusetts program ranks as among the most liberal in the nation.

B. THE COVERAGE OF ABORTION SERVICES UNDER THE MASSACHUSETTS MEDICAID PLAN

From 1973, when abortions were legalized under the United States Supreme Court's decision in Roe v. Wade, 410 U.S. 113 (1973), until 1978, when the first Massachusetts Medicaid abortion restriction was passed, abortion services were treated in a fashion consistent with the very broad purposes of the Massachusetts Medicaid program. The first set of regulations to be issued post Roe (in October 1974) covered abortion services fully along with a wide range of subsidiary services (such as family planning counseling).[14/] They state that "[i]n administering a comprehensive medical assistance program, the Department seeks to ensure availability of "high

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[14/] The law provided reimbursement for the service itself, as well as such items as pre-operative evaluation and counseling, laboratory services, anesthesia, post-operative care. 106 C.M.R. 484.007(a).

quality abortion services."[15] Moreover, since careful family planning was considered crucial to the maintenance of good health, the regulations underscored the right of recipients and their doctors freely to choose whether or not to obtain an abortion. MPAPM, Ch. VII, §X, Pt. 1, p.1.[16]

The only limitations were those which derived from the Supreme Court's decision in Roe v. Wade, where the right to abortion and the state's ability to regulate was held to depend upon the stage of pregnancy. In the first trimester of pregnancy, when the procedure was relatively safe, there could be few state imposed constraints on a woman's right to choose abortion, in consultation with her doctor. In the second trimester, when the operation became more complicated, the state was entitled to regulate more, but only so far as such regulations were consistent with maternal health. In the third trimester, when

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[15] MPAPM, Ch. VII, §X, Pt. 1, p.1 (October 1, 1974).

[16] The regulations state: "A woman always had the freedom of choice regarding abortion, just as she has the freedom of choice with regard to any other medical service." MPAPM, VII, §X, Pt. 1, p. 1 (October 1, 1974).

the procedure was most complicated, and when the state could advance an interest in potential life, the state could prohibit abortions except where the woman's life was endangered. Consistent with this formulation, the Massachusetts plan covered all abortions in the first trimester -- however characterized, whether medically necessary or elective.[17/] Second trimester abortions were also covered so long as they were performed by a licensed and qualified physician in a hospital. Third trimester abortions were covered only if they were "to save the life of a woman or to eliminate substantial risk of grave impairment to her physical or mental health" and were performed in a hospital.

In 1976, Congress enacted a rider to the Labor-

17/ While the regulations make a distinction between a "clinically indicated abortion" and an elective abortion, that distinction is relevant only for purposes of fee. A clinically indicated abortion is one carried out "primarily because of or in conjunction with the treatment of an existing illness or injury."

Ironically, because the Federal government considered abortion by a woman's decision to be a family planning service it was reimbursed at a higher rate than clinically indicated abortions at the time.

HEW Appropriations Act, generally known as the "Hyde Amendment," which had the effect of limiting federal reimbursement of abortion services, "except where the life of the mother would be endangered if the fetus were carried to term." Pub.L.No. 94-439, §209, 90 Stat. 1434 (1976). These riders have been enacted annually by Congress since 1976.[18/] Notably, Massachusetts chose to continue funding abortions as it had done previously, notwithstanding the federal limitation.[19/] With the exception of the very small category of abortions for which federal reimbursement

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[18/] The 1977 version, covering fiscal 1978, was slightly broader than the 1976 version in that it included two additional categories, cases of "severe and long lasting physical health damage" and "rape or incest." Pub. L. No. 95-205, §101, 91 Stat. 1460 (1977). The 1978 version (for fiscal 1979) was identical to 1977. Pub. L. No. 95-480, §210, 92 Stat. 1586 (1978). In 1979, Congress eliminated the "severe and long lasting health damage" exception. Pub.L. No. 96-123, §109, 93 Stat. 926 (1979).

[19/] Regulations promulgated in May of 1978 state: "All abortions which are lawful in the Commonwealth of Massachusetts are reimbursable under the Massachusetts Medical Assistance program. However, to conform to federal regulations...which limit the availability of federal financial participation for abortion services, the Department must secure the certifications described below in order to identify those abortions which meet federal reimbursement standards." 106 C.M.R. 484.001-484.201.

was available, Massachusetts assumed all costs.

In the meantime, numerous challenges were brought in federal court to the Hyde restriction, and to comparable state restrictions, based on federal statutory grounds (the requirements of Title XIX of the Social Security Act, 42 U.S.C. §1396 et seq) and federal constitutional grounds (the right to an abortion under Roe v. Wade, and equal protection). The Supreme Court spoke to the question in two cases: It held in Beal v. Doe, 432 U.S. 438 (1977), that exclusion of "nontherapeutic" abortions did not violate Title XIX; and it held in Maher v. Roe, 432 U.S. 464 (1977), that such exclusion was constitutional.[20/] These cases did not directly challenge the Hyde standard, however, since they involved state restrictions more lenient than Hyde. While they excluded elective abortions,

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[20/] The Hyde standard was also challenged, and a preliminary injunction was entered prohibiting the Secretary of Health, Education and Welfare from enforcing the Hyde Amendment and requiring him to continue to provide federal reimbursement for abortions under the standards previously applicable. McRae v. Mathews 421 F. Supp. 533 (E.D.N.Y. 1976). On appeal to the United States Supreme Court, the district court's decision was vacated and remanded for reconsideration in the light of Beal and Maher. See Califano v. McRae, 433 U.S. 916 (1977).

both state plans still covered medically necessary abortions. Massachusetts was unaffected by this litigation since it had chosen to continue funding of both elective and medically necessary abortions.

On July 8, 1978, the first Massachusetts limitation on Medicaid funding of abortions was enacted over the governor's veto. A rider to the fiscal year 1979 Medicaid Appropriation, St. 1978, c. 367 §2, Item 4402-5000, prohibited the funding of abortions except when necessary to prevent the death of the mother or except in certain cases of rape or incest.[21/]

Notwithstanding the fact that the 1978 restriction had been enjoined by the federal courts, as described below, the General Court enacted two more restrictive provisions the following year, a permanent statutory restriction governing the expenditure of state funds; and another appropriations rider (on the fiscal year 1980 budget). Both limited coverage even

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[21/] It should be noted that even this 1978 enactment was more restrictive than Hyde since it did not include cases of "severe and long lasting health damage."

further, to cases where the abortion is necessary to prevent the death of the mother. G.L.c. 29, §20B, St. 1979, c. 268 §1; St.1979, c. 393 §2, Item 4402-5000. This restriction also appears in the fiscal year 1981 appropriations act; St. 1980, c. 329 §2, Item 4402-5000.

None of these restrictions has ever been implemented in Massachusetts in its present form. From 1978 to date, only nontherapeutic abortions have been excluded; medically necessary abortions continue to be covered.[22/] Following the enactment of St. 1978, c. 367, an action was filed in the United States District Court for the District of Massachusetts. Because of the Supreme Court's decision in Maher and Beal, affirming the elimination of nontherapeutic abortions, that suit sought coverage for "medically necessary" abortions only. The complaint alleged that the failure to provide for "medically necessary

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[22/] Regulations implemented in September 1978 and continuing to date define a "medically necessary abortion" as "one which, according to the medical judgment of a licensed physician, is necessary in light of all factors affecting the woman's health." 106 CMR 484.001-484.201.

abortions" violated Title XIX of the Social Security Act and the United States Constitution. The district court found that c.367 violated the requirements of the Act by failing to provide funding for medically necessary abortions but declined to order the state to pay for abortions other than those for which federal reimbursement would be available under the Hyde Amendment. The plaintiffs appealed and sought an injunction pending appeal. On August 7, 1978, the Court of Appeals entered an order requiring the defendants to provide for all medically necessary abortions pending the disposition of the appeal.

On January 15, 1979, the Court of Appeals affirmed the district court's ruling on the plaintiffs' statutory claims and remanded the case to the lower court for consideration of the constitutional claims. Preterm, Inc. v. Dukakis, 591 F.2d 121 (1st Cir. 1979). The panel unanimously concluded that the Massachusetts restriction was inconsistent with the requirements of Title XIX. Two judges, however, agreed with the district court that the Hyde Amendment had amended the Medicaid statute; Massachusetts could not as a matter of federal

statutory law be required to reimburse for abortion services beyond what the federal government chose to reimburse.

However, the provision of medically necessary abortions continued. The court ordered continuation of the August 7, 1978 injunction pending disposition of a petition for a writ of certiorari. After certiorari was denied on May 14, 1979, the plaintiffs applied for, and received, a suspension of the order denying certiorari pending the filing and disposition of a petition for rehearing. On October 1, 1979, the Supreme Court denied the plaintiff's petition for a writ of certiorari.

From October 1, 1979 to February 15, 1980 Massachusetts still chose not to implement the abortion restrictions, even though no injunction was then pending. On January 15, 1980, a federal district court in the Eastern District of New York held that the Hyde Amendment was unconstitutional under the Fifth and First Amendments and enjoined HEW from refusing to reimburse medically necessary abortions. McRae v. Harris, Civ. No.1804 (E.D.N.Y. January 15, 1980)(unpublished). The order became effective on

February 15.) Under the First Circuit's decision in Preterm v. Dukakis, supra, the invalidation of the Hyde Amendment meant that the state's obligations now derived directly from the substantive provisions of Title XIX, which required coverage of medically necessary abortions. From February 15, 1980 to June 30, 1980, the Commonwealth abided by the McRae injunction and continued the funding of medically necessary abortions.

On June 30, 1980, the decision of the District Court was reversed by the Supreme Court. Harris v. McRae, 448 U.S.___, 48 U.S.L.W. 4941 (June 30, 1980). Although a petition for rehearing was filed, which had the effect of staying the mandate, and continuing in effect the lower court injunction in McRae, the Massachusetts officials suddenly took the position that they were no longer bound by the order invalidating the Hyde Amendment.[23/] (See Affidavit of Nancy Gertner, filed July 22, 1980, paragraph 6.)

[23/] That position is inconsistent with the position taken by the defendants between October 1, 1979 and June 30, 1980 when they voluntarily refrained from implementing the Massachusetts restrictions because of the pending injunction invalidating the Hyde Amendment.

Rather, they announced their intention to implement the latest Massachusetts restriction on Medicaid funding of abortions, the "necessary to prevent death" standard. (See Affidavit of Nancy Gertner, filed July 22, 1980, paragraph 7.)

C. THE IMPACT OF THE ABORTION FUNDING RESTRICTIONS

This litigation challenges the exclusion from Medicaid of all abortions except those that are necessary to prevent the death of the mother. Abortions that fall outside of the statutory standard include not only those that have been dubbed non-therapeutic, or elective, but also those which have been characterized as therapeutic or medically necessary abortions.

A pregnant woman has two alternatives to deal with her medical condition -- abortion or childbirth. When, in making a decision, a woman and her physician are confronted only with the ordinary risks of the abortion procedure, as compared with the risks of a normal childbirth, the procedure is considered to be

an elective abortion.[24] A therapeutic or medically necessary abortion is one in which, in the judgment of a treating physician, the abortion is necessary to protect the health of the pregnant woman, where the woman faces heightened risks to her health, not the risks of "normal childbirth" at all. Whether an abortion is necessary is a judgment to be exercised in the light of all factors, physical, emotional, psychological, familial, and the woman's age. Stubblefield Affid., par. 17.[25] A. 25.

Dr. Stubblefield cites a number of conditions which he notes could pose a threat to the health of a

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[24] Those risks are described in the Affidavit of Dr. Philip Stubblefield [hereinafter Stubblefield Affid.], §6. According to Dr. Stubblefield, during the first trimester abortion is a relatively safe and simple procedure; death is rare; mortality is one in 100,000. Indeed, abortions performed at this juncture are far safer than childbirth. Whereas one in 200,000 women die as a result of first trimester abortions, one in 7,000 women die as a result of childbirth. Stubblefield Affid. par. 6 & 7.

[25] The Commonwealth has already recognized the difference between these two situations in its first set of regulations covering abortion services after Roe v. Wade. See n. 17, infra. Those regulations distinguish between a "clinically indicated" abortion, and an elective abortion. Moreover, this has been the operational standard since August 7, 1978.

pregnant woman.[26] They include lung disease, hypertension, diabetes, heart disease, sickle cell disease, kidney disease, genital cancers of various sorts (such as melanoma, leukemia, lymphoma), and some instances of drug addiction. Stubblefield Affid., par. 18(d).[27] A. 27.

Dr. Stubblefield goes on to explain that even in the absence of specific health-threatening medical conditions or disease, a woman's age, economic status and ethnic background can affect the probability of

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[26] The examples cited by Dr. Stubblefield were not intended to be a complete list of such conditions. Stubblefield Affid., par. 21.

A more complete description of the kinds of situations included within the medically necessary standard may be found in Judge Dooling's decision in McRae v. Harris, Civ. No. 1804 (E.D.N.Y. January 15, 1980) which has been separately provided to the Court. In addition, reference to the McRae record, and the findings concerning the medical necessity standard, are found in the dissenting opinions of Justice Marshall and Justice Stevens in Harris v. McRae, 448 U.S.___(1980), 48 U.S.L.W. 4941, at 4952.

[27] In these situations, the physician considers not only the threats to the patient's health, but also the patient's desires, in making a recommendation that an abortion is medically necessary. Dr. Stubblefield notes, however, that there are conditions which pose such a severe threat to a woman's health that abortion would be recommended without regard to a patient's wish, such as in cases of severe diabetic retinopathy. Stubblefield Affid., par. 18 (c).

risk to her health during pregnancy. Stubblefield Affid. par. 18(f). A. 28 Tragically, Medicaid-eligible women as a class, because of their economic status and because they are less healthy than the general population,[28] are among those most likely to experience medical problems during pregnancy. (Stubblefield Affid. par. 18(h). A. 29:

> Poor women -- and especially poor black women -- comprise another high pregnancy risk group. Statistically, they have or develop certain conditions during pregnancy which pose unique or more severe health problems as compared to the female population in general. And the maternal mortality rate is much higher for these women than for the female population generally.

Medical conditions endemic to the poor which are likely to threaten the health of a pregnant woman include anemia, malnutrition, essential hypertension (which is more prevalent among the poor population) and sickle-cell disease (a genetic disorder which is almost unique to the black population.) Stubblefield Affid. par 18(h). A. 29

Moreover, the medical problems experienced by pregnant Medicaid recipients are likely to be

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[28] The poor are doubly burdened in this respect since the medical care available to the poor in this country is generally inferior to that available to others. Stubblefield Affid. par. 18(h).

exacerbated by the simple fact that they are poor.

> Another important factor in evaluating pregnancy health risks to poor women is the crucial importance of bed-rest during pregnancy to minimize risks posed by various conditions or diseases. Pregnancy and childbirth create a far greater health risk for a poor woman with a relatively mild condition of any sort who is unable to get extra bed-rest due to familial or job demands (or because she is unable to obtain outside help with chores or children) than for a woman with the identical condition who is able to obtain extra bed-rest. The stress to the system caused by pregnancy will accelerate the condition where simple bed-rest is unavailable to compensate for the stress. Stubblefield Affid. par. 18(h). A. 29.

A physician, exercising his best medical judgment, considers all such conditions and factors in each individual case. It is upon such consideration, together with the patient's wish to terminate her pregnancy, that a determination is made that an abortion is "medically necessary."

The "necessary to prevent death" standard is not based on any of these considerations. In fact, this standard is radically different from the standard of medical necessity recognized and accepted by the medical profession:

> A standard of medical necessity which considers only the certainty or likelihood of a patient's death is alien and antithetical to medicine in general. I know of no area of medical practice

> in which a physician exercises professional responsibility solely in terms of life and death assessments.

Stubblefield Affid. par. 17. A. 25 The standard does not permit a physician to provide treatment in accordance with his or her best medical judgment where his or her patient is dependent on Medicaid for her medical needs. Rather, it limits the physician's judgment to the extreme cases, where an abortion is necessary to prevent the death of the mother.

The net effect of these enactments would be the termination of virtually all Medicaid coverage. As a practical matter, there is only "a very small group of women for whom continuation of pregnancy will almost surely result in death" Stubblefield Affid. par. 16.[29/]

[29/] Justice Marshall spelled out four categories of abortions that were not included under the "life endangering" standard. In the first category are those medical conditions that "increase the risks associated with pregnancy or are themselves aggravated by pregnancy," or conditions in which a woman's life will not be immediately threatened by carrying the pregnancy to term, but "aggravation of another medical condition will significantly shorten her life expectancy." In the second are cases in which "severe mental disturbances will be created by unwanted pregnancies," leading perhaps to suicide, attempts at

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SUMMARY OF THE ARGUMENT

This lawsuit challenges certain Massachusetts enactments which restrict the Medicaid funding of abortions to those instances in which an abortion is "necessary to prevent the death of the mother." The challenge is based on two provisions of the Massachusetts constitution, the Equal Rights Amendment, Pt. 1, Article I and the Equal Protection guaranty, Pt. 1, Article X. The Commonwealth has moved for the dismissal of the complaint for failure to state a claim on which relief can be granted. It will be shown that this complaint, and the record below, clearly state a claim cognizable under the Commonwealth's Constitution.

The starting point of the analysis is the scope of the Massachusetts Medicaid plan. The Medicaid plan, prior to the enactment of these restrictions, could hardly be more comprehensive. Its goals include

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29-continued from previous page/ self-abortion, or child abuse. In the third category are abortions in which the pregnancies have been caused by rape or incest. In the fourth category are those situations in which it is known that the fetus itself will be unable to survive. Harris v. McRae, supra at 4953.

not only treatment and cure, but also prevention, rehabilitation and the maintenance of good health. As such, it covers treatment for acute medical conditions, services which are medically necessary or simply advisable, and even elective services.

In a program of this breadth, the singling out of abortion for special treatment is unconstitutional. First, the exclusion of a service as crucial as abortion, as intertwined with fundamental liberty and privacy interests, constitutes a violation of the equal protection guaranty of Article X as interpreted by the courts of this Commonwealth. Whatever the level of scrutiny of the exclusion -- and it will be argued that for interests as important as these, the standard should be rigorous -- the state's purported justifications cannot meet it. Second, the exclusion of an operation unique to a woman, as abortion plainly is, from a program which is comprehensive in scope, is sex discrimination. Under the Equal Rights Amendment, Article I, such discrimination, unless it meets the most stringent standard of review, "strict scrutiny," is impermissible.

The Commonwealth can come forward with no

interest that can meet the "compelling state interest" requirement under either constitutional rubric. Indeed, the Commonwealth cannot meet even the more traditional, "rationality test." This is so with respect to all abortions and applies, a fortiori, with regard to "medically necessary" abortions.

The Commonwealth also contests the continuation of Justice Kaplan's order granting preliminary relief. Given the strength of the plaintiffs' claim, and the clear irreparable harm attached to cutting off this crucial service, the plaintiffs argue that all of the tests for preliminary injunctive relief continue to be met and Justice Kaplan's order should remain in effect pending final disposition of the case.

Next, the Commonwealth makes certain jurisdictional claims, none of which withstands scrutiny: 1) The defendants argue that this Court lacks subject matter jrusidiction over this case because it involves the validity of an appropriations measure and somehow, according to the defendants, implicates the separation of powers requirement of Article XXX. That argument would effectively extinguish this Court's constitutional obligation to

review legislative acts. 2) The defendants argue that the Court lacks subject matter jurisdiction because the plaintiffs have an adequate remedy at law; the recipient-plaintiffs will be taken care of by providers who volunteer to perform abortions for free; the providers will then seek reimbursement through G.L. c. 258, the usual avenue for contract and tort claims against the Commonwealth, notwithstanding the fact that the providers will have received ample notice that funds will not be provided, and that the defendants have taken the position that they may not lawfully expend money for these purposes under the challenged abortion restrictions. 3) The defendants argue that the Court should not sever and invalidate the offending provision of the appropriations measure, but should invalidate the entire Medicaid appropriation if the abortion cutoff is unconstitutional. Neither reason nor the rules governing severability supports this theory. 4) The defendants argue, through a counterclaim, that if they ultimately prevail, the plaintiffs are liable to them for the amount of payments received by Medicaid providers during the pendency of the preliminary

injunction. There is no basis in law or equity for such a harsh, even punitive, result.

ARGUMENT

I. INTRODUCTORY CONSIDERATIONS: THIS COURT HAS THE AUTHORITY TO GIVE MEANING TO CONCEPTS OF EQUAL PROTECTION BEYOND THAT ESTABLISHED BY FEDERAL PRECEDENT

The Supreme Judicial Court has the authority and responsibility to interpret provisions of the state constitution according to its independent judgment. Over the years, the Court has done so, particularly with respect to concepts of equal protection, giving meaning to them beyond those established by federal precedent. The situation presented in this case, the denial to indigent pregnant women of reimbursement for one crucial medical service, abortion, under an extremely comprehensive Medicaid plan, presents the court with an inequality of such magnitude as to demand judicial intervention under the state constitution.

The Declaration of Rights of the Massachusetts Constitution contains provisions guaranteeing its citizens equal treatment under the laws and certain protections of life, liberty and property (Part 1, Articles I, X). These sections, enacted in 1780,

staked an early claim to self-defined conceptions of ordered liberty for the Commonwealth. In fact, the drafters of the federal constitution relied upon existing provisions in state constitutions as the source of the guarantees in the Bill of Rights, and not the reverse. And the provisions were substantial; state constitutional provisions constituted the sole check on state power prior to the passage of the federal constitution. Within the federal system, the constitutions of the several states provide independent alternative grounds for ensuring fundamental fairness in state government. As one commentator has noted:

> Every believer in our concept of federalism, and I am a devout believer, must salute these developments [of constitutional theory on independent state grounds] in state courts. Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 502 (1977)

See also General Outdoor Advertising v. Dep't of Public Works, 289 Mass. 149, 158 (1935).

The equal protection provisions of the Declaration of Rights raise similar constitutional principles as the parallel provisions of the Fourteenth Amendment to the United States Constitution. Opinion of the

Justices, 357 Mass. 827, 830 (1970) and cases cited. See also, Pizer v. Hunt, 253 Mass. 321, 332 (1925). But while the state may not interpret its own constitutional provisions in violation of settled federal constitutional guarantees;, Opinion of the Justices, 353 Mass. 790, 799 (1969), the state is free to reach beyond what is required by the federal constitution for a substantive definition under the provisions of the state constitution. It may do so both when it declines to be bound by decided precedent as well as in situations where the Supreme Court has not yet ruled on the matter. Corning Glass Works v. Ann & Hope, Inc. of Danvers, 363 Mass. 409, 316 (1973); Zayre Corp. v. Attorney General, 372 Mass. 423, 445 (1977). See also Brennan, supra, at 498-501 and cases cited therein.

In the recent past, for instance, in a case raising fundamental questions, this court was willing to reach out to the separate provisions of the state constitution to invalidate a death sentence in a rape-murder case. In Commonwealth v. O'Neal, 369 Mass. 242 (1975) Chief Judge Tauro justified the Court's power to act even though a similar constitutional challenge

under the federal Eighth Amendment awaited decision in the United States Supreme Court. The Court rejected the notion that there was a

> uniformity of State and Federal constitutional direction with a resulting subservience to Federal precedent. Such "symmetry" would sweep aside the Declaration of Rights and deprive the Commonwealth's citizens of the Declaration's protection against arbitrary and intrusive government.
>
> The fact that analysis under our State Consitution may parallel analysis under the Federal Constitution or that the analysis under the State Constitution may call for comparative construction of similar Federal provisions is no basis for evading our responsibility to declare the constitutional law which may be dispositive of the case.

369 Mass. 242, 267-8 (1975).

Recently, in District Attorney for Plymouth Dist. v. New England Tel. & Tel. Co., 1980 Mass. Adv. Sh. 197, 200, 207, this Court -- through both the majority and dissent -- reiterated its willingness to adopt a broader definition of rights under the Declaration of Rights than prevails under the Constitution of the United States. See Marcoux v. Attorney General, 1978 Mass. Adv. Sh. 1011. See also, Brennan, State Constitutions and the Protection of Individual Rights, supra. See also Douglas, State Judicial Activism - The New Role for State Bills of Rights, 12 Suffolk

U.L. Rev. 1123 (1978); Howard, State Courts and Constitutional Rights in the Day of the Burger Court, 62 Va. L.Rev. 873 (1976).

We contend that the case before the court today is just such a case where fundamental constitutional guarantees under the Declaration of Rights need to be defined and enforced. In Harris v. McRae, 48 U.S.L.W. 4941 (1980), and Maher v. Doe, 432 U.S. 464 (1977), a divided United States Supreme Court found that the federal constitution did not mandate funding of either medically necessary or elective abortion servies to indigent women covered by the Medicaid program. The dissents were bitter and forthright. But Maher and McRae are not dispositive. The interests here are ones primarily concerned with Massachusetts. The state comprehensive medical plan (Medicaid) antedates the federal program and its scope should properly be defined by this court. The statutes in question were acts of the State legislature and their constitutionality is rightly a matter for state court determination. And, most importantly, the rights impinged by these restrictions affect Massachusetts citizens. Equal protection is an empty concept unless

it can be utilized to correct real inequities in the political system.

II. THE RESTRICTIONS ON STATE FUNDING FOR ABORTIONS VIOLATE THE GUARANTEES OF EQUAL PROTECTION OF THE DECLARATION OF RIGHTS OF THE MASSACHUSETTS CONSTITUTION.

Singling out abortion for special restrictive treatment in this comprehensive program violates the equal protection guarantees of Article I and X of the Massachusetts Constitution. Once the Commonwealth undertakes a comprehensive benefits program, even if it is not obligated to do so, it may not distribute those benefits arbitrarily. The distribution, at the very minimum, must be "reasonably related" to some "legitimate government interest." When the Commonwealth goes beyond arbitrariness and administers that program in a fashion which affirmatively burdens crucial constitutional rights, or which callously disadvantages its most vulnerable citizens, the standard of justification is considerably more stringent.

The scope of the program that the Commonwealth has in fact opted for is the starting point of the analysis. This Commonwealth's Medicaid program is

among the most liberal in the nation. Because it covers medically necessary services to indigents, the failure to cover abortion, when it too is medically necessary, burdens crucial rights to privacy, and to health, and violates equal protection. Because the program has opted for more than the core "necessary" medical services (including elective surgery, cosmetic surgery, etc.) the failure to cover even elective abortions, fits within the same constitutional prohibition.

No set of state interests can meet these standards -- whether the test is "strict" or "heightened" scrutiny, or merely "rationality." It is difficult to understand precisely how any legitimate state purpose is reasonably served when Medicaid entitlement for abortion service is denied the young teenage girl, or the victim of rape or incest, or the mother already suffering the ravages of cancer, or the psychotic woman who needs drugs contraindicated in pregnancy, or the woman who knows that the child she is carrying will be deformed.

The plaintiffs are not asking this Court to cover the same ground covered by the Supreme Court in Maher

v. Roe, supra, on the funding of elective abortions, and in Harris v. McRae, supra, on the funding of medically necessary abortions. First, as noted in Section I, supra, it is the state guarantee of equal protection which is being construed in this case. In particular, under this Court's decision in Marcoux v. Attorney General, 1978 Mass. Adv. Sh. 1011, state equal protection analysis must yield different results in this setting than has the federal analysis. Second, the plan which is at the basis of these claims, the Massachusetts Medicaid plan, differs substantially from those which have been considered by the federal courts.

Section (A) argues that the "necessary to prevent death" restriction creates at least two invidious classifictions. It distinguishes women with health threatening pregnancies (medically necessary abortion) from all other Medicaid eligible people in need of medical services. It also distinguishes between women for whom abortion is an important medical alternative (elective abortion) and other Medicaid eligible people who obtain reimbursement for such purely elective services as podiatry services, cosmetic surgery (e.g.,

plastic surgery of the nose) and other forms of elective surgery.

Section (B) argues that the impact of this exclusion is to impinge upon a number of fundamental rights -- the right of a woman who chooses to terminate her pregnancy (particularly in the first trimester), the right of a woman to preserve her own health, the right of a physician to choose a course of recommended medical treatment according to his/her best medical judgment.

Section (C) argues that because fundamental rights are involved, both traditional equal protection analysis, and this Court's "sliding scale approach," require the Commonwealth to meet the strictest test of justification, the compelling state interest test.

Section (D) argues that no interest advanced by this Commonwealth can pass muster in the light of the stringency of the test. Section (E) argues that no matter what interest the Commonwealth advances, the virtual wholesale exclusion of this service, regardless of the stage of pregnancy, the cost of service, and the circumstances, cannot be the least drastic means of accomplishing it.

Finally, Section (F) argues that, even if this Court were to assign only a more lenient test of justification, these classifications will fall given the breadth of this program, its purposes, the interests to be weighed in the balance.

A. The Challenged Enactments Burden Abortion Services In a Way That No Other Services are Burdened

The Commonwealth's Medicaid program is designed to cover necessary medical services as well as services which are conducive to "good health" and health maintenance.[1/] Physicians are admonished not to treat Medicaid patients any differently from other patients, to give them the same high quality care, to make the same medical recommendations to them as they would make to private clients.[2/] Family planning services are central. The goal is prevention, and not just cure, to shape life habits so that recipients will ultimately be able to become independent of

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[1/] As noted in the Statement of Facts, n. 6, recipients are encouraged to join Health Maintenance Organizations which emphasize preventive health care, routine check-ups, educating recipients away from crisis care.

[2/] See 106 C.M.R. 450, 202(a); G.L.c. 151B §4, ¶10.

Medicaid. As such, the plan covers a continuum of services, from acute care services, through medically necessary services, to services which simply contribute affirmatively to good health and health maintenance. With respect to abortions, however, the coverage will be dramatically curtailed. Only one end of the continuum will be covered, those abortions which are necessary to prevent the death of the mother.

Abortions which a physician is prepared to certify as "necessary to prevent the death of the mother" are few. (See pp. 25-30, supra.) The restriction is tantamount to a flat prohibition. The vast majority of abortions fall far short of that standard.

The exclusion of abortions which a physician determines to be "medically necessary" is most telling. Nowhere else in this program are a doctor precluded from making decisions consistent with his/her judgment about a woman's health.[3/] Nowhere else in this program is a doctor prevented from

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[3/] For a description of the scope of physician discretion under this plan, see pp. 12-15 supra.

doing all that is necessary to avoid placing a patient's health or life at risk. Nowhere else in this program is a woman and her physician required to sacrifice her interest in the protection of her health. Nowhere else is a woman denied the right to make her own decision about whether to undertake the risks of a medically complicated pregnancy. Nowhere else does the state restrict the choice of medical treatment. Indeed, nowhere else does the State interfere this egregiously with physician discretion. If any other Medicaid recipient had diabetes or cancer, the physician could perform all necessary treatments. If a pregnant woman had these conditions, and the recommended treatment called for abortion, he/she would be foreclosed.

While the statutory exclusion is the most dramatic with regard to medically necessary abortions, it is significant, in the context of this prgram, even when elective abortions are concerned. The breadth of the Massachusetts plan is the touchstone. This is a program that covers elective services. Cosmetic surgery is included,[4] as is elective surgery.[5]

[4] See pp 13, n. 12 supra.
[5] See pp 14, n. 12, supra.

Ranked next to these sorts of services, abortion can hardly be seen as "elective." The condition of pregnancy is the fact; birth or abortion are equally "necessary" alternatives. To the woman who does not want a child, who is in no position to support or nurture additional offspring, it is hardly "elective."[6/] Justice Blackmun was perhaps most eloquent on this subject in Roe v. Wade:

6/ The lower court in Doe v. Beal, 523 F.2d 611 (3rd Cir. 1975), rev'd 432 U.S. 438 (1977) made an interesting analogy. The Court suggested that one reason the defendants focussed on the elective nature of the operation is that at the time a woman chooses to have a non-therapeutic abortion, there is a greater quantum of personal freedom than at the time she has a therapeutic abortion or goes into labor. But, as the Court notes, there is also greater freedom of choice involved when one decides to have a tooth cavity filled than when one is forced to have the tooth extracted after it has abscessed. The State could not require indigent beneficiaries to await the abscess and undergo the extraction without violating the terms of the statute, and surely the constitution. 523 F.2d at 619.

As the Court in Coe v. Hooker, 406 F.Supp. 1072, 1082 (D.N.H. 1976) notes: "Once pregnant, a woman is in need of medical treatment, and she must choose one service or another. She is not acting out of whim; she is choosing, in her own best interests, between alternative methods of treatment for a condition which the defendants recognize places her in need of medical attention." See also Klein v. Nassau County Medical Center, 347 F.Supp. 496, 500 (E.D.N.Y. 1972) vacated and remanded in light of Roe v. Wade, 412 U.S. 924 (1973).

> ...Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases,...the additional difficulties and continuing stigma of unwed motherhood may be involved. All these factors the woman and her responsible physician necessarily will consider in consultation.

Roe v. Wade, supra at 154.

A program that covers rhinoplasty (cosmetic nose surgery), speech therapy, tinted lenses, acupuncture, electrolysis, podiatry services and elective surgery must surely cover abortions.

B. The Funding Restrictions Burden Rights Held to be Fundamental.

1. The Right to Privacy and the Preservation of Health.

It is beyond question that a woman's decision to terminate a pregnancy, in consultation with her physican, is within the right to privacy and, as such, may not be abridged by the state without the justification of a compelling state interest. Roe v. Wade, 410 U.S. 113, 147 (1973). Cleveland Board of Education v LaFleur, 414 U.S. 632, 640 (1974).

Zablocki v Redhail, 434 U.S. 374, 386 (1978). Even in Maher v. Roe, 432 U.S. 464 (1977), the Supreme Court reiterated that the right to choose abortion is a fundamental one and that the case "signals no retreat from Roe or the cases applying it." 432 U.S. at 475. Moreover, this court underscored the fundamental nature of the constitutional right to abortion in Massachusetts in Framingham Clinic v Board of Selectmen of Southborough, 373 Mass. 279 (1977).

Furthermore, this right of privacy encompasses more than simply "choice." It is the right of a woman to make crucial decisions about her health and the right of a physician to exercise his/her best medical judgment. An overriding concern with the health of the woman is central to Roe v. Wade. During the first trimester "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." The end of the first trimester is designated as the "compelling point" for the state's interest in maternal health, expressly because the Court found that "established medical fact [shows] that until the end of the first trimester mortality in abortion may be less than mortality in

normal childbirth." Id. at 163. During the second trimester, the concern for the health of the woman remains paramount and regulation is allowed so long as it is closely related to the preservation of maternal health. Id. at 163. Again, the Court, turning to medical evidence, the fact that "...the risk to the woman [from an abortion] increases as her pregnancy continues," Id. at 150, found that during the later stages of pregnancy, the state retained a "definite interest in protecting the woman's own health and safety." Ibid. Once viability is reached, the state's interest in the protection of potential life becomes compelling, and normally overrides the woman's fundamental interest in deciding whether or not to bear a child. Even at this time, however, the government may not treat its interest in potential life as absolutely superior to the other interests. If an abortion is "necessary, in appropriate medical judgment, for the preservation of the life or health" of the woman, even after viability a state may not prohibit it. [emphasis added] Roe v. Wade, 410 U.S. at 165.

The health of the pregnant woman and the

physician's role in protecting it is a persistent theme in post Wade Supreme Court abortion decisions. In Doe v Bolton, 410 U.S. 179 (1973), the companion case to Wade, the Court, in striking down several Georgia abortion regulations, repeatedly emphasized the "patient's [medical] needs and...the physician's right to practice." 410 U.S. at 199 and passim. The Bolton Court also spelled out what has become the medically necessary standard, that "the medical judgment may be exercised in the light of all factors -- physical, emotional, psychological, familial and the woman's age -- relevant to the well-being of the patient." 410 U.S. at 192. The Court said that this leeway "allows the attending physician the room he needs to make his best medical judgment... [I]t is room that operates for the benefit...of the pregnant woman." Ibid.

Both Planned Parenthood v. Danforth, 428 U.S. 52 (1976) and Bellotti v. Baird, ___U.S.___, 99 S.Ct. 3035 (1979) underline the supremacy of the health and choice interests of the woman and physician over a state's legitimate interest to encourage husbands and parents to participate in the abortion decision. Even

a state's protection of a potentially viable fetus was invalidated when it unduly burdened protection of the woman's life and health. Colautti v Franklin, 439 U.S. 379, 387 (1979).

Moreover, beyond the abortion context, the Supreme Court has considered the individual's interest in preserving life and health essential. In Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), the Court characterized medical care as a "basic necessity of life" and invalidated a policy denying non-emergency medical care to new residents, even where emergency care was available. The Court said:

> The state could not deny [an indigent] care just because, though gasping for breath, he was not in immediate danger of stopping breathing altogether. To allow a serious illness to go untreated until it requires emergency hospitalization is to subject the sufferer to the danger of a substantial and irrevocable deterioration of his health...The denial of medical care is all the more cruel in this context, falling as it does on indigents who are often without the means to obtain alternative treatment. Id. at 260-261.

The point was reaffirmed in Carey v Population Services International, 431 U.S. 678, 716 (1977): Even legitimate state interests may not be pursued through means which might significantly affect a person's health.

Few situations require this protection more than the case at bar. Some of the women in this case are, by definition, in need of therapeutic abortion service to preserve their health; that is the definition of a "medically necessary" abortion. These women, because of other factors, are also necessarily dependent on medical care funded through the state program. Their choices are few. They must either attempt to set aside funds from their meager public assistance budgets, funds which are set at a minimal level to enable them to house, feed and clothe themselves and their children, in order to pay for a legal abortion. Or they must continue with their pregnancy, a pregnancy which may aggravate a precarious physical condition, result in a permanent physical impairment, increase chances of physical complications from the birth or, in many instances because of the necessity of continuing strong medication throughout pregnancy, result in the birth of a child their physician has every reason to believe will be deformed.

The burdens placed on fundamental individual interests by these funding restrictions are real and severe in the extreme.

2. Other Protected Groups and Interests.

One of the most disabling characteristics of the group affected by these restrictions is the fact that they are poor, and dependent upon welfare for their livelihood. Notwithstanding the United States Supreme Court's recent pronouncements in Harris v. McRae[7] we urge this court to adopt the line of constitutional cases holding that classifications based on wealth which result in denial or burdening of fundamental constitutional rights cannot stand. Reynolds v Sims, 377 U.S. 533 (1964); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241 (1971). Indigent women, as a result of these restrictions, are unable to participate on an equal basis with all other women in the fundamental right to decide to have an abortion.

In fact, the class affected by the restriction of funding for abortion is multiply burdened. Not only are they poor and dependent upon Government largesse, they are disproportionately young.[8] At the minimum,

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[7] See also, San Antonio School District v. Rodriquez, 411 U.S. 1 (1973).

[8] These restrictions will have a disproportionate impact on minors. Common sense alone suffices to establish that most indigent minors as a class will

(continued)

they seek a measure of control over their reproductive capacity, a degree of control allowed other more advantaged sections of the citizenry. Even more fundamental, they, together with their physicians, seek the ability to make choices which will assure them good health -- decisions about when to have a child, when to take the risks of a medically complicated pregnancy.

C. The Class of Women Affected and the Nature of the Rights Burdened Require the Most Careful Consideration and Preclude Deference to the Legislative Process.

Each of the classes described above and the interests they affect, are ill-represented, if represented at all, in the majoritarian political processes in the Commonwealth. Each warrants special judicial protection in direct proportion to its powerlessness. In one of the first non-racial equal protection cases, the Supreme Court affirmed this theme:

8-continued from previous page/ find it difficult to pay for abortions and will of necessity rely on state funding. As the District Court in the McRae case recognized, statistics indicate that women under 21 years of age are disproportionately represented among those for whom abortion is medically necessary. McRae, supra at n. 26. See also Stubblefield Affid. par 18(g).

> nothing opens the door to arbitrary action so effectively as to allow...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. Railway Express Agency v. New York, 336 U.S. 106, 112-113 (1949).

The issue presented here is whether the Commonwealth can "pick and choose" the poor, the women, and this constitutionally protected service for special exclusion.

More recently, the United States Court of Appeals for the Eighth Circuit applied this principle to restrictions on state funding for therapeutic abortions:

> Even were we writing on a clean slate, we would be constrained to find that this is an area in which sensitive judicial review is particularly appropriate. The minority disadvantaged by Missouri's medicaid exclusion is sex-specific and financially destitute; and legislative arguments disfavoring abortion tend to draw heavily on religious assumptions, see Roe v. Wade, supra, 410 U.S. at 150, 150-162, 93 S.Ct. 705; Tribe, The Supreme Court - 1972 Term-Foreward: Toward a Model of Roles in the Due Process of life and Law, 87 Harv. L.Rev. 1, 20-25 (1973); cf. United States v. Vuitch, 402 U.S. 62, 78-80 & nn. 1,2, 91 St.Ct. 1294, 28 L.Ed.2d 601 (White, J. concurring). These factors suggest "a special condition which tends seriously to curtail the operation of those political processes ordinarily relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." United States v. Carolene Products, 403 U.S. 144, 152-53 n.4, 58 S.Ct. 778,

> 784 n. 4, 82 L.ED. 1234; see L.Tribe, American Constitutional Law 929-930, 1071 n. 6 (1978). Any strong deference to the legislative process seems especially inapt where the minority asserts not only the fundamental interest in deciding whether or not to bear a child, which was the case in Maher, but the additional interest in preserving one's own health.

Reproductive Health Services v. Freeman, 614 F.2d 585, 599-600 (8th Cir. 1980).[9/]

Funding restrictions, especially on medically necessary abortion services, affect women who are, as indigents, least able to assert their interests within the legislature even in an instance in which the consequences to their own interests are so substantial. The political majority has worked its

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[9/] One distinguished commentatior has also urged the rejection of political deference claims in the area of abortion legislation, noting:

> The entanglement of religious issues in the normal processes or legislative accomodation to changing values - "political fragmentation on sectarian lines," as Justice Harlan once put it in referring to just such issues as those of birth control and abortion - had begun to create unusual legislative rigidity. Even if such religious involvement should be regarded as irrelevant on the ultimate merits of the constitutional dispute, one cannot realistically treat it as immaterial to an assessment of how accurately the political process would reflect, and how sensitively it would accomodate, the range and intensity of views and values implicated in the abortion question.

L. Tribe, American Constitutional Law, pp. 929-930 (1978).

will upon a group not effectively represented and least able to protect. That fact together with the fundamental rights implicated in these restrictions should call for the strictest scrutiny of legislative acts. Mr. Justice Marshall, in dissent in Harris v McRae, was unequivocal:

> With all deference, I am unable to understand how the Court can afford the same level of scrutiny to the legislation involved here - whose cruel impact falls on indigent pregnant women - that it has given to legislation distinguishing opticians from opthamologists, or to other legislation that makes distinctions between economic interests more than able to protect themselves in the political process. See ante, at 26-27, citing Williamson v Lee Optical, 348 U.S. 483 (1955). Heightened scrutiny of legislative classifications has always been designed to protect groups "saddled with such disabilities or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio School District v. Rodriquez, supra, at 28 (1973). And while it is now clear that traditional "strict scrutiny" is unavailable to protect the poor against classifications that disfavor them, Dandridge v Williams, 397 U.S. 471 (1970), I do not believe that legislation that imposes a crushing burden on indigent women can be treated with the same deference given to legislation distinguishing among business interests.

48 U.S.L.W. at 4953.

As noted in I, supra, this Court is free to establish a level of scrutiny of state legislative

enactments that is stricter than that utilized by the Supreme Court in the McRae case. The plaintiffs-indigent women and Medicaid providers -- urge such a standard.

Even if this Court should decline to engage in what has come to be known as the "two-tiered" equal protection analysis, the decisions of this Court mandate careful scrutiny of the Commonwealth's justifications. With the case of Marcoux v Attorney General, ____Mass. ____, 1978 Mass. Adv. Sh. 1011, this Court announced a "sliding scale" analysis of state equal protection claims:

> The cases at times speak of legislation which need only undergo a test of "reasonable relation," and legislation that must survive "strict scrutiny," but we conceive that these soubriquets are a shorthand for referring to the opposite ends of a continuum of constitutional vulnerability determined at every point by the competing values involved.

Id. at 1013 n. 4.

There can be little doubt that the interests at stake in the instant case are far more substantial than the interest at stake in Marcoux (the plaintiff's right to possess and use small amounts of marihuana in the privacy of his own home). These are restrictions which create an explicit classification according to

wealth, have a disproportionate impact on minors, seriously burden the right to privacy and the fundamental right to the preservation of health, and, as described in Section III, infra, discriminate on the basis of sex. In such circumstances, the restrictions should -- at the very least -- be carefully scrutinized as to "whether the discrimination served an important public purpose and, if so, whether it was propositioned to that purpose and did not result in excessive inequality." Attorney General v Mass. Interscholastic Athletic Association, 1979 Mass. Adv. Sh. 1589, 1599.

Whether through a "two-tiered" analysis, (triggered by a suspect classification or the presence of a fundamental right) or the Court's "sliding scale" approach, the result is the same. These enactments must be strictly, carefully and scrupulously analyzed in order to see if they serve a compelling state interest and if they are the "least drastic means" of fulfilling that interest.10/

10/ It should be noted that Article X of the Declaration of Rights is not expressed in terms of negative instructions as is the Fourteenth Amendment but in terms of positive rights vested in the people. "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property."

D. The Interests Offered by the Commonwealth in Justification Fail to Meet Constitutional Standards.

The compelling state interest test is an extraordinarily strict one. Few, if any, classifications can pass muster. Three factors are involved: that the interest be compelling; that the classification directly and demonstrably further that interest; and that the classification be designed to limit its impact as narrowly as possible consistent with its purposes (the so-called "least drastic means" test). (See IIE)

The denial of abortion funding cannot be said to further in the slightest any of the interests which underlie the Medicaid program. Rather, these restrictions directly undercut that program. They contravene the explicit antidiscrimination provisions of the Act which require giving indigent people access to the same medical care available to other members of the population. 106 C.M.R. 450.202(a); G.L.c. 151B §4, ¶10. They subvert the state's interest in providing Medicaid recipients with all of the services necessary to good health. They contravene the purpose of enabling people to maintain themselves without

welfare. They endanger the health of poor women. They undercut a physician's discretion in recommending health care, a prerequisite to bringing quality health care to the indigent. They affirmatively harm the woman recipient -- with future medical complications, the possibility of giving birth to a deformed child, substantial psychiatric and emotional costs. They ignore the range of medical conditions which may prompt a physician to recommend an abortion, as described by Dr. Stubblefield, by the lower court in McRae v. Harris, supra, by the dissenters to the Supreme Court's decision in Harris v. McRae. They work, perhaps most cruelly, on mentally retarded recipients, for whom Medicaid seeks "normalization" of their lives which includes making choices in a "heterosexual world." 106 CMR 408, 401 §M.

Even so-called "elective abortions" were characterized by Justice Blackmun in Roe v Wade as important for maternal health -- the risks of abortion in the first and second trimesters being substantially less than the risks of childbirth, the substantial costs of bearing and rearing an unwanted child. This is especially so, after all, in a program which

recognizes that health requires much more than simply response to disease, or the cure of acute problems. It is a program which strives for prevention, which underscores family planning services, encourages participation in health maintenance organizations, which admonishes physicians to give recipients the same services as are given to private patients. If the maintenance of health requires podiatry services, rhinoplasty (nose plastic surgery), speech therapy, electrolysis, acupuncture, and tinted lenses, it surely requires the provision of abortions.[11/]

Considerations of cost are insubstantial; the restrictions on abortion funding cannot be seen as being even "rationally related" to cost, much less surviving a compelling state interest test. In Preterm, Inc. v Dukakis, 591 F.2d 121 (1st Cir. 1979), the First Circuit held that:

The limitations in the Massachusetts Act clearly

[11/] The scope of this program distinguishes the instant case from the Connecticut program confronting the Supreme Court in Maher v. Roe, supra.

In Maher, the plaintiffs pointed out only to the fact that the state funded the necessary expenses of pregnancy and childbirth. Nowhere in that record is there any mention of whether or not Connecticut opted for the coverage of "elective" surgery of any sort.

> cannot be justified as a cost-saving mechanism. It is uncontroverted that the costs of medical treatment necessary when even healthy pregnancies are carried to full term exceed the costs of therapeutic -- or even elective -- abortions.

Id. at 126-27, n. 4.

Mr. Justice Stevens went even further, describing the deleterious impact of the failure to fund abortions on the rest of the program. Because the state will end up paying much more for childbirth of women who would otherwise have undergone abortions, the restrictions will have the effect of "draining money out of the pool that is used to fund all other necessary medical procedures." He adds: "Unlike most invidious classifications, this discrimination harms not only its direct victims but also the remainder of the class of needy persons that the pool was designed to benefit." 48 U.S.L.W. at 4957 (dissenting opinion) (emphasis supplied). This impact of the challenged statutes on the entire pool of Medicaid recipients reinforces the impact of the statute on poor persons as a class. Whatever the standard of review applied here, the Commonwealth cannot justify the discrimination occasioned by these statutes as a cost-

savings device.[12/]

Not even the Commonwealth's claimed interest in encouraging normal childbirth can pass muster under this stringent test.

For one thing, it is anamolous for the Commonwealth to advance its interest in encouraging normal childbirth where abortion services are concerned, when the rest of the program encourages family planning services! MPAPM, ch. VII, §R Pt. 1, pp. 1-2. Family planning services are defined as "those medical, educational and social services which assist recipients (regardless of age and sex) in exercising freedom of choice with regard to the size of their families and the spacing of children." The services covered inclued "contraceptive care through

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12/ It should be noted that when the first restrictions on abortion funding were successfully added on to the state budget, the overall appropriation was increased rather than decreased. The fiscal year 1979 budget submitted to the Legislature by the Governor of Massachusetts sought $726 million for Medicaid and contained no restriction on Medicaid funding of abortions whatsoever. House No. 1. The House Ways and Means Committee added on the restrictive abortion rider. House No. 5560 (April 26, 1978) and reduced the appropriation to $693 million. The Senate increased the amount to $700 million but retained the restriction of funding.

diagnosis, treatment, and related counseling," as well as "drugs, supplies and devices." Reimbursement is available for "related medical, counseling and educational services affecting reproductive health and family planning." Finally, sterilization services -- whether "elective" or "therapeutic" -- are fully and completely covered. MPAPM, ch. VII, §Y, Pt. 1. While abortion services are listed as a family planning service, it is only here that the Commonwealth's obligations are perfunctory. All other services are covered virtually without limitation. Moreover, in the majority of cases, "normal childbirth" is not the likely outcome at all. In the case of medically necessary abortions, childbirth can never be "normal." The conflict is not merely semantic; it goes to the fundamental nature of "normal childbirth" and of "medically necessary abortions." It does not "encourage normal childbirth" to deny poor women funds to terminate a pregnancy that is likely to end in a surgical intervention that could threaten her health. It does not "encourage normal childbirth" to force women with serious phychological problems to undergo the extreme stress of an unwanted pregnancy, that may

cause her to take her own life or may forever foreclose the possiblity that she may lead a normal life in the future. It does not "encourage normal childbirth" to so restrict the circumstances in which abortions are available to victims of rape and incest that these women are forced to endure the devastating trauma and stress of unwanted pregnancies resulting from the crimes against them. It does not "encourage normal childbirth" to force women who have a high risk of bearing abnormal children to continue pregnancy at all costs. It does not "encourage normal childbirth" to increase the pressure on poor women to undergo irreversible sterilization by denying them the option of abortion (while giving them the option of therapeutic and nontherapeutic sterilization.)

Nor can the Commonwealth's interest in "potential life" suffice. Failure to fund abortions for Medicaid recipients does not directly and demonstrably promote the state's interest in potential life. The relationship is attenuated, if at all. The issue here is not whether abortions should be criminalized, a question which more directly implicates the state's interest in life. The state's interest in encouraging

one form of behavior rather than another, in promoting one kind of decision rather than another through the mechanism of withholding funds, is not sufficiently compelling -- particularly where that interest contravenes other critical state interests and individual rights.

Roe v. Wade presents an analogy of what the application of a compelling state interest test might yield. In Roe, the Court was determining when each of the crucial interests -- in privacy, health, "potential life" -- was sufficiently "compelling" to overcome the other. The woman's right to choice, the physician's right to practice, the maternal health interests were paramount in the first and second trimesters. "Potential life" was compelling only in the third trimester (except in cases of danger to the woman's life or health.)

Finally, the defendants' own arguments point up the irrationality of these restrictions. For the purpose of countering preliminary injuctive relief, they argue that indigent women will still be able to get abortions because private charity and beneficent providers will more than amply meet this need. For

the purpose of sustaining the restriction on Medicaid funding, they argue that the challenged statutes "promote normal childbirth" and are consistent with the state'a interest in "potential life." If their first preliminary injunction argument is correct, then the state interests underlying these enactments will not be served and the acts should be permanently enjoined. If they are being served, then preliminary relief is crucial. If the truth lies somewhere in between, preliminary and permanent injunctive relief is necessary. The Medicaid restrictions will clearly wreak havoc on indigent pregnant women but in a haphazard, arbitrary and irrational fashion.

E. These Restrictions on Abortion Funding are not the Least Drastic Means to Accomplish the State's Goals.

It can hardly be said that a total cut-off of funds, except where necessary to prevent the woman's death, is the least drastic means of achieving the state's interest. The proposed restrictions concern abortion at any stage, even in the first and second trimesters of pregnancy. They cover both therapeutic and non-therapeutic abortions. Roe v. Wade, as described supra, assigned paramount importance to a

woman's right to privacy and to her health concerns in the first and second trimesters of pregnancy. These restrictions, in contrast, wholly ignore the circumstances of the abortion, except for one situation, where the abortion is "necessary to prevent the death of the mother." In short, they sweep broadly and unnecessarily across all of the fundamental rights described above.

F. The Challenged Restrictions Must Fall Even If Under a More Lenient Test of Justification

The Commonwealth will undoubtedly argue that it should not be held to a higher standard of review than showing a rational basis for the statute. Assuming, arguendo, that such a test is applicable, this Court has rejected the type of summary, automatic-upholding-of-the-statute rational basis analysis which characterizes some United States Supreme Court decisions in the federal equal protection area (including McRae). In Marcoux, the Court noted that the validity of certain legislation "was to be tested in the first place by inquiring whether it bore a reasonable relation to any permissible object of legislation." 1978 Mass. Adv. Sh. 1011, 1012.

However, the Court went on to say:

> We may observe that the hands of this Court, at least, such an inquiry has not been merely pro forma with a preordained conclusion favorable to the legislation.

Id.

Under a non-moribund rational basis analysis, the statutes are still unconstitutional. Section D, supra, spelled out the considerations in detail. To summarize: First, the statutes contravene the fundamental purposes of Medicaid, to the extent they mean greater expenditures of money for childbirth, drain money from the Medicaid pool. Moreover, they ignore crucial considerations of maternal health:

> By the time a pregnancy has progressed to a point where a physician is able to certify that it endangers the life of the mother, it is in many cases too late to prevent her death because abortion is no longer safe. There are also instances in which a woman's life will not be immediately threatened by carrying the pregnancy to term, but aggravation of another medical condition will significantly shorten her life expectancy.

Harris v. McRae, supra at 4952 (Marshall, J. dissenting). Denial of abortion could cause severe mental disturbance, leading perhaps to suicide, or to a potentially dangerous illegal abortion.

Second, the state's interest in "normal

childbirth" is hardly promoted by such restrictions. This is especially so since the statutes refuse to permit abortions when it is known that the fetus itself will be unable to survive, or will be deformed. Id. at 4953.

Third, to elevate the state's interest in "normal childbirth" or potential life above the concerns for the woman's health, the physician's right to choose appropriate treatment, and the woman's right to choose -- as the United States Supreme Court has done in Harris v. McRae supra -- is to turn Roe v. Wade on its head. As Mr. Justice Stevens said most cogently in his dissent in McRae:

> Having decided to alleviate some of the hardships of poverty by providing necessary medical care, the Government must use neutral criteria in distributing benefits. It may not deny benefits to a financially and medically needy person simply because he is a Republican, a Catholic, or an Oriental -- or because he has spoken against a program the Government has a legitimate interest in furthering. In sum, it may not create exceptions for the sole purpose of furthering a governmental interest that is constitutionally subordinate to the individual interest that the entire program was designed to protect.

48 U.S.L.W. 4941 at 4957. (Emphasis Supplied)

The goals of this program are health; -- they encourage a woman to make the choice of the more healthy alternative, to permit a physician to

recommend the healthier medical course. Those interests coincide with the interests characterized as compelling in Roe (in the first two trimesters). To say that in this one area -- where "only" the poor, the woman, the disabled are affected -- these interests can be burdened at the expense of a constitutionally subordinate interest in "potential life," is, to say the least, inconsistent.

III. THE EXCLUSION OF ONE SERVICE, NAMELY ABORTION, WHICH APPLIES ONLY TO WOMEN, FROM A COMPREHENSIVE MEDICAID PLAN IS SEX DISCRIMINATION IN VIOLATION OF THE EQUAL RIGHTS AMENDMENT.

Section II described, in general, the invidious classifications created by the challenged abortion restrictions, the rights they burdened, and the classes of people they disadvantaged. This section (III) hones in more particularly on one class, women, which this Commonwealth has singled out for special consideration in its Equal Rights Amendment.

Abortion affects only women. Its exclusion from a comprehensive program, and one that gives the full panoply of services to men (including male specific operations and male family planning services) is sex discrimination. It is sex discrimination under the non-ERA decisions of the Court; it is so a fortiori under the Equal Rights Amendment.

As such, there is yet another reason why the restrictions must be judged by the very strictest of tests -- a compelling state intest. As described before, under a "strict scrutiny" analysis, these enactments must fail.

A. Singling Out Abortion Coverage For Special Treatment Is Sex Discrimination.

The starting point for this analysis is this Court's decision in Massachusetts Electric Co. v. Massachusetts Commission Against Discrimination, 1978 Mass. Adv.Sh. 1189, 1197, which held that "any classification which relies on pregnancy as the determinative criterion is a distinction based on sex."[1/] This case fits within the explicit holding of the Court in Massachusetts Electric, and its underlying rationale. In Massachusetts Electric, the Court quotes with approval the MCAD regulations which provide

> Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom, are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment.

Id. at 1200 (emphasis supplied). The court consistently refers to discrimination pertaining to "pregnancy-related" disabilities. Finally, the Court's

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[1/] In this ruling, the Supreme Judicial Court staked out a position wholly independent from the United States Supreme Court with respect to pregnancy-related disability claims brought under Title VII, General Electric v. Gilbert, 429 U.S. 125 (1976), and under the Equal Protection clause of the United States Constitution, Geduldig v. Aiello, 417 U.S. 484 (1977). (See e. g. Section I, supra.)

explicit holding is broad enough to include abortion. It affirms that portion of the Commission's decision which requires "pregnancy-related" disabilities to be compensated under a comprehensive disability plan. Id. at 1194.

The rationale for Massachusetts Electric clearly covers this case. The Court first asks whether distinctions "based on" pregnancy are sex-linked classifications. The Court finds that since pregnancy is unique to women, distinctions based on pregnancy constitute sex discrimination.

Next, the Court considers the scope of the disability plan to determine whether "[t]he exclusion of pregnancy-related disabilities, a sex-based distinction, from a comprehensive disability plan constitutes discrimination." Id. at 1198. The Court emphasizes the breadth of the plan and the fact that exclusion affects only women. The Court notes that everyone else was provided with comprehensive coverage for all disabilities, including male-specific disabilities, while women did not have coverage to a comparable extent.

Finally, it should be noted that none of the three

complainants in Massachusetts Electric had sought disability benefits for a disability caused by a full-term pregnancy, delivery and normal birth: two of the women sought benefits for disabilities due to early miscarriages, and the third for complications arising during the seventh week of pregnancy.

In the instant case, the classification affects only pregnant women. Pregnant women are denied access to one medical alternative, abortion, while all other Medicaid recipients can pursue all medical alternatives. As in Massachusetts Electric, this is a classification "based on pregnancy," "unique to women" and as such, sex discrimination.

The Massachusetts Medicaid plan is by far more comprehensive than the Massachusetts Electric's disability plan. All medically necessary and many elective medical services are provided to other recipients, including indigent men. Only women fail to get that protection. Men with diabetes, renal failure, hypertension, or lung disease, can be treated for their condition under Medicaid. Women with comparable diseases cannot, if that treatment includes abortion. These women are required to wait until they

are on death's door. All others can seek the necessary medical attention in a timely fashion.

The defendants seek to distinguish Massachusetts Electric through a rather old and discredited argument. They argue that this is not a classification based on sex, but one that "promotes" childbirth by making a distinction within the category of pregnant women, between those who wish to go forward with their pregnancies, and those who do not. But the fact that a classification affects only a subcategory of the protected class does not affect the Massachusetts Electric analysis. Indeed, that was precisely the argument rejected by this Court in Massachusetts Electric (and accepted by the Supreme Court in Geduldig and Gilbert).[2/] The fact that the classification at issue in Massachusetts Electric affected only pregnant women and not other women did not alter the Court's holding. The question was what were the characteristics of the group that was excluded; if only women were in the excluded group, the classification was based on sex regardless of

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[2/] See n. 1, supra.

whether other women (non-pregnant women in Massachusetts Electric; women who chose childbirth in the instant case) were included. Otherwise employers could readily discriminate by classifying in terms of a sub-category of women.

Moreover, the Commonwealth's analysis confuses two questions -- the first question, whether the classification is based on sex, and thus subject to the strictest scrutiny, and the second, whether the sex-based classification is justified under that test. A classification based on unique female physical characteristics may be justified where the position is wet nurse, for instance, and clearly not justified where the position is teacher. In either case, the classification is plainly based on sex. Thus, there can be no doubt that Commonwealth v. MacKenzie, 368 Mass. 613 (1975), a pre-ERA case relied upon by the Commonwealth, involves a sex based classification (imposing criminal and civil sanctions on a male, but not a female, for begetting an illegitimate child). If the case were brought today, it would plainly be cognizable under the new Equal Rights Amendment. The question is one of justification: Do the physical

differences between unwed mothers and fathers meet the burden of justification imposed by the strict scrutiny test? The fact that the classification at issue in MacKenzie might survive that searching inquiry, is irrelevant to the question whether or not it should be strictly scrutinized under the Equal Rights Amendment. Intoning an arguably legitimate state interest at the outset, is not enough to escape the analysis mandated by the Equal Rights Amendment.[3/]

Subsequent to Massachusetts Electric, in cases involving discriminatory treatment of pregnancy leaves, the Court has again quoted the broad MCAD regulations (which cover abortions) with approval. See, e.g., School Committee of Brockton v. MCAD, 1979 Mass. Adv. Sh. 500, 504, n.7[4/]

[3/] It would be as if the employer in Massachusetts Electric defended the claim that the pregnancy exclusion was a sex-based classification by saying that it was only a classification designed to discourage working women from having children. If that characterization of arguable goals were sufficient to avoid the ERA, the amendment would be a nullity.

[4/] It should be noted that the Court in Massachusetts Electric dismissed the notion that the "voluntary" nature of the complainants' pregnancy-related disabilities had any significance. 1978 Mass. Adv. sh. at 1199. For one thing, the comprehensive disability plan at issue in Massachusetts Electric,

(Continued)

Indeed, the Iowa Supreme Court, citing Massachusetts Electric, recently took the position that the plaintiffs are here urging, that abortion was "pregnancy related." In Quaker Oats Co. v. Cedar Rapids Human Rights Commission, 268 N.W.2d 862 (1978), a complainant who "submitted to an abortion upon the advice of her doctor" and then underwent a "tubal ligation to prevent further pregnancies" sought disability benefits. Using this Court's analysis, and the precedent of other states, the Court stated that disability benefits must be paid.[5/]

4-continued from previous page/ like the Medicaid program here, provided benefits for numerous "voluntary" conditions. In any event, as the Court implied, it is not meaningful to characterize pregnancy as "voluntary," Pregnancy is a fundamental fact of life. There are two ways of dealing with it -- abortion or birth.

5/ In this area numerous state courts have taken a position wholly different from the United States Supreme Court, using language as broad, and a rationale as comprehensive, as this Court in Massachusetts Electric. See, e.g., Brooklyn Union Gas v. New York State H.R.A. Bd., 41 N.Y. 2d 84 (1976); Anderson v. Upper Bucks Cty. Area V.T. School, 30 Pa. Cmwlth. 103 (1977), appeal denied, No. 3055 (Pa. S.Ct. May 2, 1978). See also Goodyear Tire & Rubber Company v. Department of Industry, Labor and Human Relations, 87 Wisc. 2d 56 (Wisc.Ct.App. 1978) (finding sex discrimination based on discrimination in effect or impact).

The fact that Massachusetts Electric involved G.L. c. 151B, whereas the instant case involves the Massachusetts Equal Rights Amendment, cannot alter the analysis. The operative language of 151B and the Equal Rights Amendment is identical. The rationale underlying each provision is similar. Moreover, the law prohibits the imposition of penalties on the basis of unique physical characteristics. Unless a woman can exercise some degree of control over her reproductive capacity, anti-discrimination guarantees in employment and constitutional anti-discrimination guarantees are for naught. A contrary interpretation would make little sense, for it would imply that a problem which is significant was somehow included in the older, more limited, state fair employment law, but omitted from the more recent, more comprehensive state Equal Rights Amendment.

The defendants point to what they describe as the "legislative history" of the Equal Rights Amendment for support. For the most part, they argue from silence[6/] -- there is no record of any

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[6/] The Commonwealth finds the silence especially telling since the very same Legislature, considering the amendment for the first time in 1973, refused to

(continued)

mention of abortion in the 1973 or 1975 debates.[7/] (The amendment was finally passed by the General Court on May 14, 1975 and submitted to referendum on November 2, 1976.)

Second, the defendants argue from the interim report issued by the Special Study Commission of the Equal Rights Amendment in which the Commission noted only that abortion rights will be "unaffected" by the passage of the state ERA. That report hardly qualifies as legislative history. The bill authorizing the formation of a Special Study Commission was not enacted until June of 1975, one month after the General Court had debated and approved the passage of the state ERA. Ch.26, Acts and

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6-continued from previous page/ legalize therapeutic abortions. The fact that legislators did not choose to change a criminal abortion statute of long-standing is irrelevant. As of 1973 there were many sex-based classifications in the law which the Legislature had not been moved to change. Indeed, that was the reason an amendment was proposed in lieu of piecemeal legislative changes.

7/The proposed amendment had to be passed in two separate but consecutive General Courts before it could be certified by the Secretary of State to be placed on the ballot for approval or rejection at the next biennial state election. Massachusetts Constitution, Amend. Art. XLVIII, pt. 4, §§4, 5.

Resolves of 1975. The interim report was not issued until two weeks before the referendum ballot. The purpose of the commission was not to aid the legislature, and certainly not the public, in their deliberative processes. It was to suggest what laws would have to be changed in the event that the state or the federal ERA were passed. The text of the resolve states that the commission was convened "for the purpose of making an investigation and study relative to the review and formulation of state laws in order to satisfy the provision of pending Equal Rights Amendments to the Constitution of the United States and the Constitution of the Commonwealth of Massachusetts." Chapter 26, supra. It was a working document for the next round -- after the amendment had been passed -- to determine what needed to be done. Finally, the language cited by the Commonwealth comes from an interim report.[8/]

[8/] Even the 1976 interim report hardly stands for the proposition urged by the Commonwealth. The authors of the report note that abortion rights would be "unaffected" by the ERA because, it appeared, that those rights had an independent basis in the federal constitutional right of privacy. Clearly, a state constitutional amendment could not "affect" that set of federally guaranteed rights. It is not at all clear what conclusion the Commission would have come to had there not been a federal guarantee or, as is currently the case, had that "right" been eroded.

If the legislature had wanted a study to aid its deliberative process that avenue was readily available. In 1972, when the General Court began its deliberations of the federal Equal Rights Amendment it specifically ordered that a study be made for its potential impact. This report, authorized by 1972 Senate Bill #1407 and submitted as 1972 Senate Document 1537 on June 16, 1972, was the only Massachusetts legislative report in existence at the time that any of the ERA debates took place in the General Court, between 1972 and 1975. Legislative Research Council, Report Relative to the Equal Rights Constitutional Amendment, Sen. Doc. No. 1537, Gen. Court, 2d. Sess. (1972) [hereinafter Legislative Research Council Report.][9/]

[9/] The proposed federal Equal Rights Amendment and the state Equal Rights Amendment were both introduced in 1972. Mass. H.J. 3182, Gen. Court, 2d.Sess. (1972); Mass. H.J. 4522, Gen. Court, 2d Sess. 1972. The federal ERA was ratified immediately upon the filing of the Legislative Research Council Report. Mass. S.J. 1639, Gen. Court, 2d Sess. (1972); Mass. H.J. 2087, Gen. Court, 2d Sess. (1972). The state ERA was not passed by the General Court until 1975. On the date of its passage, attempts to postpone its consideration pending study were defeated. The debate strongly suggests that the body believed there had been enough study of the amendment. The only study which had been made by the General Court was the Legislative Research Council Report, State House News Service Bulletin, May 14, 1975.

If any document is to be considered "legislative history" it is this one. The Legislative Research council addresses the question of abortion as follows:

> Changes are expected in the laws on abortion, marriage, divorce, child care and custody, child support, rights in common property, bastardy proceedings, alimony, military service rights, treatment of criminal offenses....

Legislative Research Council Report, p. 46. (Emphasis supplied)

Finally, the commentary which became part of the legislative history of the federal ERA, which the Commonwealth cites, supports the plaintiffs' position, and not the defendants'. In Brown, Emerson, Falk and Freedman, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights For Women," 80 Yale L.J. 871 (1971), the authors deal specially with classifications on the basis of "physical characteristics unique to one sex." Such classifications are sex-based, but are justifiable when narrowly drawn, i.e, when they meet the test of strict scrutiny by being perfectly congruent with the purposes of the legislation (e.g. a law relating to wet nurses could cover only women, and meet any strict scrutiny test, as could a law regulating the donation

of sperm which applied only to men. Id. at 893.)

But the authors caution that under an Equal Rights Amendment, courts should be vigilant of the "possibility of evasion in the application of the...principle." In such situations, the authors conclude:

> Unless that principle is strictly limited to situations where the regulation is closely, directly, and narrowly confined to the unique physical characteristic, it could be used to justify laws that in overall effect seriously discriminate against one sex. A court faced with deciding whether a law relating to a unique physical characteristic was a subterfuge would look to a series of standards of relevance and necessity. These standards are the ones courts now consider when they are reviewing, under the doctrine of strict scrutiny, laws which may conflict with fundamental constitutional rights...

Id. at 894. (emphasis supplied) That scrutiny is precisely what is called for here.

B. Since These Enactments Discriminate on the Basis of Sex, They Are Subject to a Strict Scrutiny Standard.

This Court has been clear about the level of scrutiny to be applied to enactments which discriminate on the basis of sex. In Attorney General v. Massachusetts Interscholastic Athletic Association, 1979 Mass. Adv. Sh. 1584, 1597, the Court stated that

under the Equal Rights Amendment, "classifications on the basis of sex are subject to a degree of constitutional scrutiny 'at least as strict as the scrutiny required by the Fourteenth Amendment for racial classifications.'" Classifications based on sex, the Court noted, are only permissible if they "'further a demonstrably compelling interest and limit their impact as narrowly as possible consistent with their legitimate purpose,'" quoting Commonwealth v. King, 1977 Mass. Adv.Sh. 2636, 2655; see also Opinion of the Justices, 1977 Mass. Adv. Sh. 2728.

C. The Challenged Enactments Cannot Meet the Test of Strict Scrutiny Required by the Equal Rights Amendment.

Here the analysis is identical to that in Section II, (D) supra. The conclusion can only be that these enactments violate the Equal Rights Amendment.

IV. PRELIMINARY INJUNCTIVE RELIEF IS APPROPRIATE AND SHOULD BE CONTINUED PENDING RESOLUTION OF THIS CASE.

Injunctive relief is vital in this case not only to maintain the status quo--funding for medically necessary abortions--but to forestall the severe and irreparable harm that would flow from a funding cutoff. Accordingly, plaintiffs submit that the preliminary orders entered by the Single Justice should be allowed to remain in force or should be extended by this Court.

The standards for granting preliminary relief were recently described by this Court in Packaging Industries Group, Inc. v. Cheney, Mass. Adv. Sh. (1980) 1189. Whether a preliminary injunction should be granted, or continued, turns on an assessment of moving parties' claim of injury pending a final decision in light of their chance of success on the merits. The merits of the plaintiffs' claims have been treated in the preceeding sections of this brief and need not be repeated here. In this section, the plaintiffs will argue that the uncontested, or unrebutted, affidavits presented to

the Single Justice show that (1) the restriction of funds for abortions under the Medicaid program will mean that abortion services simply will not be available for many poor women, (2) the elimination of publicly funded abortions will have dire health consequences for women seeking medically necessary abortions, and (3) there is no reason to believe that the continuance of the injunction would result in any harm to the defendants or to the interests asserted by them.

The defendants have argued, in their submission to the Single Justice, in their counterclaim, and in their oral presentation, that the termination of public funding for abortions under the Medicaid program will have no effect on the availability of abortion services for the poor. They attempt to characterize the issue as a question of <u>who</u> will pay, rather than <u>whether</u> they will be provided at all. They contend that an injunction is unnecessary because health care providers can and will continue to provide abortion services for the poor even if the state is unwilling to pay for those services. The defendants' argument, however, is based entirely

on speculation and wishful thinking. The record in this case, the studies which are available from other jurisdictions, and prior decisions involving abortion funding clearly demonstrate that without funding, abortion services to the poor will be substantially curtailed. While the Commonwealth wishes that the problem will go away, that somehow public charity will manage to absorb it, it will not. One or two women may be able to beg for an abortion, but the class will not be so lucky. Women will either bear unwanted children, delay the abortion--seeking the illusory public charities--until the operation gets more complicated and risky, or worse, perform a self-induced abortion.

Notwithstanding the provision for payment for abortions which are "necessary to prevent the death of the mother," it is clear that the restrictions contained in the challenged legislation effectively prohibit payment for abortions under Medicaid. Dr. Stubblefield states in his affidavit that "[t]he number of women for whom continuation of pregnancy will almost certainly result in death is very small. Less than two per cent of all abortions performed in

the United States would be necessary to prevent the death of the pregnant woman." (Stubblefield Affidavit, ¶16). The experience in states which have adopted funding restrictions similar to those at issue here bears out Dr. Stubblefield's assessment.[1/]

The elimination of funding for abortions under Medicaid must mean, for the vast majority of this class, that abortion will no longer be available. The providers, however beneficent, cannot absorb this demand. Once the notices have been sent to recipients offically notifying them that abortions are not covered, providers will no longer be entitled to payment by the state. Without payment, the providers have absolutely no legal obligation to provide abortions. And the record in this case

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[1/] The District Court in McRae v. Harris, No. 76-C-1084, slip. op. (January 15, 1980), on a voluminious record, found that the data (from August 4, 1977 through June 7, 1978) for twenty-two states (excluding New York, California, Illinois and Pennsylvania) show a "radical decrease in average monthly number of abortions." Id. at 57. Quoting from that record, Justice Marshall, in his dissent in Harris v. McRae, ____U.S.____, 48 U.S.L.W. 4941, 4952 (June 30, 1980) states that in states that have adopted standards more restrictive than medically necessary, the number of funded abortions has decreased by over 98%.

establishes that the major providers of abortions will be unable to provide these services for free.[2/] The affidavits of Blanche Lansky and Martin Cohn show that two of the larger abortion clinics in the Boston area would simply not be able to provide abortions for indigent women so long as the Department of Public Welfare's cutoff of abortion reimbursement continues. (A. 73-76)[3/]

Thus, while there is evidence in the record to show that abortion services will not be available for Medicaid eligible women after the termination of funding by the Commonwealth, there is absolutely

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[2/] In the quarter ending March 31, 1980, over 73% of the abortions paid under medicaid in Massachusetts were performed in clinics. Affidavit of Eileen Jay ¶4. (A.103)

[3/] The "evidence," in the form of the Affidavit of Eileen Jay, is disingenuous and misleading. According to that affidavit, an employee of the Welfare Department telephoned various providers selected by the Department of ascertain whether on the day she called, abortions would be provided for Medicaid eligible women. The answers are meaningless, however, since Ms. Jay failed to inform any of the providers whom she contacted that--even as of the moment of her call--the Commonwealth was taking the position that they would not paid for the services they were then providing.

nothing in the record to support the defendants' claim that abortions will continue to be available because of the "long-standing commitment of the medical profession and the hospital institutions of the Commonwealth to the care of the poor on a charity basis." Indeed, the affidavits filed by the defendants in this action indicate that free abortions are not available in Massachusetts hospitals. See Jay Affidavit. (A. 62-67) Of fourteen hospitals polled by the Department only one indicated that it would perform an abortion for a Medicaid recipient, and there was no indication that any of the hospitals would provide abortions for Medicaid patients without payment.[4/]

[4/] The Commonwealth's efforts to secure a free abortion for a prisoner at M.C.I. Framingham after the Department of Correction refused to pay for the prisoner's medical treatment produced simliar results. The record in A Prisoner at M.C.I., Framingham v. King, No. 79-1498-N (U.S.D.C., Mass.), in which most of the defendants here were parties, show that four employees of the Department of Correction spent a full day canvassing the Massachusetts hospitals and that only one of over fourteen hospitals was prepared to perform an abortion without cost to the patient. (See affidavit of Alfred DeSimone, ¶¶3-5). (A. 68-70)

Ultimately, the defendants' argument that abortion services will somehow be available is flawed by its failure to take account of the fact that this is not the denial of services or treatment in an individual case. It is a categorical exlusion of an entire class of services. Although it is certainly possible that individual women will be able to obtain abortions without having to pay for them, there is no reason to believe that private charity can or will provide these services for the entire class of women affected by the restriction.

This is confirmed by the results of studies of the data on abortions in states in which funding has been restricted. A recent study of the impact of the Hyde Amendment in Georgia and Ohio concluded that, as a result of the funding restriction, "about 23 per cent of Medicaid eligible women in Ohio and 18 per cent in Georgia who could have obtained funding under the more favorable funding conditions existing in 1977 were not able to obtain them in 1978, and carried their unwanted pregnancies to

term".[5/] A separate study of the effect of the restriction of abortion funding in Texas concluded that "an estimated 35% of pregnant Medicaid eligible women who would have obtained a publicly funded, legally induced abortion before the funding restriction did not obtain one afterwards."[6/]

[5/] Trusell, Menken, Lindheim & Vaughan, "The Impact of Restrictive Medicaid Financing for Abortion," 12 Family Planning Perspectives 120, 129 (May, June 1980). The study also concluded that:

> The data available from the survey indicate that most Medicaid eligible women who obtained abortions in Ohio not only paid cost. (Ancillary services such as blood test and pregnancy tests were sometimes paid for by Medicaid.) In Georgia, some poor women continued to obtain publicly funded abortions because a large municipal hospital continued to subdize abortions for poor women. Since both Georgia and Ohio restrict Medicaid eligibility to those on welfare, it is unlikely that many (if any) of these women were covered by private health insurance.

[6/] U.S. Department of Health & Human Services, U.S. P.H.S. "Effects of Restricting Federal Funds for Abortion--Texas," 29 Morbidity and Mortality Weekly Report 253 (June 6, 1980).

Given that the restriction of public funding will result in the curtailment of abortion services for indigent women, the harm to Medicaid-eligible women who wish to obtain those services becomes clear. A Medicaid eligible woman has one of several choices: she may carry her pregnancy to term, resulting in an unwanted child or one which, by definition, she is unable to support; she may carry the pregnancy to term at a substantial risk to her health, see pp. 26 - 29 , supra; she may divert money from her own extremely limited resources for a legal abortion, rather than paying for food, shelter, or some other necessity; she may attempt to abort herself-with possibly disastrous consequences.

There has never been the slightest doubt in any of the cases brought to date challenging the restriction of Medicaid funding of abortion that the cutoff of public funds will result in the substantial (if not total) impairment of access to abortions for poor women. Committee to Defend Reproductive Rights v. Cory, S.F. No. 24503 (Cal. Supreme Court, September 20, 1979); Committee to Defend Reproductive Rights, et al v. Myers, S.F. No. 24069 (Cal. Supreme

Court, September 20, 1979); Doe v. Busbee, 471 F. Supp. 1326 (N.D. Ga. 1979)(preliminary injunction), 481 F.Supp. 46 (N.D. Ga. 1979); Doe v. Kenley, 584 F.2d 1362 (4th Cir. 1978); Doe v. Percy, 476 F.Supp. 324 (W.D.Wisc. 1979); McRae v. Matthews, 421 F.Supp. 533 (E.D.N.Y. 1976), vacated and remanded sub nom Califano v. McRae, 433 U.S. 916 (June 29, 1977), on remand sub nom McRae v. Harris (non published) Civil No. 1804 (E.D.N.Y. January 15, 1980), reversed sub nom Harris v. McRae, 448 U.S.___, 48 U.S.L.W. 4941 (1980); Hodgson v. Board of County Commissioners of Hennepin, 614 F.2d 601 (8th Cir. 1980); Orf v. Nebraska Department of Welfare, Civil No. 80-0-31 (D. Neb. January 25, 1980)(preliminary injunction); Planned Parenthood Affiliated of Ohio v. Rhodes, 477 F.Supp. 529 (N.D. Ohio 1979)(preliminary injunction); Jaffe v. Sharp, 463 F.Supp. 222 (D Mass. 1978), aff'd and remanded sub nom Preterm v. Dukakis, 591 F.2d 121 (1st Cir. 1979), cert. denied ___U.S.___, 99 S.Ct. 2182 (1979); Roe v. Casey, 464 F.Supp.

487 (E.D. Pa. 1978)(permanent injunction); Zbaraz v. Quern, 572 F2d 582(7th Cir. 1978), remanded No 77-C-4522 (N.D. Ill., May 15, 1978) (order granting preliminary injunction); 596 F.2d 196(7th Cir.1979), remanded, 469 F. Supp. 1212(N.D. Ill., 1979), reversed sub nom Williams v. Zbaraz, ____U.S.____,48 U.S.L.W. 4957 (1980). Recently Justice Stevens addressed the issue in the form of an application for a stay of the order of the lower court in Williams v. Zbaraz, which order required payment for medically necessary abortions. Stevens denied the stay, largely based upon his analysis of the likely irreparable injury to the Medicaid eligible population. 99 S.Ct. 2095, 2099 (1979).[7/] Indeed, even Justice Stewart, the author of the majority position in McRae, would not take a different position. Justice Stewart conceded that restrictions on Medicaid funding for abortion results in the constricting of the indigent woman's ability to enjoy the constitutional right of choice, that it did place substantial obstacles in her path. Harris v. McRae, supra at 4141. If the issue had solely been one of irreparable harm, as it had been for Justice

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[7/] Williams v. Zbaraz, the companion case to Harris v. McRae, was subsequently reversed on the merits. ____U.S.____, 48 U.S.L.W. 4957 (1980).

Stevens, these findings would have been more than sufficient.[8/]

The harm to Medicaid eligible women clearly outweighs any interest which can be asserted by the state in support of the funding restrictions. The state would suffer no financial harm if ordered to provide funds for abortion under the Medicaid program. This is because the restriction of funds for abortion, if it is successful, would not save the Commonwealth any money. Instead, it would require the Commonwealth to assume the greater financial burden of paying for the expenses associated with pregnancy and childbirth.[9/]

[8/] To be sure, Justice Stewart was considering a different question--whether that conceded harm was sufficient to trigger Government protection, i.e., whether these obstacles were the equivalent of the prohibitions in Roe v. Wade. He concludes that they are not, drawing a distinction between obstacles that the Government places--namely criminal sanctions and those which derive from a condition not of the Government's making, namely indigency.

[9/] The Commonwealth would also become obligated to pay for the support of the child after its birth.

Thus, as a practical matter, an injunction ordering the Commonwealth to pay for abortions would not be likely to result in the expenditure of additional funds. The defendants, furthermore, cannot assert non-monetary interests outweighing the critical needs of the plaintiffs here. Whatever the propriety of the states' various justifications for denying abortions to poor women, they are not relevant where an injunction merely perserves a long-standing status quo pending the resolution of constitutional controversy. See Section II-D, supra.

V. THE COURT POSSESSES JURISDICTION OVER THE SUBJECT MATTER OF THIS ACTION

The defendants have offered an array of arguments in support of the proposition that this Court lacks subject matter jurisdiction over the present action and authority to remedy the constitutional violations involved. The following sections will demonstrate why subject matter jurisdiction is not relevant in this case and why, as well, no procedural or prudential considerations bar effective relief.

A. The Doctrine of Separation of Powers Does Not Preclude the Court from Adjudicating the Case Or Ordering Appropriate Relief.

The defendants' principal jurisdictional argument is that the Court does not have jurisdiction to consider this action because the relief sought by the plaintiffs is - or would require - "the forced appropriation of funds"[1/] which the defendants contend would violate Article XXX and somehow implicate the "political question" doctrine. The answer to this contention is straightforward: In the first place, the relief sought by the plaintiffs

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[1/] Answer p. 1 (A. 78)

is not the forced appropriation of funds. Second, the simple fact that the suit involves an appropriation measure does not transform the issue into anything like a "political question" and does not deprive the Court of jurisdiction to consider the case.

The precise relief sought by the plaintiffs is a declaratory judgment that a statute of the Commonwealth (G.L. c.29 §20B) and a rider attached to the 1981 Medicaid appropriation (St. 1980, c.329 §2, Item 4402-5000) are unconstitutional and an injunction barring their enforcement. They are not seeking a separate and additional appropriation of funds by the legislature: the legislature has already appropriated funds for the medical assistance program. Item 4402-5000 generally appropriates $920,786,000.00 for the Commonwealth's medical assistance plan, the largest single item in the appropriations act. With the exception of the abortion rider (and certain other restrictions which are not material), there is no further or more specific allocation of the funds in question. The plaintiffs do not seek appropriation of any further or additional funds; their suit is addressed to the manner in which the funds which have already been appropriated are to

be used.

Furthermore, there is nothing in the nature of the relief sought by the plaintiffs that would or could require the legislature to appropriate additional sums. The challenged legislation embodies a legislative choice that the state will pay for childbirth, but not for abortions. Of course, as other courts have consistently noted, and as the record in this case shows, the cost of medical treatment during pregnancy and childbirth is many times greater than the cost of an abortion. The inclusion of abortion, then, rather than requiring an additional appropriation should, presumably, result in a lower actual expenditure of the already appropriated funds.[2/]

The record of the past two years provides a graphic illustration of this point. From August 7, 1978 through October 1, 1979, the federal court enjoined the implementation of this state's restrictions on Medicaid funded abortions, and required that medically necessary abortions be funded under Medicaid. The Court did not

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[2/] See Section II-D, supra .

doubt their power to do so,[3/] even though the state defendants raised challenges similar to those raised here (and raised questions of federalism, in addition). From October 1, 1979 through February 15, 1980, when the same defendants were not under any injunction at all,[4/] the state continued to fund medically necessary abortions on the same terms as previously. Finally, from February 15, 1980 to June 30, 1980, the state defendants provided funds for medically necessary abortions in compliance with the injunction that had been issued in the McRae case.[5/] The money for such services was found by the state defendants; no "forced" appropriations were required.

The fact that the only defendants in this case are executive officers is telling. So long as the General Court has not been joined as a defendant, this case cannot involve the "forced appropriation" of money. The executive does not have the power to appropriate anything. At the same time, it plainly does have the wherewithal to comply with the constitutional

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[3/] Preterm, Inc. v. Dukakis, 591 F.2d 121 (1st Cir. 1979).

[4/] See Statement of Facts, Section B, Supra, pp. 22-25

[5/] The McRae decision and order were issued on January 15, 1980 but the Court stayed the decision until February 15, 1980. On that date, all further stays pending review by the Supreme Court were denied.

obligations spelled out in sections II and III supra.[6/] This Court has found, on numerous occasions, that the appropriations power, though clearly in the legislature's domain, is not solely located there. A certain discretion resides in the executive branch, to use or not to use existing funds so long as constitutional obligations are met. In ABCD, Inc. v. Commissioner of Public Welfare, 1979 Mass. Adv. Sh. 1566, for instance,

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[6/] See e.g. Massachusetts General Hospital v. Sargent, 397 F. Supp. 1056 (D. Mass. 1975) in which the Court, faced with a claim by providers that the Commonwealth had failed to pay promptly for services rendered to eligible recipients, resulting from the lack of appropriated funds, issued declaratory relief entitling plaintiffs to full and prompt payment for the services involved. In effect, the Court was saying that the Commonwealth had an obligation to pay somehow and that the Court was indifferent as to how the Commonwealth came up with the money. (Given the facts of the case, unlike the instant one, it would appear very likely that the legislature would have to come up with additional appropriation). The Court did not order injunctive relief but only because the plaintiffs were unclear as to whether the injunctive relief they sought was to require the payment of past claims, which "might" run afoul of the Eleventh Amendment, and because the Court was of the view that declaratory relief would be sufficient, that the Court could rely on the good faith of the officials. Nevertheless, the Court retained jurisdiction if its assumption were not correct. Nothing in the opinion suggests that the Court believed prospective injunctive relief to be inappropriate.

this Court held that executive officers did not have to expend monies specifically appropriated for increases in welfare benefits where it would be pointless and wasteful to do so. Similarly, in Opinion of the Justices, 1978 Mass. Adv. Sh. 1412, 1424, this Court commented, in the context of a proposed bill to restrict the ability of the executive to refuse to expend properly appropriated funds, that in the "difficult area... near the juncture of legislative territory and executive territory...some overlap may be inevitable."

The defendants' position that this case implicates the "political question" doctrine comes alarmingly close to an assertion that the Court's traditional equity jurisdiction to assess the constitutional validity of legislative enactments should be abrogated simply because one of those enactments formed part of an appropriations measure. As this Court recently said, in disposing of a nearly identical contention in Colo v. Treasurer and Receiver General, 1979 Mass. Adv. Sh. 1893, 1897:

> Without in any way attempting to invade the rightful province of the Legislature to conduct its own business, we have the duty, certainly since Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803), to adjudicate a claim that a law and the actions undertaken pursuant to that law conflict with the requirements of the

> Constitution. "This," in the words of Mr. Chief Justice Marshall, "is of the very essence of judicial duty."[7/]

The power and duty to review the constitutionality of legislation is so central to the judicial function that determination of nonjusticiability here would itself threaten to dismantle the delicately balanced distribution of powers enshrined in Article XXX of the Declaration of Rights.[8/] The Supreme Judicial Court has made precisely this point in response to objections, in separation-of-powers terms, to adjudication of the constitutionality of executive actions. See, for example, Perez v. Boston Housing Authority, 1980 Mass. Adv. Sh. 325, 361:

[7/] Colo involved a challenge on First Amendment and cognate State grounds to the payment of salaries to legislative chaplains. The defendant claimed the controversy was "not susceptible of judicial resolution because any attempt by this court to resolve it would violate either the doctrine of the separation of powers...or the political question doctrine." 1979 Mass. Adv. Sh. at 1895. The ostensible reasoning was that payment to chaplains was a matter of internal legislative procedure.

[8/] In an advisory opinion, this Court has noted that "the protection of the independence of the judiciary was the exclusive purpose of the original draft of the Massachusetts separation of powers clause. As drafted by John Adams and reported by the committee as article 31 of the draft, the clause read as follows: 'the judicial department of the State ought to be separate from, and independent of, the legislative and executive powers.'" Opinion of the Justices, 365 Mass. 639, 645 n. 5 (1974).

> (I)f it is a function of the judicial branch to provide remedies for violations of law,...then an injunction with that intent does not derogate from the separation principle...To the contrary, when the executive persists in indifference to, or neglect or disobedience of court orders...it is the executive that could more properly be charged with contemning the separation principle.

See also Blaney v. Commissioner of Correction, 1978 Mass. Adv. Sh. 278, 284-285 (order to executive officer does not violate Article XXX; "(s)uch functions are judicial, and in no way usurp the power of the executive"). The same reasoning applies a fortiori to judicial review of legislative actions because invalidation of legislation (whether an appropriations measure or otherwise) is far less intrusive of traditional legislative functions than is the type of broad remedial intervention in executive activity approved in such cases as Perez and Blaney.[9/]

[9/] In the analogous situations in federal Court, the courts are hardly without power to assess legislative compliance with constitutional standards, even in regard to internal matters such as judgment about the qualifications of members, which the Constitution reposes in the Houses of Congress, or which the Speech and Debate Clause might be thought to envelop in immunity from judicial review. Powell v. McCormick, 395 U.S. 486, 503-506, 512-549 (1969). Nor can State legislatures infringe the constitutional rights of their members, and evade judicial review, on the premise that they are merely determining members' qualifications or assuring their loyalty. Bond v. Floyd, 385 U.S. 116, 131 (1966).

The fact that a portion of an appropriations measure is one of the two statutes challenged in this case, therefore, has no effect on the justiciability of the controversy. At most, it would be relevant to a determination whether the appropriate remedy is to sever the offending portion of the statute, or strike the appropriation in its entirety. Whatever might be said about the legislative intent and equitable considerations relevant to this choice of remedy (see section VI infra.), there can be no separation of powers bar to invalidating restrictions on funding of abortion services.[10/]

[10/] Nor is the doctrine of sovereign immunity a bar. The doctrine does not bar a suit against officers and agencies of the Commonwealth, as distinguished from the Commonwealth itself. G. M. Employment Service, Inc. v. Commonwealth, 358 Mass. 430 (1970). It is a fundamental tenet of constitutional and equitable jurisprudence that officers and agents of a State may be sued for unconstitutional activities and enjoined from acting in an unconstitutional manner. Ex Parte Young, 209 U.S. 123, 159-160 (1908); Greene v. Mayor of Fitchburg, 219 Mass. 121, 127-128 (1914). See also Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 689-690 (1949). The fact that the Court's order may require the expenditure of public funds by the state officials in no way alters the character of the action. See, e.g. McCarthy v. Commissioner of Public Welfare, 1979 Mass. App. Ct. Adv. Sh. 2177 (ordering payment of AFDC benefits by the Commissioner). Edelman v. Jordan, 415 U.S. 651 (1974) and its progeny make clear that sovereign immunity bars only retrospective damage judgments payable from the State treasury. See also Quern v. Jordan, U.S. 99 S. Ct. 1139, 1145 (1979). In any event, as this Court has reiterated, state sovereign immunity is a common law doctrine which it, as well as the legislature, is free to modify or abrogate. Whitney v. Worcester, 373 Mass. 208, 210 (1977).

B. The Plaintiffs Have No Other Judicial or Administrative Remedy.

The defendants contend that the Court lacks subject matter jurisdiction over the plaintiffs' equitable claims because G. L. c.258 provides the plaintiffs with a "complete and adequate remedy at law".[11/] The claim is an extraordinary one, both as a matter of fact and law.

As with the defendants' opposition to the plaintiffs' request for preliminary relief, the defendants' claim here is premised on the notion that this case can be seen as one in which abortion services will somehow, against all odds, continue to be provided and in which the providers may then pursue their administrative remedies through the Department of Public Welfare, ultimately bringing suit for payment under Ch. 258. The fallacy of this argument has already been demonstrated. See Section IV, supra. Under the circumstances of this case, where injunctive relief is necessary to ensure that abortion services will continue to be provided, it should be obvious that Ch. 258 does not provide a complete and

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11/ A. 78.

adequate remedy at law to plaintiffs Moe, Poe and Koe and other indigent women seeking abortions. They would be wholly at the mercy of the largesse of Medicaid providers. They do not have an independent remedy under that chapter as there is nothing in this case which would permit them to sue the state in tort or contract. Recipients have no contractual right to the provision of any particular service under the Medicaid program. The denial of medical services, no matter how severe the consequences, would not create a right of action in tort under Ch. 258 because the statute specifically excludes from tort liability actions taken pursuant to statutory authorization.12/

But, even as to Medicaid providers, those who have beneficently decided to provide abortions in the hopes that they will be reimbursed, the defendants'

12/ Ch. 258, §10(a) excludes from the statute "any claim based upon an act or omission of a public employee when such employee is exercising due care in the execution of any statute or any regulation of a public employer, or any municipal ordinance or by-law, whether or not such statute, regulation, ordinance or by-law is valid..."

claims are, to say the least, disingenuous. In fact, inadequate is not strong enough to describe the efficacy of G.L. c.258 to these providers. What the defendants hope to do is to send those hapless providers on a merry-go-round, through a procedure that is certain to lead nowhere.

First, pursuit of any administrative remedies which may be available through the Department of Public Welfare would unquestionably be futile. The Department's position is categorical: It is bound to comply with the requirements of the challenged statutes which specifically prohibit reimbursement![13/] See Ciszewski v. Industrial Accident Bd., 367 Mass. 135, 141 (1975); Boston Edison Co. v. Board of Selectmen, 355 Mass. 79, 84-85 (1968); Mathews v. Eldridge, 424 U.S. 319, 330 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636, 641 n. 8 (1975). Nor could the Department's

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13/ Properly viewed, "exhaustion of Administrative remedies" is not an issue here because no agency proceedings have been instituted. The question is whether the issue is within the "primary jurisdiction" of the Agency. See Murphy v. Administrator of Division of Personnel, 1979 Mass. Adv. Sh. 272, 277-278; K.C. Davis, Administrative Law Treatise §19.01 (1958); Jaffe, "Primary Jurisdiction," 77 Harv. L. Rev. 1037 (1964).

expertise or findings on a question of constitutional obligation inform or enhance a subsequent judicial determination. See Nelson v. Blue Shield of Mass., Mass. Adv. Sh. (1979) 953, 961; Murphy v. Administrator, supra at 277. Where the issues presented turn on "questions of law which have not been committed to agency discretion," courts are the appropriate arbiters in the first instance. Murphy, supra at 277.

Second, if that were not sufficient, an action under Chapter 258 would be completely unavailing once proper notice to recipients of the termination of services has been made under federal regulations. Central to an action under Ch. 258 is a contractual obligation between the providers and the Commonwealth. Under federal regulations, 42 C.F.R. §431.200 et seq., and extensive federal case law,[14/] the Commonwealth cannot cut off a service to recipients until the recipients have been properly notified. The obligation to continue

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[14/] See, e.g. Budnicki v. Beal, 450 F. Supp. 546 (E.D. Pa. 1978); Becker v. Toia, 439 F. Supp. 324 (S. D.N.Y. 1977); Turner v. Walsh, 435 F. Supp. 707 (W.D. Mo. 1977), aff'd per curiam, 574 F. 2d 456 (8th Cir. 1978).

to provide a service to recipients includes the obligation to pay the providers for the services they have duly rendered to recipients, prior to that formal notification. Until notice is given, both the Commonwealth and the providers have a contractual obligation to continue these services.

If this Court does not give the relief the plaintiffs have requested, which includes enjoining the giving of notice to recipients,[15/] those notices will issue and providers will no longer be contractually obligated to provide abortions. Those that do and then seek reimbursement will face the prospect of the Commonwealth's raising the termination of the contractual obligation as a complete defense. What the Commonwealth seeks then is to have this Court refuse prospective injunctive relief, because of the supposed adequacy of Ch. 258 legal remedies, issue the formal notices to recipients and providers, and then, to the few hapless providers who

[15/] Justice Kaplan specifically enjoined the giving of notice to recipients under 42 C.F.R. §431.200 et seq. A. 112.

resort to Ch. 258, claim that there is no contractual obligation at all.[16/]

16/ There is already a similar example. In New England Women's Service v. King, SJC No.79-69, five providers filed suit in 1979, claiming that the Commonwealth had refused to reimburse them for past claims. namely for abortions provided during a three week period in 1978 between the effective date of the appropriations rider and the date an injunction was entered. The Commonwealth, in an August 30, 1978 opinion of the Attorney General, took the anamolous position that although the providers had to provide abortions until notice could be provided to recipients under federal law, they could not be paid for it! The executive officers of the Commonwealth were obliged not to reimburse for these services as of the effective date of the rider, but the providers were obliged to provide the services until federally mandated notice.

Not surprisingly, the providers sued in this Court alleging a violation of the Supremacy Clause of the United States Constitution, the impairment of the obligations of contract and the taking of property without fair compensation. The Commonwealth, in proceedings before this Court and in the Attorney General's letter, admitted that the monies were owed but took the position that Ch. 258 was the proper remedy. The plaintiffs argued that Ch. 258 by its terms excluded claims which challenged the validity of a statute as distinguished from claims which presumed the validity of the law but deal with the inadvertence or error of the state employee. Nevertheless, since the case involved the reimbursement for past claims, and not prospective relief, the Court remanded those claims (although it retained jurisdiction over future claims, should the situation recur).

However, once before the Superior Court in the remanded proceeding the Commonwealth suddenly claimed that Ch. 258 did not apply at all because the passage of the appropriations rider terminated the providers' contractual obligations to provide abortions, rather than the date of notice to recipients (a position which contradicts the Attorney General's 1978 opinion and flies in the face of the federal law).

The implications are clear: If the claims of providers who provided services before they received any notice to the contrary, before recipients were notified in compliance with federal law, when they had every reason to believe they were contractually obligated to provide abortions and when

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Third, if these claims were ever reduced to judgment under Ch. 258, a possibility that is remote, to say the least, the defendants' collection problems could be catastrophic. The defendants will surely take the position that they will not pay these claims out of existing funds but that a separate appropriation would be required. The result would be predictable.17/

Finally, the defendants urge the Court to select the Ch. 258 alternative in the exercise of this Court's discretion. The defendants suggest that the case is far more complex than this record reflects, and that the Ch. 258 procedure is somehow better able to deal with this complexity. The plaintiffs' claims belie

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16 - continued from previous page/ that belief was grounded in settled law, will not be honored, surely the claims of plaintiff providers who provide services after federal notice, after the Commonwealth has announced it will oppose reimbursement, are even more in doubt.

17/ The plaintiffs do not argue that a separate appropriation would in fact be required. However, the fact that providers could expect to meet resistance in satisfying any judgment against the Commonwealth in the absence of a clear order from this Court specifying their constitutional obligations certainly suggests that Ch. 258 does not provide a complete or adequate remedy.

that contention. The core of the claim involves the four corners of this state's comprehensive Medicaid program and questions of comparison resolvable from the face of that statute and its implementing regulations.

Next, the defendants suggest that this Court should avoid constitutional questions, and somehow focus on the reimbursement issues which they would have the Court believe lie at the heart of this case. That position wholly misperceives the nature of the claim. Plaintiff physicians do not seek damages or reimbursement for past services. They seek a declaration and injunction barring future implementation of the Medicaid cutoff of abortions. The injuries they allege -- which are basic to the constitutional claims -- are not monetary. They claim injury to the physician patient relationship, to the doctor's duty to make responsible medical judgment. And the plaintiff recipients, forced by a lack of funds to return to back alley practitioners or self-induced abortions, seek an injunction to avoid future irreparable damage to themselves. It is simply unconscionable for the defendants to attempt to avoid a prompt adjudication of the merits of this action, and attempt through the

classic "squeeze play," to force providers into the dilemma of either turning away Medicaid women or donating services to replace the state's obligation. Moreover, in the meantime, while the claims, if any there be, wend their way through the legal labyrinth, Medicaid eligible women will suffer egregious harm.

VI. GIVEN THE CONSTITUTIONAL INVALIDITY OF THESE ENACTMENTS, THE APPROPRIATE REMEDY IS SEVERANCE OF THE OFFENDING PROVISIONS FROM THE MEDICAID APPROPRIATION STATUTE

The plaintiffs urge this Court to invalidate the statutory restrictions on Medicaid reimbursement of abortions. Specifically, the plaintiffs call for the invalidation of the proviso found in Item 4402-5000 of the 1980 General Appropriations Act, St. 1980, c. 329 §2. Chapter 329 is the Commonwealth's budget for fiscal 1980. Within it, Item 4402-5000 establishes a Medicaid appropriation of $920,786,000.00 -- the single largest item within the budget. And within that is the challenged section, that "no funds appropriated under this item shall be expended for the payment of abortions not necessary to prevent the death of the mother."[1/] Since the challenged provision is an "exception"

[1/] The other statute challenged in this case, c. 29, §20B, presents no severability problem. Although enacted as part of St. 1978, c. 258, which contained other provisions relating to abortion, it was clearly separate from them, and injected into a different chapter of the General Laws. If unconstitutional, it can be declared inoperative by this Court. Of course, without a Medicaid appropriation, the fact that Section 20B is invalid will not secure the plaintiff class of women actual abortion funding.

clause, the impact of invalidation will be that the Medicaid program will continue -- as it did in the years before these restrictions were passed,[2] with abortions of all sorts covered under the general Medicaid appropriation. There was never a special appropriation for abortion. It was clearly fit within the categories of "family planning services", or "physician's service", or part of "in patient hospital services."[3]

In the alternative, if this Court finds that the proviso is not unconstitutional in toto, a finding which would restore both medically necessary and elective abortions, but only unconstitutional insofar as it excludes medically necessary abortions, the relief sought would be the extension of the challenged proviso to include that category as well.

The defendants argue that either remedy is inappropriate. As to the first, the invalidation of

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[2] See Statement of Facts, p. 15-20.
[3] See Statement of Facts, p. 10-12.

of the statute, the defendants argue that rather than simply severing the offending statute and invalidating it, the Court should invalidate the entire $920,786,000.00 Medicaid program. As to the second, which would involve extending the limitation so that medically necessary abortions are covered, the defendants argue that severance and extension of the benefits are inappropriate.

First, on the question of severability, this Court's prior opinions demonstrate a strong presumption favoring severability. E.G. Del Duca v. Town Administrator of Methuen, 368 Mass. 1, 13 (1975); Opinion of the Justices, 330 Mass. 713, 726 (1953); Krupp v. Building Commissioner of Newton, 352 Mass. 686, 691 (1950). As the Court explained in the 1953 Advisory Opinion:

> When a court is compelled to pass upon the constitutionality of a statute and is obliged to declare part of it unconstitutional, the court, as far as possible, will hold the remainder to be constitutional and valid, if the parts are capable of separation, and are not so entwined that the Legislature could not have intended that the part otherwise valid should take effect without the invalid part.

330 Mass. at 726 (emphasis added). Thus, only where the Legislature could not have intended the constitutional provisions of a statute to survive, i.e., where saving

the challenged provision would require "major surgery," and the "sheerest speculation," ABCD, Inc. v. Commissioner of Public Welfare, supra at 1579, 1580, should an entire enactment be struck.[4/]

The Commonwealth argues that the entire appropriations statute, or at least its Medicaid portion, should be struck, and the General Court provided an opportunity to determine whether it wishes to continue Medicaid at all, given the requirement that it do so without constitutional infraction. For this theory, the defendants rely upon Rosado v. Wyman, 397 U.S. 397, 421 (1970), where, on account of the "massive" expenditure that would result from a remedial order involving computation of welfare benefits, and because there was no "discreet and severable provision whose enforcement can be prohibited," the Supreme Court

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[4/] The U.S. Supreme Court has indulged much the same presumption, regardless of the presence or absence of an explicit severability clause. See United States v. Jackson, 390 U.S. 570, 585-586 (1968); Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932). See also House v. House, 368 Mass. 120, 122-123 (1975); Wheelwright v. Boston, 188 Mass. 520, 524-525 (1905).

remanded the case to "afford New York an opportunity to revise its program in accordance with the requirements of (the federal statute) if the State wishes to do so."

However, the Court particularly distinguished King v. Smith, 392 U.S. 309 (1968), which did involve a "discreet and severable provision," Id. at 421, and where judicial extension of the welfare benefit was appropriate. Indeed this has been the rule in constitutional adjudication involving benefits. E.g., Weinberger v. Wiesenfeld, 420 U.S. 636, 642 (1975); Goldfarb v. Califano, 430 U.S. 199 (1977), aff'g 396 F. Supp. 308, 309 (E.D.N.Y. 1975). Rosado is the exception.

In determining whether to strike down an entire law or extend an impermissibly underinclusive one, a court must look to the social cost of total invalidation. There should be reluctance to invalidate in its entirety legislation that is necessary to an important public purpose. Thus, for instance, a Court is not likely to invalidate a tax program simply because of an unconstitutional exception clause. Developments in the Law--Equal Protection, 82 Harv. L. Rev. 1065, 1136 (1969).

See also Brown, Emerson, Falk & Freedman, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," 80 Yale L. J. 871, 912-920 (1971); Note, "The Effect of an Unconstitutional Exception Clause Upon the Remainder of a Statue," 55 Harv. L. Rev. 1030, 1032-1033, 1036-1037 (1942).

It is difficult to imagine the enormity of the hardship on Medicaid recipients were the defendants' remedial argument to be accepted. All low-income Medicaid-qualified persons in the Commonwealth would be denied necessary medical services until the Legislature, by a new appropriation, resumed funding. The damage would be staggering.

Moreover, considerations of legislative intent suggest the same alternative. As one commentator noted:

> "Legislative history is useful in many ways to determine the fate of statutes containing invalid exceptions. When an exception is an amendment to the original statute it will almost always be excised, on the theory that such an amendment was void ab initio and can neither build up nor tear down the original statute. This is true even though the legislature might have repealed the original statute had it known that the exception would be invalidated; the courts do not favor repeal by implication."

Note, "The Effect of an Unconstitutional Exception Clause Upon the Remainder of a Statute," supra at 1033.

The challenged enactments have been passed long after this Commonwealth made a commitment to Medicaid. If this Court were to invalidate the appropriation, nullify that commitment, on the grounds urged by the defendants -- that this is what the legislature "would have wanted to do"--it would,in addition to wreaking havoc upon the poor in this state, be effecting a "repeal by implication". In any event, the speculation about legislative intent is misplaced. The issue is not what the General Court would have done had it been faced with two co-equal policy alternatives -- no Medicaid and no state funded abortions or Medicaid and state funded abortions. The issue is what the General Court would have done had it known that it could not constitutionally restrict abortion funding.

If this Court choses not to accept the plaintiffs' position that the statute should be invalidated in its entirety, and medically necessary and elective abortions restored, but finds that the provision is only unconstitutional to the extent that it excludes medically necessary abortions, it must address the issue of "extension or invalidation." In this case, the relief requested would be to broaden

the proviso to include not only situations in which the life of the mother is endangered, but also to medically necessary situations.[5/]

The defendants argue that extension is inappropriate, based interestingly enough, on the minority position in Califano v. Wescott, U.S. (1979), 99 S.Ct. 2655 (1979). Wescott involved one section of the welfare statute providing benefits to families whose dependent children might have been deprived of parental support because of the unemployment of the father, but excluding children similarly deprived because of the unemployment of the mother. First, the Court focused on one, discrete and severable provision, declared it to be unconstitutional, and ordered compliance with the federal law. As in King v. Smith, supra, it did not suggest that the state must be given an opportunity

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[5/] The defendants' position is unclear. Invalidation of the provision in this situation yields the very relief the plaintiffs are requesting -- the elimination of the challenged enactments, the restoration of coverage for all abortions. Extension in this situation can only mean extending the exception to the broad prohibition on abortion coverage to include medically necessary abortions. In fact, assuming that the offending provision is severed, the defendants do not want either extension or invalidation. They want only the invalidation of the entire appropriation.

to opt out of AFDC totally and it did not invalidate the program.

Second, the affirmative relief that the Court fashioned involved the extension of benefits to the excluded class. The majority outlined the circumstances under which extension, rather than invalidation, was proper -- the equitable considerations, the cost of cutting off benefits to all rather than extending them, the congressional intent to "minimize the burdens imposed by a declaration of unconstitutionality upon innocent recipients of government largesse," etc., 99 S. Ct. at 2663 and 2664.

The principles adopted by the United States Supreme Court in Wescott are well established in the commentary on equal protection analysis in general and in the commentary regarding equal rights amendments in particular. See, e.g., Brown, Emerson, Falk and Freedman, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," 80 Yale L. J. 871, 912-920 (1971); Note, "The Effect of an Unconstitutional Exception Clause Upon the Remainder of a Statute," 55 Harv. L. R. 1030 (1942); Developments, Equal Protection, 82 Harv. L. R. 1065, 1136-1136 (1969).

Moreover, those principles are embodied in Massachusetts law as well. See dicta in House v. House, 368 Mass. 120, 122-123 (1975); Commonwealth v. Morgan, 369 Mass. 332 (1975); Saraceno v. Saraceno, 369 Mass. 956 (1975). These principles include, inter alia, a concern for legislative intent (what the legislature would have done had it known that the means it selected was unconstitutional), the importance of the provision, and the social cost of invalidating it (particularly important where revenue laws are involved), the feasibility of extending the law to include the excluded group.

Extending this coverage to include medically necessary abortions is certainly feasible. The Commonwealth has been operating under just such a rule since 1978; this was the substance of the Court of Appeals' August 7, 1978 injunction. The "medically necessary" standard is already operative and workable in the Medicaid context. There would be no substantial additional costs in this extension; indeed, the result would be precisely the opposite--a savings to the Commonwealth. (See section II-D, supra.) If the Court finds that the coverage of

medically necessary abortions, and not elective abortions, is constitutionally mandated, than the outcome most consistent with the legislative intent to limit abortion coverage to the extent constitutionally permissible, suggests the extension of coverage to this category, rather than invalidation which would result in the coverage of all abortions.[6/]

[6/] The defendants suggest that any of the alternatives described above which have the effect of covering abortion services, somehow run afoul of G.L. c. 29 §§ 26,27, and 66. Section 29 prohibits executive employees from spending in excess of relevant appropriations and relieves the Commonwealth of liability for any such excess. Section 66 imposes a criminal penalty on executive officers and employees who violate c. 29.

None of these sections suggests applicability to the judicial branch, nor do the relevant cases imply that the powers of appropriation and expenditure are not subject to reasonable incursion in the exercise of judical powers. E.g., Blaney v. Commissioner of Correction, supra at 284 n. 3; Baird v. Attorney General, 371 Mass. 741, 763 (1977), O'Coins v. Treasurer of Worcester, 362 Mass. 507, 510-511 (1972). Moreover, the Attorney General himself has recognized that no criminal prosecution for violation of section 66 would be possible where the officer in question acted pursuant to court order. See Op. Attorney General 76/77-20 (February 14, 1977) at 7, n. 7.

VII. THE DEFENDANTS' COUNTERCLAIM SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

The defendants have filed a counterclaim in which they allege, inter alia, that Dr. Stubblefield and other medicaid providers, in receiving payment for abortion services performed while the temporary injunction remains in effect, will "have benefited unjustly and should be required to make restitution to the Commonwealth if the defendants prevail on the merits." They ask for a determination that Dr. Stubblefield, the class he represents, and all other authorized providers who are not parties to this action are jointly liable to the Commonwealth for the total amount of reimbursement for services performed while the injunction is in force and ask the court to order that any amounts paid out pursuant to the injunction be offset against future payments to such providers. Alternatively, they seek an order that Dr. Stubblefield personally reimburse the Department of Public Welfare for the total amount paid out under the injunction.

Analysis of the counterclaim shows that it is

a reformulation of the defendants' factually unsupported and legally insufficient opposition to temporary relief and is based on the astounding proposition that the temporary orders entered by the single justice have absolutely no legal effect,[1/] and that the order of the Single Justice denying bond may be circumvented by means of a counterclaim seeking the same indemnification.

The defendants' contention that medicaid providers will be unjustly enriched is without any foundation to begin with. Under applicable law

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[1/] The defendants assert in paragraph 9 of their counterclaim that the temporary orders entered by the Single Justice do "not temporarily invalidate the statutory restriction, permanently postpone its effective date to a time later than July 1, 1980, or entitle the recipient plaintiffs to benefits or Phillip Stubblefield to reimbursement of costs which the General Court has determined to deny them." (A. 115)

unjust enrichment denoted the getting of something for nothing,[2/] and here any reimbursement would be predicated on performance of actual services. Cf. National Shawmut Bank v. Fidelity Mutual Life Ins. Co., 318 Mass. 142, 147, (1945)(no restitution against innocent defendant who has given value).

The law in this Commonwealth is quite clear that, where, as in this case, no bond has been required as a condition of preliminary relief, a damage assessment against the plaintiff is prohibited. American Circular Loom Co. v. Wilson, 198 Mass. 182, 211 (1908). See also All Stainless, Inc.,

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2/ See, e.g. Corbin on Contracts §19 (1952); Stone & Webster Engineering Corp. v. First National Bank & Trust Co., 345 Mass. 1, 4 (1962)(action for money had and received lies where money "should not in justice be retained by the defendant and which in equity and good conscience should be paid to the plaintiff"). Technically the defendants would not have an unjust enrichment cause of action available since actual contracts with the providers exist, and the terms of those contracts would govern. See discussion in Fay, Spofford & Thorndike, Inc. v. Massachusetts Port Authority, 1979 Mass. App. Ct. Adv. Sh. 605, 611. The defendants are thus attempting to evade the fact that no damages would be due them under the provider agreements by inaccurately framing their counterclaim in terms of restitution.

v. Colby, 364 Mass. 773, 782 (1974). The reason for this salutary rule is quite plain; subjecting a plaintiff to potentially massive liability for having brought a controversy to judicial attention would deter resort to the courts and punish those who litigate in good faith. See Note, "Interlocutory Injunctions and the Injunction Bond," 73 Harvard Law Review 333, 341-348 (1959). Cf. NAACP v. Button, 371 U.S. 415, 429-430 (1963).

VIII. THE PLAINTIFFS' CLAIMS AGAINST THE GOVERNOR OF THE COMMONWEALTH ARE NOT BARRED BY THE DOCTRINE OF SEPARATION OF POWERS AND THE ACTION AGAINST HIM SHOULD NOT HAVE BEEN DISMISSED.

The defendants, relying on Rice v. The Governor, 207 Mass. 577 (1911), moved to dismiss the action against the Governer of the Commonwealth. The motion was allowed by the Single Justice, and the question has been reported to this Court for decision.

Whatever the continuing vitality of Rice v. The Governor, it does not require the dismissal of the plaintiffs' claims against the governor. Rice was an action for a writ of mandamus to compel the Governor to dispense certain funds which had been delivered to him to raise and equip a volunteer army for the Spanish-American War. Focusing on the nature of an action for mandamus, and the peculiar threat of judicial interference with executive actions posed by such suits, id. at 578-579, the Court concluded that an action for a writ of mandamus could not be brought against the Governor. There is nothing in the decision of the Court to suggest that the Governor enjoys blanket immunity from suit in the courts of the Commonwealth or that that the Governor cannot be sued individually when he acts in a manner which is inconsistent with the commands of the Constitution. See Greene v. Mayor of Fitchburg, 219 Mass. 121, 127-128 (1914); Ex Parte Young, 209 U.S. 123, 159-160 (1908); see also, Larson v. Domestic & Foreign

Commerce Corp., 337 U.S. 682, 689-690 (1949).

CONCLUSION

For all of the foregoing reasons, the Court should determine (1) that the Single Justice has jurisdiction to consider this action, (2) that the exclusion of abortion services from the Medicaid program pursuant to the challenged statutes violates the Equal Rights Amendment and the Equal Protection guarantees of the Constitution of the Commonwealth, (3) that the invalid provisions of the statute are severable, (4) that the temporary relief granted by the Single Justice should be continued pending final disposition of this action, (5) that the Governor of the Commonwealth is a proper party defendant, (6) that the defendants' counterclaim fails to state a claim upon which relief can be granted, and should, accordingly, vacate the order of the Single Justice dismissing the suit against the Governor, and remand the case to the Single Justice for the entry of an order denying the defendants' motion to dismiss, allowing the plaintiffs' motion to dismiss the counterclaim, and continuing in effect the preliminary injunction previously entered by the Single Justice.

Respectfully submitted,

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COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. 2231

SUFFOLK, SS

MARY MOE, et al.

v.

EDWARD T. HANLEY, et al.

CERTIFICATE OF SERVICE

I, Nancy Gertner, hereby certify that I served "On Reservation and Report; Brief for Plaintiffs, Moe, Koe, Poe and Stubblefield," upon the parties by delivering two copies of same, via messenger, on this day to Thomas R. Kiley, Assistant Attorney General, 1 Ashburton Place, Boston,MA.

Done this 2nd day of September, 1980.

Nancy Gertner