ORAL ARGUMENT – 11/28/01
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BOST V. LOW INCOME WOMEN OF TEXAS

BOYD: The Texas Equal Rights Amendment prohibits the legislature from purposefully discriminating against Texas citizens because of their gender. But it does not prohibit laws that merely affect one gender and not the other.

The plaintiffs in this case demonstrated on summary judgment evidence, §32.024 of the Texas Human Resource Code has an effect upon women that it does not have on men. A disparate impact if you will. But they offered no evidence. There was none in the record because in fact there is none anywhere that that provision of the Texas statute was adopted by the legislature with the purpose of treating women differently because they are women.

This court should reverse the CA decision in this case...

ENOCH: Are you saying that the ERA prohibits the legislature from passing a law that it intends to discriminate against women but doesn't prohibit the legislature from passing a law that in fact discriminates against women?

BOYD: It's actually slightly different than that because of the technical legal definition of intend. Intend, as the court is aware under tort law with the knowledge of substantial certainty that a particular result will occur as a result of your conduct, you may have intent attributed to you. But what the ERA does is it prohibits the legislature from purposefully treating a person differently because of their membership in that class. The law may in fact have a different effect on members of that class but it doesn't violate the ERA simply because of a different effect.

We know that for at least three reasons. One is the language of the ERA itself. The ERA says that right's equality shall not be abridged or denied because of gender, sex, race, color or national origin. The words 'because of' must have some meaning. If there wasn't a motivational element for the words 'because of' in the ERA, there would be no need for those words there.

O'NEILL: Is the constitutional analysis the same under the equal protection clause as under the ERA?

BOYD: The analysis is the same. The only difference is whether gender rises to the level of a suspect classification. And this court has made that clear in the McLean case...

O'NEILL: But otherwise the analysis is exactly the same?

BOYD: The analysis is exactly the same under the ERA. And in fact in Richards v. LULAC in 1992, that's exactly what this court said. In Richards v. LULAC the allegation was that

there was discrimination based on race and national origin. And this court in that case specifically said there is no difference between the analysis under the ERA or the equal provision of the Texas Constitution because both of them provide that race and national origin are suspect classifications. Gender on the other hand at least through US SC precedent does not rise to the level of a suspect class entitled to strict scrutiny. The ERA raises it to that level.

PHILLIPS: If the ERA did apply to this case would you lose?

BOYD: If the ERA applied to this case...

PHILLIPS: Of course it applies, but if it applied in a way that it was impacted by the ERA, in other words this was a sex classification would you lose?

BOYD: If disparate impact were sufficient to show a violation of the ERA the state would lose in this case. Because there is a disparate impact on women than there is on men. It's not only women who are impacted by this legislation. But there is a different impact. But the state would suggest to the court that we could take statistical analyses of how many men verses women get speeding tickets and find a disparate impact. Disparate impact in and of itself is insufficient to show a violation. Number 1, because of the 'because of' language of ERA. And in fact it's this court's own decision in Quantum(?). Quantum(?) was actually a statutory construction case involving the state's statute implemented in Title 7. And there the question was whether the test for determining whether there was a violation of that statute required showing a motivating factor, or that it was the only motivating factor that this particular plaintiff fell within that class.

And what the court said in that case is that because of the words because of in the statute are inherently ambiguous. But what the court explained was they are ambiguous because they are ambiguous as to whether it must be a motivating factor, or the only motivating factor. But it still has to be a motivating factor. If it didn't all the ERA would have to say is that equality shall not be denied or abridged to anyone of a particular gender, or to anyone of a particular race, or to anyone of a particular national origin. But by choosing the words 'because of' the language itself indicates that there must be a motivational factor, a purpose to discriminate because of the person's membership of that class.

ENOCH: Isn't that issue taken care of by the review that's applied? If you apply strict scrutinies strict scrutiny isn't applied to the notion of well was this a motivating factor. It's applied to the motivation of the government for what the gov't claims to be its reason for doing so, acknowledging that it has a disparate impact. And the court concludes that the government's reason for doing so doesn't survive strict scrutiny, therefore, the statute is unconstitutional. Isn't the court required to focus on the other reasons given for the statute and if those are sufficient, then that takes care of it and if they are not sufficient it doesn't? Aren't you asking us to do it kind of backwards by - well if it's only some motivating factor it doesn't count, or if it's no motivating factor it's backwards

BOYD: No. Because that question confuses the purposefully discrimination in the statute from the purpose that the legislature seeks to achieve by the statute. The example would be the Toungate or Barber cases, the hair regulation cases. A hair regulation in a school says, males may not have hair longer than their collar. Females may. On its face that regulation purposefully discriminates against that person because of their gender. On its face there is no other reason for the distinction. All laws, at least any law that's even susceptible to a good faith ERA challenge discriminates. It's inherent in the nature of law to treat different people differently. The question is does it purposefully discriminate because of that person's membership in the class. Once you show that, if you show that in fact there is purposeful discrimination in the law, then you get to the strict scrutiny analysis, which then brings in the question of what is the purpose that's sought to be achieved by the law.

HANKINSON: What would be the example of purposeful discrimination?

BOYD: Purposeful discrimination comes 1) out of the Mercer, Barber and Toungate cases where on its face they are intentionally - the purposed discrimination in those regulations is to treat someone differently because they are male. It's on its face. Another example is the McLean case where the parental preference doctrine was applied to mothers but not to fathers. Because they are female they have a greater benefit or right to the parental rights than the males do. And this court struck that down, because on its face it was purposeful discrimination.

JEFFERSON: On the _____ striking that down though didn't the court say in McLean whether or not the state has a lofty goal is not really determinative of whether the statute violates the equal rights amendment in some way. And what the respondent is arguing as I understand it is they look at the analysis in McLean and say, if it in fact treats the plaintiff differently on the basis of their gender, then that is a potential violation of the statute. How do you address that?

BOYD: Again, respondents are confusing the purposed discrimination. The aim of the discrimination is what class you're drawing the line between verses the purpose to be achieved by the statute. It doesn't matter how great the purpose to be achieved by the statute is if it discriminates on the basis because of gender. You begin then with that fundamental principal that there must be a purpose to discriminate because that...

HANKINSON: Mr. Boyd, the examples that you give seem to be the very examples that your opponents are relying upon to say that this does violate the ERA, because all medically necessary procedures for men are covered by the statute, but not all medically necessary procedures for women are covered. If I recall their briefing correctly it seems to me they're relying on those very examples to say that there is a violation. So what is your response to that argument?

BOYD: My response to that is that they misconstrue by changing the levels of analysis. For example, comparing the purposed discrimination verses the purpose to be achieved. They start with men verses women. And yet in realty you go under women, there are women who are indigent, women who are not indigent, or you can actually start with indigence. Men verses women. Are we

drawing a line between them on the face of this statute or even on the face of the Hyde amendment? No. Because women are entitled to benefits for medically necessary care. Well are all women entitled to that? No. There are pregnant women and not pregnant women. All non-pregnant women are entitled to that. And then you break down under the pregnant women there are those who choose to give birth to the child and those who choose to have an abortion, and that's when you get to the point where there is a discrimination so to speak...

PHILLIPS: But under that analysis there would never be a gender or race discrimination. I mean if you're talking about not serving a certain race of people in a lunch counter. That's not everybody. That's just the ones who choose to go to a lunch counter. Or it's women who choose to have children and not support them in McLean. There is seldom any law that affects the 120,000 million people.

BOYD: That's the whole point. And I would direct you to the Feeney case from 1979 US SC. And in particular, and most interesting the Bailey v. City of Austin case which came out of the 3d court actually written by the very justice who wrote the opinion in this case, who recognized that the analysis is, first we look to see does it discriminate on the basis or because of their classification on its face. The hair length regulations do. The paternal preference law did in McLean. But there are cases in which they don't. And Feeney is a perfect example of that. In Fenney on its face it gave hiring preferences to veterans. It didn't say we're only going to give hiring preferences to men. It said on its face we're only going to give hiring preferences to veterans. The impact of that is that 98.3% of everyone that gets those benefits are men. And so you are violating the rights of the women who are not getting those benefits. And the analysis that the SC took on that case was to look, okay it's not facially discriminatory. It is facially neutral. And so now we have to look and see is there a discriminatory purpose? Is the legislature's real purpose here to discriminate on the basis of the fact that those people who aren't getting the benefit are women? And the Feeney court indicated three things to look at in making that analysis. The first thing you look at is the actual language of the statute: is it facially discriminatory on that suspect class or not? In this case it's not. 32.024 discriminates if at all on the basis of whether the procedure you are seeking receives federal matching funds.

ENOCH: Let's change up the circumstance. We're dealing with sickle-cell anemia, a condition that applies mostly to African American descent. Let's suppose the statute permits treatment for medically necessary illnesses, but the statute says, we will not treat a particular condition by treating sickle-cell anemia. Now that doesn't discriminate based upon race under your theory. Because it's not a distinction between African Americans and other races. Because it's a subcategory, only a small subcategory in the African American ethnic population. Would that survive a strict scrutiny analysis under these facts? The state just says, we're only going to do what the feds do, so there will be no public funding for a treatment that goes to sickle-cell anemia. We'll treat all of the complications of it, but we won't treat that. Would that survive strict scrutiny?

BOYD: You don't get to the strict scrutiny analysis until you first determine whether there was purposeful discrimination on the basis of race. And the way you do it under Feeney and

even under the Bailey decision by Justice Smith in the 3rd court, the way you do that is you look first to say is it facially neutral as applied to this classification? And the answer in that hypothetical is yes. It doesn't discriminate on the basis of race on the face of the legislation. Then you look to two other things: what is the purpose for this...

HANKINSON: Why doesn't Justice Enoch's example discriminate on the face of the statute if it says we'll treat all medically necessary conditions except sickle-cell anemia? Sickle-cell anemia only affects African Americans.

BOYD: Because on the face of the statute you are denying benefits not to the blacks or Hispanics or whatever race it may be directed at, but you are denying benefits because this person needs treatment for sickle-cell anemia. That's on the face of the statute. Now you may look at that. It's kind of like the hypothetical legislation of saying we're going to outlaw _____. You know you look on the face of it, that's facially neutral. It doesn't discriminate against people of Jewish faith. Then you look at what is the purpose for doing that. What is the purpose the legislature is seeking to achieve by making that distinction? And you balance that with the impact on the members of that particular protective class.

JEFFERSON: And how do you determine that purpose?

BOYD: You determine that purpose by looking at the manner in which that particular regulation is acted out within the legislative scheme. So for example, it's clear in this case under 32.024, the purpose was to have a conservative fiscal approach to the implementation of the medicaid program. So you look first to see how it works itself out within the scheme. What is the stated purpose, and does it in fact achieve that purpose? And so for example, you can look here to see that in fact under 32.024, limiting the expenditures to those situations for which there is federal matching funds provides a fiscal conservative approach to the state implementation of the medicaid program. If as the respondents would say, you should impute to the state of Texas the policies behind the Hyde amendment, then you look to the purpose of the Hyde amendment. The purpose of the Hyde amendment is to promote child birth over abortion, and thereby, protect potential life.

When the challenge is as it is here to the Texas medicaid program, 32.024 of the Texas Human Resources Code, you have to look at what is the purpose of that particular provision within the medicaid program. That provision was adopted in 1967 when the state of Texas first opted into the medicaid program.

PHILLIPS: What if the medicaid program says, no American Indians will be covered and our law just says we do what medicaid does?

BOYD: In that situation the American Indians who would challenge that law would have to challenge the federal law that is passed through the state law to affect their benefits.

PHILLIPS: State courts couldn't really do anything about it other than strike down a law

of congress, and it would be only a federal question?

BOYD: That's right. The state court could strike down that law on federal constitutional grounds.

PHILLIPS: So you're saying really the only challenge they have here is a challenge to the McRae case that's already been decided?

BOYD: That's correct.

PHILLIPS: And you take that up through state court and see if the SC wants to look at it?

BOYD: And that's why we were entitled to summary judgment in this case because the SC has looked at it and made that decision already.

ENOCH: You said earlier that sex discrimination - sex is not a suspect class.

BOYD: It is a class entitled to intermediate scrutiny as opposed to rational basis _____.

ENOCH: If we disagree with you that the gov't can pass a law that affects only a sub-segment of a particular race and we conclude that that is discriminatory and we evaluate it based on a suspect class of strict scrutiny would Texas' refusal to pay this survive that inquiry?

BOYD: It would not. If the court were to determine that impact by itself is sufficient to demonstrate the denial of equality because of gender or race, then the plaintiffs will have gotten by step one, which is to show that this in fact does deny equality because of gender. Then you apply strict scrutiny which is different than what the federal courts would apply, and require the state to show a compelling interest and that the statute is narrowly tailored to meet that interest. And I think the state would concede that if the court went that direction, that this law would not survive strict scrutiny.

PHILLIPS: The state does concede that we have to analyze this law based on ordinary Texas equal protection.

BOYD: Yes. I mean the challenge is under the Texas constitution. And so yes you will have to apply that.

PHILLIPS: And you've already said that the stated purpose was following the federal guidelines so as to maximize the _____.

BOYD: That is the purpose of the medicaid provisions of 32.024.

PHILLIPS: Is there any other state purpose that's present that we would - whatever we decided the classification for rational scrutiny review was, is there any other state purpose beyond maximizing the Texas taxpayers benefit for amounts spent?

BOYD: The state has in other context demonstrated a policy purpose of promoting child birth over abortion. For example, in the state appropriations act. So the state legislature certainly has demonstrated that as a policy objective within the State of Texas. Our point is that the provisions challenged here - 32.024 of the Texas Medicaid act - which were adopted 6 years before Roe v. Wade and 10 years before the Hyde amendment was ever even adopted clearly that provision was not adopted for the purpose of achieving that particular purpose of promoting child birth over abortion. That's not to say that that is not a policy purpose of the State of Texas. But it is not a policy purpose that underlies the enactment of 32.024.

O'NEILL: Would you agree that yours is a minority position among the states that have decided this issue?

BOYD: Six to five minority. If you look at the SC decisions of the states that have decided this issue under their own constitution it's 6 to 5.

O'NEILL: And do you distinguish the ones that have gone against you based upon the wording of the statute? Do their statutes have this fiscal sort of element to it?

BOYD: No. I would distinguish those decisions that have gone the other way, for example California, New Mexico and others. Now one of them, New Mexico, did it based on their equal rights amendments. The only one that did it based on equal rights amendments. The others did it based on due process or general privacy rights under their constitution.

O'NEILL: But were their statutes worded the same way as this one is, which seems to sort of wholesale adopt the federal restriction on matching funds?

BOYD: I don't recall, but I don't believe so. I think we have a different situation here than they had in New Mexico or California. In that we have here a statute that's being challenged which on its face simply limits the expenditures to those for which there are federal matching funds.

O'NEILL: And you don't know if those states have a similar sort of statute?

BOYD: I don't recall.

You would look to see that there is in fact a disparate impact on this class. Under the veterans preference case or the Feeney case, the court looked ro say, in fact it used the word 'severe impact', 98.3% of all the people that got the benefit were men. And the court said that is a severe impact on women. However, they balanced that impact verses what was the real purposed discrimination, which was not to distinguish between men and women but to distinguish between

veterans and non-veterans. Which in fact as acted out within the implementation of that statute justified the ultimate goal of the statute which was to take care of and benefit veterans and honor them for their service in the military. Here you would see the same thing work out under either the Hyde amendment analysis or 32.024.

PHILLIPS: The dissenting justice in the CA offered a theory that the constitution itself forbade the state from making this choice. Nobody seems to have adopted that in a brief. Is that just a concession to _____ or do you think that argument does not hold up?

BOYD: I'm not exactly sure which argument. The constitution in art. 8.6, and art. 344...

PHILLIPS: Article 3, §51a, the constitution was specifically amended in order to allow the states to spend money in a way that would entitle them to the federal sharing.

BOYD: I do recall that language but I don't recall why we didn't brief it.

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RESPONDENT

JONES: Almost 30 years ago the people of Texas overwhelmingly passed an equal rights amendment to their state constitution to stop unequal treatment of women by the state. This case asks whether the promise of that ERA is going to hold true for poor women who are pregnant and ill.

O'NEILL: Would you agree that the state statute in this case is facially neutral because it's premised upon matching federal funds?

JONES: No. The program at issue here is not facially neutral. The Texas medicaid program through its statutes, its regulations and its policy manuals, which are binding on participants limit the state's funds to abortions that are needed to save a woman's life or for rape or incest. They do not provide funds for medically necessary abortions, although they provide funds for any other medically necessary care.

O'NEILL: But the statute we're talking about here simply says that the state medicaid funds will be paid to the extent they are matched by federal funds. And that particular statute in and of itself without looking at the booklets or regulations appears to be facially neutral.

JONES: There is two things. One is that we challenged the funding bend(?) as a whole, not just in the statute. The statute, the regulation, the state's implementation of a medicaid program that denies medically necessary abortions to poor women. The statute itself in addition adopts the terms of the Hyde amendment. It adopts all funding limitations of the federal government. By adopting those terms it cannot be said to be facially neutral. You have to look at

what those terms are to see whether it's facially neutral or not.

BAKER: Does that implicate the state's argument that your argument is based on our court interpreting the Hyde amendment under our ERA, not the statute itself but the Hyde amendment?

JONES: What this court needs to interpret is the state's implementation of a program of comprehensive health care that denies one service and it's a service that is only needed by pregnant women. That is what the court has to analyze today against the requirements of the ERA.

PHILLIPS: Was the statute in Feeney facially neutral?

JONES: Yes it was facially neutral. This is not a disparate impact case. Feeney was. A disparate impact case involves a statute that is facially neutral and that places a disadvantage on both men and women. Albeit to different degrees but it places a burden on both sexes.

Here there is no burden placed on both sexes. It only applies to pregnant women. So it's just like in McLean where the statute only applied a higher standard of eligibility to fathers because that only applied to men. It was a sex classification.

PHILLIPS: McLean was a situation where it was possible to treat men and women equally. And the legislature had chosen not to. And here you're dealing with abortion. It's not _____ to treat men and women equally.

JONES: Well it certainly is possible to treat men and women equally under the medicaid program. The purpose of the medicaid program is to provide medically necessary care to the eligible poor. And the way to treat men and women equally is if you're going to generally provide all medically necessary services to the poor, you provide them to men and you provide them to women whether they are pregnant or not. So the state could provide all medically necessary services to both sexes.

BAKER: Would you identify who and what is low income women of Texas? Is that an association, a corporation or a generic term or what?

JONES: It's a class of women who are eligible...

BAKER: I understand. But does it exist in reality other than...

JONES: No it's just a name for the class of women who are affected.

BAKER: And so we have 4 doctors and a clinic that are representing those interests in this case. Is that correct?

JONES: They represent the interests of their patients and a class was certified representing the interests of the women of Texas who are eligible for medicaid who will need abortions during the pendency of this lawsuit because of health conditions.

BAKER: So it's a class action?

JONES: Yes.

BAKER: I couldn't find it and may have missed it. What exactly is the injunctive relief that the CA's judgment gave your respondents?

JONES: I believe that the court gave the injunctive relief that we asked for...

BAKER: I understand. But what is it? Exactly what does it say?

JONES: It's to prohibit the state from enforcing the statutes and regulations that they are precluded from paying for medically necessary abortions on the same terms as it pays for all other medically necessary care for medicaid recipients.

PHILLIPS: Is this ordering the state to pay for medically necessary abortions, or ordering the state not to pay for any medically necessary procedures of any sort to anybody?

JONES: It's ordering the state not to exclude medically necessary abortions from the program that already generally provide for medically necessary care and it already has funds appropriated for that care.

PHILLIPS: Shouldn't that be the legislature's choice whether to expand this program or shut the program down altogether?

JONES: Well it's the legislature's choice whether to adopt a medicaid program. But once it does so it is required by the Texas constitution to respect the rights of Texans. And it is this court's job to determine whether the program that the legislature created measures up to the standards imposed by the Texas ERA. Here it does not.

PHILLIPS: The state could have chosen simply not to participate in the medicaid program.

JONES: Certainly. And it could have chosen to exclude broad categories of care if it wanted to.

PHILLIPS: So if we rule in your favor shouldn't we allow the state to make that choice?

JONES: If the state wants to cancel it's medicaid program in order to stop paying for medically necessary abortions, it can certainly do that in response to this court's ruling. But the state

has promulgated the program for two goals. Two goals that would still be met if the relief we're asking for is given. Those goals are to provide health care to the poor, and to obtain all available matching funds for that care. If this court orders the state to pay for medically necessary abortions both of those goals will still be met.

BAKER: How can we order the state to spend money? Isn't that a legislative prerogative to appropriate and designate how funds are spent and not this court or the judicial branch's function?

JONES: The state has already appropriated money for the medicaid program to pay for medically necessary care. All this court would be doing is striking down an unconstitutional restriction on those funds, and that is the province of this court.

BAKER: But does that have the effect of implicitly ordering the state to pay for those medically necessary procedures?

JONES: It has the effect that the funds will go to procedures that the legislature might not have envisioned. Just as has happened in many cases in which unconstitutional laws are stricken. When the SC struck down the segregation of schools, when they desegrated schools, the funds that were given to schools ended up paying for desegregated schools even though that's not what the legislature envisioned. When the SC in Shapiro v. Thompson struck down an eligibility requirement on welfare benefits, those welfare benefits ended up going to newcomers even though the legislature didn't foresee that that would happen. It is the province of the court to measure legislative actions against the constitution and if necessary to strike down restrictions. And that does not require any new appropriation or an appropriation by this court.

BAKER: But there's only so many dollars.

JONES: Yes. But there is already adequate money in there.

BAKER: And those dollars equal what the federal government sends to Texas. Is that correct?

JONES: That's not exactly correct. What happens is the state allocates money for the medicaid program. The state spends the money so long as it's spending money on things for which it can receive matching funds. It submits a bill of sort to the federal government and gets the matching funds. All it would have to do here is to the extent it pays money that is not for services that can be matched, it just needs to keep a separate accounting of those and not seek matching funds for them.

HANKINSON: Will you respond to Mr. Boyd's argument that the Texas ERA requires a showing of purposeful discrimination. There has been none here.

JONES: That contention has already been flatly refuted by the court in McLean, which held that when a law imposes a disadvantage only on one sex, that's a sex classification. It's not necessarily unconstitutional. But it must meet strict scrutiny. And the same thing has happened here. They have placed a burden only on women. Even only on pregnant women. And that must meet strict scrutiny. The court in McLean held that even lofty goals wouldn't permit sex classifications to just escape without the scrutiny of this court. So intent is not necessary under the Texas ERA when the law places a burden only on one sex.

ENOCH: You're responding to Mr. Boyd's argument under Feeney. And would you elaborate on that a little bit. He apparently concedes that if the court gets to a strict scrutiny analysis, then the state loses. But he says we don't get there. And he says Feeney's the reason why. Can you distinguish that?

JONES: Feeney's not the reason why for a number of reasons. First of all, it was decided under the less protective federal constitution, which does not contain an ERA.

ENOCH: His point is, that comes after you've determined there's purposeful discrimination. Feeney says there's not a purposeful discrimination.

JONES: The Texas ERA does more than just apply a heightened level of scrutiny. It does not follow the federal analysis. It provides independent strong protection against sex discrimination in this state. And the court has held in McLean that when you place a burden on only one sex, that is subject to strict scrutiny. You don't have to look at intent. So in that way McLean offers a different analysis than Feeney does. Furthermore, they are just not the same type of case. Feeney is a disparate impact case in which both men and women were burdened but to different degrees. This court has not yet decided whether it's going to require a showing of intent in disparate impact cases.

BAKER: We're obviously talking only about women for obvious reasons. So that's a big class. But then there was discussion about reducing that class to smaller subclasses and we get to pregnant and non-pregnant women, and then we get to women who choose to either carry the child or not, and then we're to the issue of should medically necessary abortion procedures be included in what's paid. Is that correct? So that the class we're looking at is not men verses women. We're looking at a subclass of disparate treatment between women only.

JONES: As CJ Phillips pointed out. If you reduce the class in the discrimination suit to that small a level, you will never find discrimination. In McLean you could have said, this isn't about men. This isn't discrimination against men. This is only discrimination against men who have children out of wedlock and decide that they want to come establish paternity through a legal proceeding. The fact is, the court has recognized that the ERA protects more strongly than that. If a law burdens only one sex, as it did there, only disadvantaging men, that's sex discrimination. The same is true here. It may just affect women who are pregnant and need abortions because they are suffering from cancer or diabetes. But the fact is, only women are ever denied medically necessary

care.

JEFFERSON: Why shouldn't we look at the US SC decisions that look specifically at the Hyde amendments and determine in McRae or in Gray that the restrictions on the funding in the Hyde amendment are not sex based classifications. Why shouldn't we take that as the ground for our decision here, and if it's not a classification based on sex, doesn't that end the inquiry?

JONES: There are a couple of reasons why not. The first is again that the Texas constitution undisputably provides greater protection against sex discrimination than the federal constitution. Second, in the Harris v. McRae and Monford(?) cases, which considered funding ban like the one here, the SC did not address a sex discrimination claim. Sex discrimination was not raised in either case.

The Bray(?) case is a different issue. It addresses whether the actions of private actors expressing disfavor towards abortion show animosity towards women under a statute that required a showing of animosity towards women. It's simply in opposite here. Because as we've discussed, the ERA does not require a showing of any sort of malicious or invidious intent towards women for finding of discrimination. So the fact that Bray found that disfavoring abortion doesn't discriminate against women. It doesn't tell us anything about whether excluding medically necessary abortions from a state funded program of health care is sex discrimination.

RODRIGUEZ: The CA justice who wrote this opinion also wrote the opinion in Bailey v. City of Austin, and there she did make some differentiations. In Bailey v. City of Austin she said the classification at issue there, this is a domestic partnership benefits issue, was not homosexuals but unmarried domestic partners. So how do we differentiate the two cases? And that was an equal rights case.

JONES: It was an equals case, but it was a disparate impact case again. It didn't affect just the class. It was a law that affected all unmarried persons and the claim there was that it imposed a disparate impact on homosexuals rather than unmarried heterosexuals. But the fact was it placed a burden on both groups. And so the court had to evaluate whether there was such a disparate impact as to evidence, a showing of discrimination.

There is no need to make that kind of inquiry here, because the burdens are only placed on women. It's not a disparate impact case.

PHILLIPS: Under your analysis that this is sexual discrimination because it can only affect women, how could the legislature ever pass any laws on abortion? How could they do what Roe v. Wade says a legislature can do and prohibit abortions late term?

JONES: The state has a couple of different interests at stake. If you're talking about a law that regulates abortion that is passed in order to further the state's interest in potential life, then if the court was evaluating that sort of law it would have to look at whether men and women are

differently situated with respect to that interest. And it may well find as you say that women are differently situated than men when the state is trying to promote its interest in potential life. But that's not the interest here. The state hasn't claimed it is. It said it would be happy to pay for medically necessary abortions if the federal government did. The interest here is in providing health care to the poor and securing all available matching funds. Men and women are not differently situated with respect to that goal. A woman who is pregnant and needs an abortion so that she can get cancer treatments or reduce her hypertension is exactly the same situation with respect to Texas medicaid as a man is who has prostrate cancer or whatever other treatment. So you can only determine whether men and women are similiarly situated with respect to the law by looking at the purpose of the law. And with a parental notice requirement or something of that nature, the purpose of the law is going to be a very different one than it is here.

The evidence is undisputed that it is far cheaper to provide women with these health conditions, with medically necessary abortions, than to cause them to carry a complicated pregnancy to term and go through child birth. It's undisputed that the money already allocated just for the state's portion is enough. There is no cost saving here. There's not a shred of evidence that a cent would be saved by this. All the state is doing is sacrificing the health of pregnant women so that it doesn't have to pay money for something that is not getting matching funds for. That's the only interest at stake.

ENOCH: On the issue of the medically necessary treatment, the way this law applies could the legislature even if it applied only to one sex make a determination that all medically necessary treatment will be available except there will be certain types of treatment that will not be used. They've already declared that experimental treatments may not be paid for. But could they say that we understand there's a treatment out here when someone suffers from hypertension or cancer or these kinds of things, that they could opt for the abortion, not because it solves the health condition they have, but because it complicates the treatment for the health condition they have? Could the government just decide that's just not a decision that the doctor/patient are going to be able to make if we're going to pay for it. We're going to say they are going to have to use some other treatment for their condition, which is the hypertension or the cancer, that they will have to use if they are going to expect public funds to do that. Doesn't that affect the analysis on a discrimination claim that the women here are not being denied medically necessary treatment. They are being denied just one aspect of the treatment that might be called for to avoid other complications as a part of the treatment prospect for what the injury is that they are suffering from. Assuming that the pregnancy is not life threatening, then could the government make some determinations as differentiating as between the sexes that this won't be one of the alternatives that would be taxpayer supported.

JONES: The state can modify its definition of medical necessity. But it has to do so in a way that complies with the Texas ERA. So if it's going to change its definition it needs to do it in a way that either treats men and women equally, or is justified by a compelling interest. And here it has not done so. It has applied one standard of medical necessity generally to the whole medicaid program except for a pregnant woman who needs an abortion to save her health. And in

that instance it has applied a higher standard and only subjected those women to that standard. Under McLean that's a sex classification and the state concedes it cannot meet strict scrutiny.

PHILLIPS: Is it permissible for a legislature whether federal or state to consider that there is no widespread popular objection to this list of 200 medical procedures, but there is widespread opposition among the public to this one particular medical procedure and that everyone's taxes will be applied to pay for those procedures whether rightly or wrongly ½ of my constituents thinks this procedure is fundamentally morally wrong? Can that enter into a legislator's equation at all?

JONES: That's going to depend on the interest at stake and the purpose of the program. Here, the purpose of the program is not to provide care to the poor when it's generally considered acceptable to the populace. The program is to save the health of the poor by providing them care that they can't afford on their own. So in this context that interest is just not related to the purpose.

RODRIGUEZ: Well the purpose - say there's a male who wants a sex change operation. Can he be denied that treatment even though it may cause him psychological problems and there may be medical necessity associated with his desire to change sexes? Does the legislature have to fund such an operation?

JONES: The legislature can exclude broad categories of care as long as it does so consistent with the Texas ERA. If it prohibited all sex change operations and that prohibited them from men and for women and for generally people of different races, it may be able to do that. But it can't preclude care just needed by women, which is what it's done here.

JEFFERSON: But under your analysis, we always have to go behind the statute itself, because in fact when this statute was written the Hyde amendment wasn't even in place. So you're always requiring us to undertake an analysis of the impact of the statute, which seems to me contrary to what you're saying before that we don't have to look at, that this is not a disparate impact case. But it seems to me that your argument forces us to do that. So with respect to every piece of legislation we will have to look behind it and see not whether it is neutral on its face or whether it has some purpose to discriminate, or if it has a very noble purpose of saving the _____. But instead what sort of impact does it have in general?

JONES: That's not exactly what I'm arguing. What I'm saying is that you have to look at the program on its face. This program on its face does exclude medically necessary abortions and nothing else.

JEFFERSON: Not when it was first written right?

JONES: Not when it was first written. But now it does. Because intent is not a relevant question here, you don't have to look back at what it did in 1967. What you need to look at is what does this program do now? And what this program does now on its face is provide all medically necessary care except one treatment needed by pregnant women. So that's the extent of

what the court has to look at to determine that there's a sex classification that has to meet strict scrutiny.

OWEN: Is it a classification based on sex or a classification based on the unborn child?

JONES: It's a classification that only affects pregnant women. And under McLean...

OWEN: But is it based on the unborn child or the fact that it's a woman?

JONES: The program that Texas has enacted disproportionately - it only places a burden on women. And the purpose of it is not to protect potential life. That's is not an interest of the state. So whatever the motivating factor is it's not potential life. And the result is to cause women to face health risks that men don't have to face. The state has never said that its program is designed to promote potential life.

OWEN: But you said the regulations carry forward the Hyde amendment and that you are challenging the regulations themselves.

JONES: We're challenging the medicaid program which does adopt the terms of the Hyde amendment. But the state has explicitly said that it does not adopt the purpose of the Hyde amendment. It says that its purpose is to provide health care to the poor, and to ensure access to all matching funds. It can do both of those things regardless of whether it pays for medically necessary abortions.

And to answer CJ Phillips' question regarding the constitutional provision discussed in the dissent. That provision only limits the legislative action to the extent that it would make the medicaid program ineligible for federal matching funds. And the SC has explicitly stated in Harris v. McRae that providing funds for medically necessary abortions by the state does not affect the state's eligibility for any other funds. So there is no constitutional limitation.

JEFFERSON: If we decided that this was not a classification based on sex then that ends the question right? You lose if that's what we decide?

JONES: No. We still don't lose. Because even if it's not a classification subject to strict scrutiny, under this court's rational basis analysis under the Texas constitution, this would still have to fail. Even under the rational basis test, this court requires a connection between the classification that's being challenged and the ultimate purpose of the law at issue. The court clearly dictated that in the recent case of HL Farm, which is cited in our briefs. There was no suspect class challenged, no fundamental rights challenge, and the court said what we have to do here is look at this classification and determine if it's rational. And to do that we have to determine what the purpose of this program is and figure out whether it makes sense. Well if you look at the purpose of Texas medicaid of providing health care to the poor and of ensuring access to all matching funds, you will see that this exclusion is not even rationally related to the interest. In fact it directly

undercuts the interest of providing needed medical care to the poor.

RODRIGUEZ: As I understand the state's argument its rational basis is receipt of federal matching funds. So you've lost me there. Why isn't there a connection?

JONES: The statute's purpose is to make sure that all available matching funds are given to medicaid recipients in Texas. That goal is unaffected by whether or not the state pays for medically necessary abortions for its medicaid recipients.

RODRIGUEZ: Well can the goal be not to pay for more than is matched by federal funds?

JONES: Well that's what the state is saying its interest is now. But that's not the stated purpose of the medicaid program. And this court said in HL Farm you have to look at the purpose of the law. The purpose of the law was not to make sure that the state didn't pay 1 cent for something that the federal government wasn't going to pay for. That wasn't its purpose. It's purpose was to provide a comprehensive health program for the poor and to gain access to federal funds to do so. So there's not even a rational relationship to those two goals.

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REBUTTAL

BOYD: Justice Baker your question about the relief requested in fact demonstrates exactly why disparate impact alone cannot be sufficient to violate the ERA. Think about the relief that would have to be ordered in this case. The relief would be, you tell the state you either have to pay for all medically necessary abortions, or you have to stop paying for child birth. But if the state chooses to stop paying for child birth, there is still a disparate impact on women. In fact, the refusal to pay for medically necessary abortions or child birth affects only women under their theory. And so you have to say, well then you stop paying for medically necessary abortions or you stop paying for pregnancy expenses. Same problem with that.

HANKINSON: I thought the relief requested was much broader. It went to the whole program as opposed to just childbirth.

BOYD: And that's the point. At what point do you have to go up those levels of disparate treatment until you get to a point where there's not different treatment for men and women. You've got to go up beyond the abortion choice, up beyond pregnant...

HANKINSON: I think Ms. Jones would say, if you're going to fund for medically necessary procedures, then you do it for all medically necessary procedures. Have I missed the point?

BOYD: No, that's right. But the point is so the only choice the state is left with is, we don't have a medicaid program or we pay for medically necessary abortions. Because you've got to get all the way up to the level of treatment of men and women to where there's no disparate

impact before you can get to a point where under their theory you don't violate the ERA.

ENOCH: The Feeney case that dealt with veterans benefits discriminated between men who are veterans and men who were not veterans. And it discriminated between women who are veterans and women who were not veterans. Right?

BOYD: That's incorrect. On its face it discriminated in the sense that it denied particular benefits to a particular class. It discriminated between people who are veterans and people who are not veterans.

ENOCH: But the disparate impact argument was that because most veterans were men it impacted women on a greater degree than it impacted negatively men. Right?

BOYD: Not just on a greater degree or mostly - it was 98.3% men.

ENOCH: Because I was comparing men or women, I was using greater. But I could use greatest. But I think grammatically it wouldn't be correct. But at any rate, that's disparate impact argument. That's what Ms. Jones is talking about. She says, Feeney doesn't apply because this isn't a disparate impact. This is a place where when the law is applied men are not affected at all. And only women are affected. So there's no negative impact as between men who need medically necessary treatment and get it and men who need medical and necessary treatment and don't get. The only impact is on women who need medically and necessary treatment. But as to a particular medical and necessary treatment, they don't get it. How do you say that that's a disparate impact argument?

BOYD: They did a fantastic job in the record in this case of demonstrating that this law has impact on women. But they have not shown in the record that it does not have any impact on men. And as we've pointed out in our brief to the extent that any of the women that made this choice are married, the cost of paying for that abortion without state funding is borne by the husband under the community property laws. There are men affected by it too. Their record doesn't support their own argument. But even if it did, even if was only women 100%...

HANKINSON: You mean they have to put on a disparate impact case? They've chosen not to challenge it under the disparate impact theory.

BOYD: No. I'm saying that they are trying to distinguish Feeney by saying in Feeney that 1.7% of the people impacted were women. Whereas in this case, none of the people impacted are men. And what I'm saying is they haven't demonstrated that in the record at all.

HANKINSON: But I think their theory is that no man is denied medical treatment for a medically necessary condition.

BOYD: It's not the denial of medical treatment. It's the denial of the funding for that

medical treatment that the state law effectuates here.

HANKINSON: Well in indigent population in many instances that's effectively denying them the treatment.

BOYD: And so you've got to carry that analysis to some smaller segment of the population they are complaining about, to say some smaller segment of the population then doesn't get that particular treatment at all.

HANKINSON: Would you respond to Ms. Jones' argument that McLean provides the roadmap for how this case should be decided?

BOYD: It can't because the law in McLean was facially discriminatory on the basis of gender. Because of gender we're going to treat these men differently than these women.

HANKINSON: Well her response to that is that they've challenged the entire implementation package associated with the medicaid program in Texas. And that when you look at that it is facially discriminatory. What's your response to that?

BOYD: They need to point to the statute that they are complaining about because in order to determine if there is facial discrimination you've got to look at the language of that particular statute. The statute is 32.024 of the Texas Human Resources Code, and the language says nothing about women, nothing about abortion.

HANKINSON: But she says that their challenge stands beyond just the statute to all the implementing and regulations.

BOYD: And the regulations cannot be the basis for the challenge. Because all the regulations do is implement what the Hyde amendment - the effect of the Hyde amendment for purposes of implementing the program by the department of Health. So the challenge has got to be to the statute.

Certainly what art. 351(a) does is it provides a constitutional basis for the policy choice made by the legislature.

PHILLIPS: You essentially agree with Ms. Jones' analysis?

BOYD: Not exactly. What I would say is that that argument is susceptible to the counter argument, which says that one provision of the constitution cannot be construed so as to violate another. To the extent that you find that a statute violates - for example if you were to find disparate impact were sufficient in and of itself so that the statute violates the ERA, you could not then construe art. 351(a) to say, oh it doesn't matter if it violates the ERA because art. 351(a) says that's okay. You can't construe one provision to allow for a violation of another.

BAKER: But does it provide a reason for a policy decision, which the majority says the state never showed?

BOYD: It certainly provides that the people of Texas through their constitution have expressly blessed the policy choice made by the legislature in this case in 32.024.

PHILLIPS: Without that provision of the constitution there couldn't be a Texas medicaid program?

BOYD: Yes, because of art. 351 that would prohibit the expenditure of funds to individuals.

PHILLIPS: But once you have this provision it allows the medicaid program, and then it says the medicaid program has to be at least enough to get federal funding, but it doesn't specifically prohibit a program more generous than the federal _____?

BOYD: No it doesn't.

RODRIGUEZ: Justice Baker's earlier question dealing on standing. As I understood the answer from Ms. Jones, three males brought this suit alleging an equal rights amendment violation on behalf of women. Did the state object to that class certification, and is that issue still preserved on appeal?

BOYD: There is no class certification I'm aware of. The state asserted lack of standing as an affirmative defense in its original answer in the case. However, the state did not assert that as a ground in support of its summary judgment. Frankly, under the Roe decision, the state's position would be that Roe was wrong on that standing analysis. But under the Roe decision the court recognized an interest not only of the pregnant woman but also of her physician in light of the physician/patient relationship. I don't think this court has to get there, because I think the state prevails on it.

BAKER: Well are you now saying you don't think it exists in the case, or that it's still there?

BOYD: I think the state's position here is that these doctors under a proper analysis of a physician/patient relationship would not have an adequate interest to give them standing in this case. But I don't think this court has to get there in order to find for the state as it should