

ORAL ARGUMENT — 2/4/98
97-0889
PATTERSON V. PLANNED PARENTHOOD

WILBORN: I am Dee Dee Wilborn with the Office of the AG. This is a rare case in part because it is a direct appeal. The State of Texas chose to pursue a direct appeal in this case because the issues are of paramount importance. Namely: Can the State Legislature decide how state funds in Texas will be spent? Certainly, the appropriation's system should not be overturned lightly; and, secondly, will we grant standing to a group who will not be harmed by the implementation of this law?

In 1997, the Texas legislature passed Rider 14 to the Appropriations Bill. The rider merely says: "that no state funds shall be used to dispense prescription drugs to minors without parental consent." The rider does not in anyway affect the substantive right of minors to consent to their own medical care in certain situations as provided for in the Human Resource Code.

HECHT: In fact, as proposed, it doesn't affect anything does it?

WILBORN: Well I disagree to some extent. What the rider accomplishes is that it makes a statement. It's a bold statement by the State of Texas that we will not pay for prescription drugs for minors who choose not to communicate with their parents about these important issues.

HECHT: But you're going to see that the money gets there just the same?

WILBORN: The Dept. of Health has begun its process of implementing a tracking system, whereby, they can assure that private entities such as Planned Parenthood will continue to receive funds. The _____ will be federal funds rather than state funds. This is the way the Health Dept. could comply with the intent of the legislature while at the same time not affecting rights of people like Planned Parenthood.

BAKER: Is there any validity to the theory that when the matching federal funds are received and deposited in the state treasury that they become state funds, so that all the money is in effect state funds, so that there's no way to segregate as the department?

WILBORN: Unfortunately on the record before us those facts are not flushed out.

BAKER: Well that's a legal theory. Do you agree or disagree?

WILBORN: I disagree. In part because in cases such as this federal funds that come down from the fed. government are deposited in different places. For example, this case involves Title 10, Title 20, and Title 19. Title 19 is deposited with NHIC as far as I know. Again, these facts are

unfortunately not in the record.

BAKER: That's the insurance company?

WILBORN: That's correct. Title 10 funds go to Region 6 in Dallas. Title 20 goes to DHS. So this is how the Dept. of Health is very competent saying that if they could develop a tracking system, because the funds are deposited in different places it would be easier for the Dept. of Health to ensure that the state funds were not used.

BAKER: But that still doesn't do away with the theory if it's correct that regardless of where it's deposited they are state funds, because the state then could administer where they go and how they go, isn't that correct?

WILBORN: That's correct. I believe in this case, the legislative history is somewhat dispositive. If you look, and it is attached as an exhibit, the history is very brief, but there is a conversation between Senators Junnell and Zively where they make certain that federal funds will not be affected by the rider. So certainly, the legislators who passed it...

BAKER: But that still doesn't answer the question whether they are affected or not. What is your answer to whether federal funds will go to state funds or not?

WILBORN: My answer is no. And that we can discriminate between state funds and federal funds if based on no other reason than based on the source of the funding. And I believe that that's what the legislators intended when they did pass the rider.

HANKINSON: What was the effect in this case of the evidence that's in the record of a letter from the fed. government indicating that the state will lose all federal funding if it implements this rider?

WILBORN: The letter is from a regional health administrator. If you look at the letter clearly and the day on which it was written, the letter was premature. The letter was written in anticipation that Rider 14 would be fully implemented. By that, I mean agencies such as Planned Parenthood would not be reimbursed unless parental consent was indeed required. The letter says: "Rider 14 on its face," and then later is says: "If Rider 14 is fully implemented." It's clear that the gentlemen who wrote the letter had no knowledge of the funding mechanism the Health Dept. intends.

OWENS: What happens to Rider 14 if the federal government does in fact withdraw the \$93 million?

WILBORN: The effect would be huge. But it would be unintended.

OWENS: Doesn't the statute automatically strike itself down if that were to happen?

WILBORN: I don't think it's automatic. I think that one interpretation would be that Texas is not complying with these federal regulations, and by not complying, then we've somehow chosen to opt out of participation. As you know, it's voluntary participation. Texas voluntarily participates in these _____.

OWEN: But the statute requires the state to do everything it can to maintain the maximum level of federal funding doesn't it? Wouldn't this appropriations bill violate that statute if in fact the federal government withdrew the \$93 million?

WILBORN: I disagree that the statute requires a state to do everything it can to achieve maximum funding. It requires the state to comply with the regulations connected to the receipt of these federal funds and it requires the state to provide medical services. And very clearly this Rider does not affect the provision of medical services, those services will continue to be provided.

HANKINSON: What about the provision of the Human Resources Code that was an issue in this case? Does it not require the state to maximize funding in this area?

WILBORN: No. There is nothing in the Human Resource Code that requires a state to spend state funds on prescription drugs for minors without consent.

HANKINSON: I understand that. But the provisions of the Human Resources Code that Judge McCowan cited in his opinion, can you disagree that those particular provisions of the statute require the state to maximize obtaining federal money in providing services?

WILBORN: I disagree that those statutes require the state to maximize federal funding. I wholeheartedly agree that they do require the state to provide medical services and that we will continue to do. Medical assistance I believe is the term in 32.024.

ENOCH: Not Rider 14, but does the state have to within the appropriations bill appropriate funds to provide medical services provided by the Health & Resources Code? Do they have to fund it at all?

WILBORN: No. I am glad you brought that up.

ENOCH: So if they don't have to fund it all, is there anything that prohibits them from defunding part of it?

WILBORN: No, sir, and that's our argument. If you look carefully at the Human Resource Code it very clearly says: "The Dept. of Health may administer and expend state funds that are appropriated." In other words, the legislature clearly said it, "they don't have to appropriate funds

for anything.” If you look down at 32.021(b), it gives the Dept. of Health the ability to enter agreements with federal agencies to administer medical assistance when the Dept. of Health determines the agreements to be compatible and within the limits of appropriated funds. In other words, I believe that you’re correct and the legislature never forces or never intended for the Dept. of Health to be forced into _____.

ENOCH: Even if Judge McCowan’s worried about \$200,000 being wasted, the appropriations bill could earmark certain funds to be wasted and certain funds not to be, at least according to the way the legislature determines it ought to be, spent?

WILBORN: That’s correct. It’s not our job to question the wisdom of the legislature rather only what they’ve done is unconstitutional. And in this case, as you pointed out, there’s nothing about the Rider that conflicts with the Human Resource Code. Because medical assistance will continue to be provided.

HANKINSON: Do we know yet what the reaction of the federal government is going to be to Rider 14, or has that question not yet been answered?

WILBORN: It has not yet been answered.

HECHT: And if it’s negative what?

WILBORN: Well then I believe that an agency such as Planned Parenthood at that time may have standing to bring...

HECHT: To challenge the constitutionality of this Rider?

WILBORN: Correct. But at this time, I do not believe they have standing. I believe that this suit is premature.

HECHT: Whether this is constitutional or not depends upon what a director of a federal agency may decide about an option that is proposed here?

WILBORN: No, I believe that the rider will be constitutional no matter what. My comment only went to the standing of Planned Parenthood to challenge the rider. I do not believe that the decision of the federal government in any way is indicative of whether or not this Rider is constitutional.

HECHT: So if they do withhold funds, that would not make this Rider unconstitutional?

WILBORN: Correct.

HANKINSON: What then is the effect, I'm a little bit confused in the joint stipulation that the parties entered in the TC. In stipulation No. 16, the statement is made: "effective Sept. 1, 1997, Planned Parenthood will no longer be eligible to receive medicaid funds for providing prescription medication to minors without consent." I'm afraid I don't understand the implication of that particular stipulation in light of what you just told us.

WILBORN: In the family planning strategy utilized in the State of Texas there are 4 sources of funds: Title 10, Title 20, Title 19 and TNAF, which is the welfare reform law. What that stipulation says is that medicaid funds will not be used, state nor federal, no medicaid funds are going to be used for reimbursements to entities like Planned Parenthood. Rather, the Dept. of Health is going to pull other federal sources of funds. The other three funding sources other than medicaid do not include any state funds at all, hence they are not at all affected by Rider 14. So there are 3 other funding sources from which TDH can pull to reimburse Planned Parenthood.

You will note in the record that in fiscal year 1996, which I believe were the only statistics available at the time, something like \$267,000 was spent on prescription drugs for minors in the state of Texas. That's not distinguishing between who had parental consent and who had did not. So we're talking about pulling roughly \$267,000 from one of these three other sources.

SPECTOR: Does this Rider cover just regular prescription drugs in addition to oral contraceptives?

WILBORN: Yes. All prescription drugs are covered.

SPECTOR: So Planned Parenthood or any physician could not give a prescription to a minor to treat anything without parental consent, is that what that Rider says?

WILBORN: No.

SPECTOR: Paid for by state funds?

WILBORN: If you were to just take a literal interpretation of the Rider, that's probably one interpretation. However, the sole evidence in the record is that TDH is going to institute a funding mechanism where doctors can still give prescription drugs to minors, and then those doctors or people like Planned Parenthood will still continue to be reimbursed, but they won't reimburse with state funds. The effect of the Rider is focused on the funding source not the ability of entities such as Planned Parenthood to continue to give drugs to minors.

SPECTOR: But it does not only affect Planned Parenthood, it affects other doctors who treat minors on an emergency basis or whatever?

WILBORN: It only affects entities that would be reimbursed with state funds. Doctors who

would be reimbursed with state funds would be affected. That's correct, but only affected in that the money they receive is going to come from a different source.

HECHT: On the consumer end nobody's going to be affected, that's your proposal?

WILBORN: Correct. Well but I add to that. Nobody will be affected in one way, but in another way, Texas will still have made this bold statement. The Rider is not affectless.

HECHT: I wouldn't call it bold. Maybe meek, I might call it.

WILBORN: I would like to focus a little bit more on the issue of standing. As you all are aware, it's fundamental that no court has jurisdiction to render an advisory opinion over a controversy that is not ripe(?). The burden was on Planned Parenthood to establish that it had standing in this case, and the sole testimony in the record before you is that Planned Parenthood will not be harmed by the implementation of Rider 14. And that's due to TDH stated intention of how they are going to apply the Rider.

SPECTOR: If this Rider prevents the State from directly funding these prescriptions, how can the State indirectly fund them?

WILBORN: By relying on federal funds. The Rider only precludes the use of state funds, funds that have their source in state dollars, not dollars that come from the federal government.

SPECTOR: But if the state takes some funds to implement using federal funds isn't that doing indirectly what they are prohibited from doing directly?

WILBORN: It would be, that's why we are not going to use state funds at all. No medicaid dollars are going to be used at all. Only federal dollars will be used to reimburse entities such as Planned Parenthood to distribute the drugs.

SPECTOR: I don't think we're communicating. I thought you can't do indirectly what you are prohibited from doing directly?

WILBORN: No state funds are going to be used directly or indirectly. No state funds will be used to reimburse someone for these prescription drugs.

SPECTOR: Or to secure reimbursement from another source besides the state?

WILBORN: Correct.

SPECTOR: The state's going to be able to do that with a telephone call?

WILBORN: The state is going to tap into other resources of federal dollars. And that's what I was referring to earlier, the fact that there are 3 other sources in the family planning strategy that come directly from the federal government.

HANKINSON: If the state loses the federal fault funding ultimately when this plan is implemented, does Rider 14 then violate Art. 3, §35 of the Texas Constitution. Is that an unintended consequence then of Rider 14 that would make it a violation of that provision?

WILBORN: No, I do not believe so. I believe if you read the Human Resource Code carefully it speaks strictly about medical assistance and what assistance we are going to provide. The TDH is going to continue to provide the same level of assistance.

HANKINSON: So if they lose the funding and the State of Texas comes up with the \$93 million or whatever is lost to continue to provide the assistance, then that would save it from constitutional infirmity?

WILBORN: That's our position.

OWEN: What about 32.001b that talks about to the extent that federal matching money is not available to the State, the conflicting provision of state law shall be inoperative. How do you get around that?

WILBORN: In this case matching dollars is not at issue.

OWEN: What if we lose the \$93 million? If the \$93 million is withdrawn or federal matching funds are withdrawn what is that effect, what does that have on Rider H?

WILBORN: The matching funds that only goes to medicaid. So it wouldn't affect all of the \$93 million. I understand your question, and I'm not trying to not answer it. I still think that the Rider...

OWEN: If the federal government says you're not complying and we are withdrawing the \$93 million, doesn't that cause Rider H to violate 32.001(b)?

WILBORN: I don't know. In part it's because I haven't thought of this before. But our argument to that would be this, if that's going to happen...

OWEN: Well that's what the TC held, and that's what has been briefed here, it's not in your briefs, what's your response to that?

WILBORN: Because this case doesn't involve matching funds at all, medicaid is the only one, it's one of the four funding sources in this strategy.

OWEN: What's the \$93 million, what is that?

WILBORN: That's Title 10, Title 20...

OWEN: What if that's withdrawn? Is that matching funds?

WILBORN: No, it's not matching funds.

OWEN: What are matching funds if the \$93 million isn't?

WILBORN: Matching funds are roughly \$5.4 million. That's also in the record.

OWEN: What are they?

WILBORN: That's the money that Texas puts up to pull down the matching funds in medicaid. You have to remember that matching funds is a term...

OWEN: What's federal matching money?

WILBORN: That's the money we get from the federal government on a 1-\$9 ratio.

OWEN: So the \$93 million is federal matching money?

WILBORN: No. Part of the \$93 million is federal matching money, you are correct. But if you think about 4 funding sources, and this is in the joint stipulation of facts, the figure of state dollars that is put up in order to pull down federal matching funds, that's included in the record.

ENOCH: In your argument you said, the same services are going to be provided even if the state funds were not used for prescription drugs, and because of that, you did not feel Rider 14 was unconstitutional?

WILBORN: Correct.

ENOCH: Actually there will be less services provided because the state funds that will not be used for the medicine will require funds from other sources to be used for medicine, so there will be less total dollars available for services want there? How does that not equate to less total dollars for services?

WILBORN: There is nothing in the record that identifies the source of the money that's going to be used to implement this system. There's nothing that identifies the loss that you're describing. The record is completely devoid of any evidence of harm suffered by the administrative costs or the moving around of funds.

ENOCH: So for the purposes of the record, there is no demonstration that there is any loss of services because of this Rider?

WILBORN: Correct, and that definitely supports our argument that Planned Parenthood is without standing, because they failed to make that showing.

OWEN: I would ask that you would supplement your briefs on 32.001, because that was in their brief, and it's also in the TC's opinion. I don't see it in your brief.

* * * * *

APPELLEE

DUGGANS: I would like to begin with a brief discussion of the standing issue, and then move directly to the merits of why this fiscal shell game the state has proposed won't work. Before I even do that though, I would like to address your question about what's involved in this case, and what is not involved in this case.

We are dealing only with the family planning appropriation, and only with respect to prescription drugs for minors. What that is is prescription contraceptives, and prescriptions used to treat sexually transmitted diseases. It does not include for instance in your example, emergency room treatment for a child hurt in a wreck. It does not include abortion or the drugs involved in an abortion as amicus seem to think. We are dealing with contraceptives and sexually transmitted disease treatment.

GONZALEZ: Let me ask you a fundamental question with regards to standing, because I know you are going to address it. Do you concede the fact that in order for you to have standing Planned Parenthood must have a liberty or property interest protected by the constitution? And if the answer is yes, would you address what that liberty or property interest is that is at risk?

DUGGANS: I don't think that a liberty interest is implicated. What we have is an economic interest, a property interest, a contract interest, we contract with the state to get these funds, we contract with the federal government to get these funds. These contracts are in evidence in this case.

GONZALEZ: And if the state would violate that contract that's not only a breach of contract but it's unconstitutional, is that what you're arguing?

DUGGANS: In this case, the constitutional violations are under the federal constitution supremacy clause, and the state's constitution unity and subject clause. We have standing to assert that because we sustained pecuniary damage to our economic interest.

OWEN: Isn't this all premature until we know what the federal government's view of

Rider 14 is? If the federal government says we don't have a problem, we are going to fund, doesn't all this go away?

DUGGANS: That's the sort of things courts decide all the time. There is a great body of case law on this issue, and what medicaid requires and what medicaid doesn't require, what states can do and what states cannot do. I don't think that it takes the withdrawal of the funds to create a controversy. We are plainly threatened with harm here. And a threat of harm, a concrete threat of harm has always been sufficient.

OWEN: Isn't it necessary for this court to conclude that the federal government will withdraw funds in order to find that this Rider violates state law? Isn't that a fundamental underpinning?

DUGGANS: No, it is not. This Rider prohibits the use of state funds for a purpose that the general law of this state authorizes the department to use state funds for. This Rider, therefore...

HANKINSON: But isn't that permissive, it's not mandatory, it's just the department may expend the funds?

DUGGANS: That's quite right it is permissive. And that permission in this instance is withdrawn by the Rider. The Rider, therefore, amends the general permission granted by the general law. And that cannot be done in a rider to an appropriations bill under this court's jurisprudence. You can't amend the general law with a rider.

ENOCH: Couldn't the Rider have just said: We are not going to appropriate any funds for matching grants or medicaid?

DUGGANS: Certainly. This is an elective deal. The state doesn't have to participate in medicaid or any of these other federal programs.

ENOCH: So why can't the state just pick and choose which parts of the program it's going to fund subject to the risk that the federal government says: "That's not sufficient, and so in practice you've opted out?"

DUGGANS: There are two answers to that question. The first one is that the state is not free to pick and choose under the case law. And I have some cases on that proposition.

The second answer is that the state has not opted out. It is stipulated in this case that the state has elected to participate in each of these programs. The Human Resources Code directs the authority to maximize those federal funding sources.

ENOCH: I thought you said by rider it could choose to not fund these matching

programs?

DUGGANS: I'm sorry. I don't think that that could be done by a rider because that, too, would be a change in the general law of the state under the Human Resources Code.

HECHT: But if you don't lose a dollar, you don't have standing to raise that issue do you? Maybe they have modified the Health & Safety Code, but if it doesn't hurt Planned Parenthood, then what standing do you have to raise?

DUGGANS: To be perfectly frank with you if this court could hold that this funding scheme complied with the state law, and if this court could hold in some manner binding on the federal government that it complies with the federal statutes in regulations and nothing changes, we're perfectly content. That's not the case, however.

HECHT: If this is a bold statement, you don't object to that? Well you may object to it, but it's up to the legislature to make those...

DUGGANS: If all it is is a bold statement, I have no business standing here. It's not all it is though. It doesn't work. Let me explain why it doesn't work. Title 10, is the federal program that goes directly to family planning. All programs receiving any Title 10 funds, which includes the State of Texas through the Health Dept. are governed by Title 10 regulations regardless of the other funding sources.

GONZALEZ: With regards to all these federal programs, Title 10 included, the State does not have to choose to participate. There's nothing mandatory about the state choosing to participate in the program. If the state does not want the rules or regulations or restrictions in a program they say: We don't want to participate.

DUGGANS: That's absolutely correct. And you forfeit the millions and billions of dollars of medicaid funding..

GONZALEZ: Whether it's wise or unwise the legislature had the power to do that?

DUGGANS: That's correct. The legislature has that authority. Under the total budgeting concept anybody getting Title 10 funds, including the state, is governed by the Title 10 regulations, regardless of the other funding sources. Those regulations prohibit parental consent requirements of this nature. You have to provide the services to whoever wants them on a confidential basis. The department says: Well that's okay. We're going to do that. We're still going to do these services, we are just not going to pay for them with state funds, because we're not going to use any medicaid funds. And medicaid is the only one that involves state matching dollars. It doesn't work.

The State's plan violates Title 19, the medicaid statute; 42 USC 1396(d)(a)(4),

which requires a state medicaid plan to provide family planning services and supplies to everybody who meets the eligibility requirements for medicaid expressly including sexual active minors.

ENOCH: But your situation, your argument is that a rider can't be the mechanism that the state chooses to not fund these matching funds?

DUGGANS: That is one of the arguments, that if you are going make that kind of public policy decision for the state of Texas, and the legislature which admittedly has the power to do, it needs to be done with debate, knowledge of the legislature, and not slid in as a rider to an appropriations bills.

ENOCH: That may be the case, but the provision under the Texas Constitution that that rider would violate is a provision on the unity and subject clause, correct?

DUGGANS: Yes sir.

ENOCH: But if that were to apply to this rider, would it not apply to any rider that eliminated funding for any program that was otherwise mandated by statute, where the legislature may when it appropriates funds fund a particular program, then your view of the _____ subject clause in the constitution would prohibit the legislature by rider from eliminating the funding for that kind of program as being inconsistent with the statute?

DUGGANS: Yes, if you're going to repeal a general statute of the state, you need to do that with a general statute, not with a rider to an appropriations bill.

ENOCH: The lack of appropriations in it is in effect repealing the statute?

DUGGANS: No, that's not what we're dealing with in this rider though. A simple inaction, we're not going to fund it this time, is not the same thing as having a rider that says: Your permission to spend state funds given in the general statutes is hereby withdrawn as to this one item.

HANKINSON: But you do agree that there's no violation of the unity of subject clause of the state constitution when the state restricts the use of funds in a rider?

DUGGANS: I don't think that I can necessarily agree with that statement under this court's jurisprudence. There is no statement in any case from this court to that effect.

HANKINSON: You would agree that there is no affirmative obligation imposed in this rider upon any particular state official?

DUGGANS: Yes.

HANKINSON: It is on its face language that says: State funds cannot be used to fund prescription medications for minors without parental consent?

DUGGANS: And were there not these other general statutes requiring the maximization of federal funding and permitting the expenditures of state funds for that purpose that in and of itself would not violate _____ constitution.

HANKINSON: I understand that. And that's the second aspect of analyzing the rider under the unity of subject provision. As to the first element, the case law indicates that the state can by rider restrict the use of state funds provided that the second step is not violated?

DUGGANS: I don't think I have a quarrel with that proposition.

HECHT: Now supposing the Appropriations Act they simply put in there a line item for prescription drugs to minors without parental consent, zero, what would be wrong with that?

DUGGANS: Under the Texas Constitution, I don't know that there would be anything wrong...well, no, it would still have the same problems because it would still be in effect an amendment of the general statutes under the Human Resources Code, because it has the impact of reducing the federal funding and losing those matching federal funds.

HECHT: But if the State wants to appropriate zero, you say they can't. If they choose to appropriate no money and to lose the federal funds they can do that despite the general statute.

DUGGANS: I don't think they can do that with a rider to an appropriations bill.

HECHT: But they can do it in the bill. They can just say zero. For these program funds zero.

DUGGANS: In the face of the other statutes?

HECHT: Yes.

DUGGANS: I don't think you could. And that is because it is a federal supremacy issue we're talking about. As long as the state elects to participate in these programs it is bound by their rules.

HECHT: But what you're saying is they can't unelect by appropriating zero?

DUGGANS: Right.

HECHT: They have to unelect by repealing...

DUGGANS: If they are going to unelect they need to repeal those statutes, they need to have a public debate, and they need to do it with knowledge of what they're doing.

OWEN: If the TC had not held this rider unconstitutional, how and when would we have known ultimately whether the government would withdraw funds or not?

DUGGANS: That never happened so I cannot give you a specific answer to that question. The way that the courts have dealt with this on all of the cases is they have invalidated the state statutes that are inconsistent with the federal regulations and statutes. They have not said: Ok, we're going to say this is an election not to participate, you're money is cut-off, that has never happened yet, because of the supremacy clause. In the absence of an unequivocal statement by the state that we don't want your money, we don't want your conditions, the courts have construed individual statutes in conflict with the federal regulations as violative of the supremacy clause and, therefore, invalid.

That is what happened in the *T.H. v. Jones* case. It was a Utah case where the state imposed a parental consent for these same family planning dollars. The DC held that that was invalid because it was a new eligibility requirement for medicaid funds other than those set out in the medicaid statute themselves. The statute says: You're going to do it for everybody who wants it, who meets the eligibility for medicaid, and you're going to do it for sexually active minors, and you're going to do it confidentially. The parental consent requirement there was a new requirement engrafted on that federal statute. The courts unanimously have held that a state cannot engraft an eligibility requirement on the federal statute. That is the express holding, the statutory holding of *T.H. v. Jones*, which was expressly affirmed by the US SC. That is what we are trying to do here with this scheme that the state is proposing. They are taking minors out of medicaid for family planning. They are imposing a new eligibility requirement: If you're a minor, with out without parental consent, you're not going to be eligible for medicaid. We're not going to use medicaid funds, because that means we have to match state funds. We're going to use some other pot of money to pay that. They've disenfranchised them from medicaid, that is a new eligibility requirement and that is invalid under the supremacy clause so long as the State of Texas elects to continue receiving these funds.

There was a very similar funding scheme considered in a case that's not in the briefs, *Hearn v. Bay*, 57 Fd.3 906, 10th circuit case from 1995, cert denied by the SC. There, Colorado amended its constitution to prohibit the use of state funds to fund abortions in the limited context of the times that medicaid covers abortions. That restriction was invalidated on the basis that if federal funds are available for a service mandated under medicaid and the state has elected to participate in medicaid, then the state is required to provide the required matching funds for that service. Just as here, a family planning services are mandated by medicaid for minors, federal funds are available, and the state is required to provide its matching funds for those services. That holding is plainly applicable to our case by analogy, and the opinion in that case contains extensive legislative history unmistakably showing the congressional intent that state matching funds needed

to be provided for each medicaid eligible service.

HECHT: So you disagree with the state's contention that no matching funds are implicated under their option B?

DUGGANS: The way they have phrased Option B, no matching funds are implicated. I agree with that. The way they have phrased Option B, it is unconstitutional under the supremacy clause.

HECHT: So again it depends on Option B? If Option B were effective it would not implicate matching funds?

DUGGANS: Yes, and there are other reasons why Option B doesn't work. We have to go to medicaid first for medical eligible clients. Our contracts require that, the Title 10 and Title 20 regulations require that. If it's medicaid eligible that is the primary funding source.

This statute violates the federal statutes, the regulations under those federal statutes, under which Texas receives these huge sums of federal money. The legislative history on Rider 14, such as it is, it is in the record, is clear that the legislature did not intend to impact the federal funds.

PHILLIPS: These other cases you refer to like *Kerr*, did they come up before there was actually a cut-off of federal funds?

DUGGANS: Yes.

PHILLIPS: And in any of those situations had the state attempted to provide another mechanism for funneling money to the affected claimants?

DUGGANS: I don't believe so. Let me go back and tell you where we were when we filed this lawsuit. When we filed this lawsuit, we had the position of the Dept. of Health in _____, in evidence in this case, Exhibit 2, where they said to us: We are going to apply Rider 14 across-the-board. You will get no funds for prescription services to minors unless you can prove parental consent. We had as Exhibit 3, the letter from the regional administrator of the federal agency saying: That results in no federal funds. Now, it wasn't the only evidence in the TC that they were going to do this option B, they also had an Option A, which was as they had told us in their letter applying it across-the-board. It is only in their brief in this court for the first time that they have ever committed to this Option B. It doesn't work for the reasons that I have explained. It still violates the federal statutes, it still violates the Texas Constitution. But regardless of that, they cannot divest a court of jurisdiction, they cannot divest us of standing by conceding a legal issue in the SC. Clearly, we had standing in the DC and just as clearly, we have standing here for our funding is still in jeopardy.

ENOCH: The cases where it's determined that the state cannot make a different eligibility requirement. If I understand what you're saying, the effect of Rider 14 is to simply say when a child shows up who's eligible for medicaid dollars, that the state has in effect made them ineligible for medicaid dollars because they are a minor and what they're asking for is a prescription drug which would otherwise require permission of their parent. And you're saying the state can't create an additional eligibility requirement for that child who would otherwise be eligible for medicaid services, that's your point?

DUGGANS: I think that's correct.

ENOCH: It seems to me one of the positions here is, if that makes the state ineligible for medicaid dollars from the federal government, what difference does it make to the court whether the court requires the state to eliminate that criteria or the court simply says: Well, the state is free to make that choice fully aware of the risk that it will lose the medicaid dollars, and the court allow the legislature to live with its decision, and let them fix it if they want medicaid dollars?

DUGGANS: If you were faced with a statute, a general statute passed after debate that said: The legislature hereby determines we're not going to participate in these federal programs, then perhaps you would be faced with the situation you addressed. What you are faced in this case under the facts of this case though is a stipulation that Texas has elected and continues to elect to participate in these programs statutes in the Human Resource Code that direct the department to maximize those federal funds and legislative history of Rider 14 indicating it was not intended to impact the federal funding. So for the court to say: "Well you should live with the consequence of your foolish choice and lose the funding" flies in the face of the evidence, the legislative history and the general statutes of the State.

ENOCH: But the only way the court gets to that is to determine if this rider somehow is violative of the constitution. Somehow the legislature didn't have the authority to author this rider. Not that it conflicts with our statutes, but it didn't have the authority to author this rider.

DUGGANS: Under either the state or the federal constitution, and so long as the state has elected to participate in these programs it has not that authority under the federal constitution. And so long as this court's jurisprudence under the unity and subject clause remains valid it has not that authority by a rider to an appropriations bill.

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REBUTTAL

WILBORN: I believe based on counsel's comments, he has almost admitted that they don't have standing in this case. He had a conversation with you all about pecuniary loss, there is simply no evidence that Planned Parenthood is going to sustain any pecuniary damage as an effect of Rider 14.

HANKINSON: Do you agree with him though that if there were such a lawsuit would flow from the contract that Planned Parenthood has with the State and the federal government?

WILBORN: No, I don't. And even if he were correct, then that sounds like a breach of contract case to me, which was not filed here.

HANKINSON: Judge McCowan characterized I think in his opinion, damages being a loss of federal assistance, and I know you disagree with that. Your opponent indicated that there are contracts in the record which support the fact that there would be a pecuniary loss; is that the case?

WILBORN: No, there are contracts in the record that show that Planned Parenthood receives these federal funds. It's a contract that says they are entitled to the reimbursements from medicaid and these other dollars. But because there's no evidence in the record of any loss that's going to be sustained, there's a lot of talk and speculation about how much it would cost to implement rider 14, and there's speculation that we may indeed at sometime in the future lose some federal funding, it's all speculative and contingent and there's nothing in the record that supports that.

HANKINSON: I understand that. If we assume there's a loss of federal funding, then does Planned Parenthood have standing as a result of this contract that it has with the state or the federal government?

WILBORN: Perhaps, but again...

HANKINSON: That is something that would have to happen in the future?

WILBORN: Right, exactly.

BAKER: What about Ex. 2, that counsel referred to, the letter, what's your response to that?

WILBORN: The letter says that the Health Dept. has contacted the federal government, we are currently awaiting a response to his inquiry. The department's position will be formulated after we see the response from a grantor agency. So again, this just shows that Planned Parenthood acted prematurely in bringing a lawsuit prior to receiving the response.

SPECTOR: I thought there was a letter saying that they were going to enforce the rider?

WILBORN: It says: It is our opinion that Rider 14 would apply to all federal funds. The letter in no way states how Rider 14 is going to be applied by the Dept. of Health. This letter is written July 15, 1997, two months prior to the effective date of the Rider.

ENOCH: How do you respond to Mr. Duggan's argument that the state says this is simply a rider, which takes away funding. And he says: But actually it is an eligibility requirement which cases around the country have said the state cannot impose. In other words, when a child who's a minor comes up they must apply through medicaid if they are eligible for it first and all the state has done is simply added not that medicaid doesn't apply, but that they've had this additional eligibility requirement of parental permission, and the courts have fairly uniformly said that states cannot impose this additional criteria?

WILBORN: I have two responses. First, what the cases uniformly hold is that the state cannot withhold medical assistance. Again, medical assistance will not be withheld. Secondly, there is no requirement that medicaid money be spent on prescription drugs for minors. I think that is very significant here. The US SC in 1977 in *Beal v. Doe* said that medicaid does not require that states provide funding for all medical treatment falling within the five categories of treatment that medicaid provides.

ENOCH: But the state hasn't refused to provide medicaid medicine for children?

WILBORN: That's right. It's only refusing to use medicaid funding to reimburse them.

ENOCH: No, it only says: We won't have medicaid funding to reimburse children for medicine who haven't gotten their parent's permission.

WILBORN: Right. That's true.

ENOCH: So they are providing prescription service to children who have parent's permission?

WILBORN: No. That's actually not what TDH has intended in this funding scheme under Option B. No medicaid fund is going to be used to give prescription drugs to any minor.

ENOCH: So to avoid the problem the rider creates, the department has just decided not to use medicaid funds at all for services for the children?

WILBORN: That is correct.

ENOCH: But that's not really what the rider does?

WILBORN: The rider says: No state funds shall be used.

ENOCH: So the only way this becomes not a problem is by the department just deciding on its own not to use medicaid funds even though the legislature has appropriated funds for that purpose?

