CASE NOTE:

A WOMAN'S LIFE, A WOMAN'S HEALTH: EQUALIZING MEDICAID ABORTION FUNDING IN *SIMAT CORP. V. ARIZONA HEALTH CARE COST CONTAINMENT SYSTEM*

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I. INTRODUCTION

In late summer of 1999, a group of Arizona physicians challenged an Arizona statute restricting Medicaid funding for abortions sought by indigent women.[1] Arizona Health Care Cost Containment System ("AHCCCS") administers Medicaid claims in Arizona and provides services to Medicaid-eligible recipients with incomes at or below 140% of the federal poverty level.[2] The plaintiff-doctors provided services, including abortions, to AHCCCS patients and had other patients who were suffering from illnesses that were serious, though not immediately life-threatening.[3] Medical treatment for many of these conditions requires that pregnant patients first undergo an abortion, as the treatment could be damaging or fatal to the fetus.[4] In many cases, postponement of therapy during

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1. Simat Corp. v. Ariz. Health Care Cost Containment Sys., No. CV 99-014614 (Ariz. Super. Ct. 1999) (minute entry).

2. Simat Corp. v. Ariz. Health Care Cost Containment Sys., 56 P.3d 28, 29 (Ariz. 2002). For the fiscal year 2003, this income threshold is the equivalent of $25,760 annually for a family of four. *See* CTR. FOR MEDICARE & MEDICAID SERVS., MEDICAID ELIGIBILITY POLICY, 2003 FEDERAL POVERTY GUIDELINES, *available at* http://www.cms.hhs.gov/medicaid/eligibility/pov0103.pdf (last visited Sept. 28, 2003).

3. *Simat*, 56 P.3d at 29.

4. *Id.* The most common example of this type of condition is cancer, for which the standard treatment of chemo or radiation therapy cannot be administered to a pregnant woman. Other examples for which treatment must be suspended during pregnancy include heart disease, diabetes, kidney disease, liver disease, chronic renal failure, asthma, sickle cell anemia, Marfan's syndrome, arthritis, inflammatory bowel disease, gall bladder disease, severe mental illness, hypertension, uterine fibroid tumors, epilepsy, toxemia, and lupus. *Id.* at 29–30.

pregnancy can have serious repercussions for pregnant women, including adverse health effects and decreased life expectancy.[5]

In allocating funds for abortion services, AHCCCS followed a statutory prohibition on payment of abortion services unless "necessary to save the life of the woman having the abortion,"[6] but also provided services for victims of rape or incest as a condition necessary to receive federal reimbursement under Medicaid.[7] AHCCCS did not provide abortions to indigent women whose health, but not life, was threatened by pregnancy.[8]

In a decision deviating from those of the United States Supreme Court, the Arizona Supreme Court declared the Arizona statute and accompanying AHCCCS provisions unconstitutional because they did not survive a strict scrutiny analysis under the Privileges and Immunities Clause of the Arizona Constitution.[9] Where the state of Arizona has undertaken to fund abortions for indigent women whose lives are directly threatened by pregnancy, it cannot refuse to pay for abortions for similarly indigent women whose health, but not life, is threatened.[10]

II. FEDERAL LAW

A. A Brief History: Medicaid and the Hyde Amendment

Popularly known as Medicaid, Title XIX of the Social Security Act was created in 1965 to provide federal grants to states that furnish medical assistance to those who cannot afford necessary medical services.[11] Each state's Medicaid program must comply with the federal mandates and requirements specified in Title XIX.[12] Although the federal government issues general guidelines, states

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5. *Id.* at 30.

6. ARIZ. REV. STAT. § 35-196.02 (1980) (declared unconstitutional by *Simat*, 56 P.3d 28).

7. *Simat*, 56 P.3d at 30. Medicaid apportions federal funds to states to provide abortions when the pregnancy constitutes a direct threat to the life of the mother, but not when the pregnant woman's health is jeopardized by the pregnancy. Funds are also available when the pregnancy is a result of rape or incest. *See* Hyde Amendment, Pub. L. No. 96-123, § 109, 93 Stat. 923 (1979); 42 U.S.C. § 1396 (2003). Under federal law, Arizona was not required to fund abortions other than those for which federal reimbursement was available, and the state accordingly funded only those abortions required to maintain compliance with Medicaid statutes and regulations. *Simat*, 56 P.3d at 30; s*ee also* Harris v. McRae, 448 U.S. 297, 309–10 (1980).

8. *Simat*, 56 P.3d at 30.

9. ARIZ. CONST. art II, § 13. Arizona has historically followed the United States Supreme Court's equal protection analysis when analyzing privileges and immunities claims under the Arizona Constitution. *See* Valley Nat'l Bank v. Glover, 159 P.2d 292, 299 (Ariz. 1945); Martin v. Reinstein, 987 P.2d 779, 799 (Ariz. App. 1999).

10. *Simat*, 56 P.3d at 32.

11. *See* 42 U.S.C. § 1396; *see also* Ctr. for Medicare & Medicaid Serv., *Medicaid: A Brief Summary, available at* http://www.cms.hhs.gov/publications/overview-medicare-medicaid/default4.asp (last visited Sept. 28, 2003). To be eligible for Medicaid assistance, recipients must fall well below the federal poverty level; the precise income-eligibility threshold is determined by individual states. *Id.*

12. *See* Ctr. for Medicare & Medicaid Servs., *supra* note 11.

establish their own requirements for Medicaid participation,[13] thus retaining the flexibility to adopt provisions based on individual economic resources, political and social climates, and state constitutions.

Congress initially restricted Medicaid funding for abortions when it enacted the Hyde Amendment in September 1976.[14] Named after its original congressional sponsor, Representative Henry Hyde, the amendment severely limits the use of federal funds to reimburse states for the cost of abortions under Medicaid.[15] The amendment contains a few narrow exceptions to the general ban on federal abortion funding, which have varied over the years.[16] In its current form, the Hyde Amendment authorizes federal funding of abortions when a pregnant woman's life is endangered by the pregnancy, or when a pregnancy results from a reported rape or incest.[17] Federal funding is not available when abortion is recommended for the treatment of other medical conditions where the woman's health, but not her life, is put at risk by carrying the fetus to term.[18] The Supreme Court has consistently upheld the constitutionality of Hyde Amendment restrictions on federal abortion funding and removed the obligation of states to subsidize abortions when federal funding is unavailable.[19]

B. Maher & Harris: Equal Protection Analysis of State Statutes Limiting Medicaid Funding for Abortions

In two major cases involving the constitutionality of the Hyde Amendment, the United States Supreme Court has applied an equal protection analysis to state statutes that limit a Medicaid recipient's access to funding for

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13. *Id.*

14. Hyde Amendment, Pub. L. No. 94-439, § 209, 90 Stat. 1418 (1976); *see also* Larry P. Boyd, Comment, *The Hyde Amendment: New Implications for Equal Protection Claims*, 33 BAYLOR L. REV. 295, 295 (1981).

15. Boyd, *supra* note 14, at 295.

16. *Id.*

17. Hyde Amendment, Pub. L. No. 96-123, § 109, 93 Stat. 923 (1979); *see also* Harris v. McRae, 448 U.S. 297, 301(1980).

18. The majority of states have followed the federal government's lead in restricting public funding for abortion. Thirty-two states pay for abortions for indigent women whose lives are endangered by the pregnancy, as well as in cases of rape or incest, as mandated by federal Medicaid law and the Hyde Amendment. (A few of these states also pay in cases of fetal impairment or when the pregnancy threatens "severe" health problems, but none provide reimbursement for all medically necessary abortions for indigent women.) Currently, only seventeen states fund abortions for indigent women on the same terms as other pregnancy-related and general health services. Three of these states provide funding voluntarily (Hawaii, New York, and Washington); in fourteen states, courts have interpreted their state constitutions to give broader protection for reproductive choice than the United States Constitution and have ordered nondiscriminatory public funding of abortions (Alaska, Arizona, California, Connecticut, Illinois, Indiana, Massachusetts, Minnesota, Montana, New Jersey, New Mexico, Oregon, Vermont, and West Virginia). Finally, one state (South Dakota) fails to comply with the Hyde Amendment, instead providing coverage only when necessary for lifesaving abortions. *See* AM. CIVIL LIBERTIES UNION, PUBLIC FUNDING FOR ABORTION (Jan. 15, 2003), *available at* http://www.aclu.org/Reproductive Rights/ReproductiveRights.cfm?ID=9039&c=146.

19. *See* Maher v. Roe, 432 U.S. 464 (1977); *Harris*, 448 U.S. 297.

abortions.[20] The Equal Protection Clause of the Fourteenth Amendment provides that no state may "deny to any person within its jurisdiction the equal protection of the laws,"[21] a mandate interpreted to require that state governments treat all similarly situated persons alike.[22] Citizens need not be treated identically, however, and perfect equality is not required.[23] The level of judicial scrutiny applied to equal protection challenges varies based on the nature of the classifications or rights involved. If a classification does not involve a suspect class or fundamental right, it is examined under the relatively lenient rational basis standard, and such legislation will be upheld provided it is rationally related to a legitimate state interest.[24] When the implicated right is considered fundamental or the affected class is suspect, however, courts will apply a strict scrutiny analysis and the discriminatory legislation will be upheld only if it serves a compelling state interest and is narrowly tailored to achieve that interest.[25]

In *Maher v. Roe*, decided one year after passage of the Hyde Amendment,[26] the Court upheld a Connecticut statute denying funds for abortions for indigent women except when medically necessary.[27] The Plaintiff claimed an equal protection violation, arguing that abortion and childbirth should be treated equally.[28] After noting that indigence is not a suspect classification,[29] the Court explained that *Roe v. Wade* did not establish a fundamental constitutional right to abortion.[30] Instead, the right at stake was that of a pregnant woman to make a choice free from "unduly burdensome interference" by the government.[31] The Court rejected the argument that the statute placed obstacles in the path of an

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20. *Maher*, 432 U.S. 464; *Harris*, 448 U.S. 297.
21. U.S. CONST. amend XIV, § 1.
22. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).
23. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 24 (1974).
24. *City of Cleburne*, 473 U.S. at 440. The fundamental rights that give rise to a strict scrutiny analysis include marriage and procreation, voting, certain aspects of criminal procedure, many First Amendment rights, and the right to travel. *See* 16B C.J.S. *Constitutional Law* § 714 (1985). A suspect class is one with a history of unequal treatment, in a position of political powerlessness or having immutable characteristics that result in stigma or inferiority. *Id.* Suspect classifications include race, national origin and alienage. BLACK'S LAW DICTIONARY 1460 (7th ed. 1999).
25. Plyler v. Doe, 457 U.S. 202, 217 (1982). The intermediate scrutiny test, which applies to so called "quasi-suspect classifications," does not apply to the classifications at issue in this case and was not discussed by any of the various courts.
26. The version of the Hyde Amendment at issue in *Maher* prohibited the use of federal funds for abortion except in three circumstances: when the life of the mother would be endangered by carrying the fetus to term; a full term pregnancy would result in severe and long-lasting damage to the mother's physical health, as certified by two physicians; or the mother was a victim of incest or rape, but only if the incest or rape had been promptly reported to law enforcement or public health officials. *See* Hyde Amendment, Pub. L. 94-439, § 209, 90 Stat. 1418 (1976); Maher v. Roe, 432 U.S. 464 (1977); *see also* Boyd, *supra* note 14, at 295.
27. *Maher*, 432 U.S. at 474.
28. *Id.* at 470.
29. *Id.* at 470–71.
30. *Id.* at 473–74.
31. *Id.*

indigent woman's exercise of her right to choose abortion, finding that the financial constraints that prevent a woman from exercising her choice are instead a product of her indigency.[32] Because a fundamental right was not involved, the statute passed rational basis muster. The state's legitimate interest in protecting the life of the fetus was "rationally further[ed]" by Connecticut's decision to subsidize only medical expenses incident to childbirth.[33]

A few years later, the Court reconsidered the abortion funding issue in *Harris v. McRae*.[34] Though the effective version of the Hyde Amendment was substantially more restrictive than the version in force when *Maher* was decided,[35] the Court again found no infringement upon a fundamental right,[36] nor impact on a suspect class.[37] As concluded in *Maher*, the government's legitimate interest in protecting potential life was rationally related to the Hyde Amendment's decision to withhold funding for almost all abortions.[38]

III. THE ARIZONA SUPREME COURT

While decisions of the United States Supreme Court carry great weight in guiding the interpretation of state constitutional provisions that correspond to federal provisions, Arizona courts are not required to "blindly follow federal precedent."[39] Consequently, the Arizona doctors urged the superior court to disregard the precedent set forth in *Harris* and grant relief notwithstanding this backdrop of unfavorable federal law. The doctors' initial complaint sought declaratory and injunctive relief on the grounds that AHCCCS's funding policy violated various provisions of the Arizona Constitution, including the privacy clause, the due process clause, and the equal privileges and immunities clause.[40] The superior court granted the doctors' motion for summary judgment and ordered AHCCCS to fund abortions that were medically necessary to the same extent it funded other abortion services.[41] The court identified the right involved as one of privacy, a fundamental right under the Arizona Constitution, and found that the statute did not survive a strict scrutiny analysis.[42]

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32. *Id.* at 474.
33. *Id.* at 478–79.
34. *See* Harris v. McRae, 448 U.S. 297 (1980).
35. *Id.; see also* Hyde Amendment, Pub. L. No. 96-123, § 109, 93 Stat. 923 (1979). Specifically, the Hyde Amendment in *Harris* excluded the prior language authorizing Medicaid funds when the health of the pregnant woman would be jeopardized by a full-term pregnancy. *Harris*, 448 U.S. at 302–03. Therefore, federal reimbursement for abortions through the Medicaid program was available to a state only when the abortion was required to save the mother's life or when the woman was a victim of a reported rape or incest. *Id.*
36. *Harris*, 448 U.S. at 301.
37. *Id.* at 322–23.
38. *Id.* at 324.
39. Pool v. Super. Ct., 677 P.2d 261, 271 (Ariz. 1984).
40. Simat Corp. v. Ariz. Health Care Cost Containment Sys., 56 P.3d 28, 30 (Ariz. 2002); ARIZ. CONST. art. II, §§ 4, 8, 13.
41. *Simat*, 56 P.3d at 30.
42. *Id.*

Relying on the United States Supreme Court's decision in *Harris,* the Arizona Court of Appeals, Division I, reversed the superior court's decision on both the right to privacy and equal protection issues.[43] The court first declined to find that the Arizona Constitution affords a greater right to privacy in abortion matters than the United States Constitution.[44] The equal protection analysis also tracked the holding of the Supreme Court in *Harris:* The statute was not predicated on a constitutionally suspect classification (the relevant classification was not sex, but indigency), nor did it restrict a fundamental right (the amendment did not impinge on the fundamental right to choose abortion, just upon the right to have the government finance that choice).[45] Under the less rigorous rational basis review, the Arizona statute was rationally related to a legitimate governmental purpose, namely the state's interest in promoting childbirth and protecting unborn life.[46]

In an opinion authored by Justice Feldman, the Arizona Supreme Court rejected the court of appeals' reasoning and found that the holding in *Harris* was not dispositive of the issue under the Arizona Constitution.[47] While noting that the Arizona Constitution, unlike the United States Constitution, provides an explicit right of privacy to its citizens,[48] the court did not analyze the case in terms of a right to privacy.[49] The court instead approached the issue under the equal privileges and immunities clause of the Arizona Constitution and applied the equal protection analysis used by the United States Supreme Court.[50]

The Arizona statute discriminated between two classes of women: "those who require recognized and necessary medical treatment to save their lives and those who require such treatment to save their health and perhaps eventually their lives."[51] Unlike the United States Supreme Court, the Arizona Supreme Court found that the statute had not simply "made childbirth a more attractive alternative, thereby influencing the woman's decision," but had in fact impinged upon the fundamental right to choose abortion recognized in *Roe v. Wade.*[52] Because the right identified was fundamental, the court applied strict scrutiny and determined

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43. Simat Corp. v. Ariz. Health Care Cost Containment Sys., 29 P.3d 281, 287 (Ariz. App. 2001).

44. *Id.* at 285.

45. *Id.* at 284.

46. *Id.* at 286–87.

47. *Simat*, 56 P.3d at 31.

48. Interestingly, the court included a "disclaimer" toward the end of the opinion, noting, "Our decision is entirely based on the Arizona Constitution and Arizona cases interpreting the relevant provisions of that constitution. Federal cases are cited only for illustrative or comparative purposes and have not been relied on in reaching our conclusions." *Id.* at 37.

49. The court specifically noted that Arizona's right of privacy does not entitle citizens to subsidized abortions. *Id.* at 32.

50. *Id.; see also* ARIZ. CONST. art II, § 13.

51. *Simat*, 56 P.3d at 32.

52. *Id.* at 33; s*ee also Simat*, 29 P.3d at 286 (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)).

that the Arizona statute could only be upheld "if it serve[d] a compelling state interest and [was] narrowly tailored to achieve that interest."[53]

The Arizona Supreme Court recognized the state's legitimate interest in preserving and protecting potential life and promoting childbirth. The court found the lower court's decision misguided, however, because it had applied the wrong standard of review, namely the rational basis test. The Arizona statute did not survive strict scrutiny because the state's proffered interest was no more compelling than its interest in protecting the health of the pregnant woman herself. "Promoting childbirth is a legitimate state interest, but it seems almost inarguable that promoting and actually saving the health and perhaps eventually the life of a mother is at least as compelling a state interest."[54]

The court bolstered its opinion by citing several United States Supreme Court cases decided subsequent to *Harris* wherein state restrictions on abortions gave way to the more compelling state interest of protecting and preserving the health of pregnant women.[55] By withholding funding for abortions to indigent women whose health is at risk, the state may be promoting childbirth and protecting the fetus, but often it is endangering the health and perhaps eventually the life of the pregnant woman.[56] The state is not merely influencing a woman's decision by making childbirth a more attractive option. Rather, it is "actually conferring the privilege of [medical] treatment on one class and withholding it from another."[57]

The state might have had a better case if it chose to withhold funding for all abortions.[58] Once the state has undertaken to provide medically necessary health care for indigent women, however, it must do so in a neutral manner.[59] The state's interest in promoting childbirth and protecting the fetus is not sufficiently compelling to justify its refusal to protect the health of a seriously ill pregnant woman.[60] The justification for this disparate treatment becomes even less persuasive given the law's allowance for funding for the abortion of a healthy fetus that results from rape or incest, even where the mother's life or health would not be endangered by carrying the fetus to term.[61] The Arizona statute and related AHCCCS provisions failed strict scrutiny analysis and violated the privileges and immunities clause of the Arizona Constitution.[62]

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53. *Simat*, 56 P.3d at 33.
54. *Id.*
55. *Id.* at 34 (citing Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992); Stenberg v. Carhart, 530 U.S. 914, 930 (2000)).
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 32, 34.
60. *Id.* at 34.
61. *Id.*
62. *Id.; see also* ARIZ. CONST. art II. § 13. This decision is in accord with the majority of states that have examined similar funding restrictions. *See Simat*, 56 P.3d at 35–36. The opinion outlined several cases wherein courts have concluded that their state constitutions offer broader protection than the United States Constitution and have held that once the state has undertaken to provide medically necessary care related to childbirth, they

IV. CONCLUSION

The Hyde Amendment disallows federal Medicaid reimbursement to states for abortions that are necessary to protect the health, but not the life, of a pregnant indigent woman. The Arizona Supreme Court's decision in *Simat* means that, notwithstanding the unavailability of federal reimbursement, once the state undertakes to provide abortions for indigent women where necessary to save their lives, it must provide such health care in a neutral manner and also provide abortions when necessary to protect and preserve the health of these women. The state will therefore be required to finance the procedures with its own funds.

The decision was a major victory for abortion rights advocates and critics of the Hyde Amendment, who claimed that the law as it stood before *Simat* often presented pregnant, indigent women with a string of bleak options: carry the pregnancy to term and face possibly serious health consequences; attempt to procure an abortion through less expensive and more dangerous sources;[63] or use their own limited funds to finance the abortion, often at the expense of other children or necessary living expenses.[64] Others claim that the Hyde Amendment is a back-door attempt by Congress to limit abortions generally and to deny poor women the protections espoused in *Roe v. Wade*.[65]

Critics of the decision, including the dissenting justices, argue that the *Simat* decision is actually a means of judicial legislating; the state is being forced to spend money beyond that which the legislature authorized.[66] Moreover, Arizona courts had previously followed the equal protection analysis employed by the Supreme Court, and the Court's analysis in *Maher* and *Harris* appeared dispositive of the issue: While a state cannot interfere with a woman's right to choose an abortion, it is under no obligation to fund that choice.[67]

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must also fund medically necessary abortions for indigent women. *Id.* (citing Doe v. Gomez, 542 N.W.2d 17, 28 (Minn. 1995); Right to Choose v. Byrne, 450 A.2d 925, 935 (N.J. 1982); Doe v. Maher, 515 A.2d 134, 150 (Conn. 1986); State v. Planned Parenthood of Alaska, Inc., 28 P.3d 904, 913 (Alaska 2001); Moe v. Sec'y of Admin. and Fin., 417 N.E.2d 387, 402 (Mass. 1981); Comm. to Defend Reprod. Rights v. Myers, 625 P.2d 779, 798 (Cal. 1981)).

63. In the first year the Hyde Amendment was in effect, an estimated 2,000 Medicaid-eligible pregnant women turned to illegal abortion. Willard Cates, Jr., *The Hyde Amendment in Action: How Did the Restriction of Federal Funds for Abortion Affect Low-Income Women?*, 246 JAMA 1109, 1111 (1981).

64. One study showed that 44% of women on Medicaid who obtained abortions in 1982 paid for them wholly or partly with money designated for living expenses. Stanley K. Henshaw & Lynn S. Wallisch, *The Medicaid Cutoff and Abortion Services for the Poor*, 16 FAMILY PLANNING PERSPECTIVES 170, 178–79 (1984).

65. *See, e.g.,* Sandra Berenknopf, Comment, *Judicial and Congressional Back-Door Methods that Limit the Effect of Roe v. Wade: There Is No Choice if There Is No Access*, 70 TEMP. L. REV 653 (1997).

66. *See Simat*, 56 P.3d at 40–41 (Berch, J., dissenting); s*ee also* Robert Robb, *Court's Abortion 'Remedy' Is Legislating from Bench*, ARIZ. REPUBLIC, Oct. 30, 2002, at B11.

67. *Simat*, 56 P.3d at 38; s*ee also* Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980).

The dissenting opinion by Justice Berch suggested that the decision in *Simat* had in essence created a new fundamental right to neutral funding.[68] If this right to funding is fundamental—which the majority denies—a path may have been laid by which future plaintiffs could challenge on equal protection grounds any government program that provides disparate health care benefits. Do indigent patients have a fundamental right to have all necessary medical treatment subsidized by the state, or is the right to equal funding specific to abortion? As the *Simat* decision notes, the privacy clause of the Arizona Constitution has been found to confer a fundamental right to choose or refuse medical treatment.[69] Thus, while the majority claims that its decision is to be construed narrowly and will not require AHCCCS to provide "greatly expanded medical care" to its recipients,[70] the decision does provide a potential framework for new challenges to government-subsidized health care in Arizona.

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68. *Simat*, 56 P.3d at 41 n.4.
69. *Id.* at 32 (citing Rasmussen v. Fleming, 741 P.2d 674, 682 (Ariz. 1987)).
70. *Id.* at 37.