

The following brief was joined by James E. Andrews, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.). It was filed in the Supreme Court of Kentucky on April 15, 1996.

SUPREME COURT OF KENTUCKY
NO. 95-SC-783-TG

MARY DOE, et al.

PLAINTIFFS-APPELLANTS

v

On Transfer from
Court of Appeals of Appeal from
Jefferson Circuit Court (No. 94-CI-02183)

MASTEN CHILDERS II,

DEFENDANTS-APPELLEES

Secretary, Kentucky Cabinet
for Human Resources, et al.

BRIEF FOR AMICI

JAMES E. ANDREWS, AS STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.); BOWLING GREEN UNITARIAN UNIVERSALIST FELLOWSHIP; CATHOLICS FOR A FREE CHOICE; CENTRAL PRESBYTERIAN CHURCH, PEACE AND JUSTICE MINISTRY UNIT, LOUISVILLE; THE DEPARTMENT OF HUMAN CONCERNS OF THE EPISCOPAL DIOCESE OF KENTUCKY; EPISCOPAL WOMEN'S CAUCUS, LOUISVILLE; FIRST UNITARIAN CHURCH OF LOUISVILLE; FRIENDS MEETING OF LOUISVILLE (QUAKERS); KENTUCKY METHODISTS FOR CHOICE; LORETTO WOMEN'S NETWORK; NATIONAL COUNCIL OF JEWISH WOMEN - LOUISVILLE SECTION; PAFF HAUS: A COMMUNITY MEETING HOUSE; PLYMOUTH CONGREGATIONAL UNITED CHURCH OF CHRIST, LOUISVILLE; THE TEMPLE, CONGREGATION ADATH ISRAEL BRITH SHOLOM, LOUISVILLE; UNITARIAN UNIVERSALIST CHURCH OF HOPKINSVILLE; ZION UNITED CHURCH OF CHRIST, HENDERSON; 24 CLERGY MEMBERS IN SUPPORT OF APPELLANTS

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INTRODUCTION

This Amicus Curiae Brief is respectfully submitted on behalf of a diverse group of religious organizations and clergy whose religious teachings permit, counsel or even mandate abortion in certain circumstances. While some religions view abortion as categorically immoral, others believe abortion is a religiously and morally viable option in certain circumstances. Given the divergence of religious opinion within traditional Judeo-Christian

theology of the advisability and permissibility of abortion, Amici believe governmental neutrality on the abortion issue is essential. At a time when the media portrays the abortion issue as a battle between religion on the one hand and secularism on the other, it is important to realize that no monolithic religious teaching exists regarding abortion. The question of whether abortion is wrong or right in a particular circumstance varies from religion to religion, as it involves competing claims based on widely divergent, but thoughtfully held, moral principles and religious beliefs. Although this appeal does not directly involve a freedom of religion claim under the Kentucky Constitution, Amici urge this Court to consider this appeal in the context of the Kentucky Constitution's strong and explicit guarantee of freedom of religion and conscience.

The Bill of Rights of the Kentucky Constitution provides a clear and specific guarantee of religious freedom, guaranteeing individuals the right to follow the precepts of their own moral conscience. This constitutional right to religious freedom requires that the government treat all religious groups in an even handed manner. The commonwealth can not adopt programs that favor a particular religious viewpoint -- including a particular religious view on the question of abortion.

The Kentucky legislature has violated women's constitutional guarantee to freedom of religion by enacting a Medicaid funding scheme which provides that eligible women may obtain Medicaid benefits for all pregnancy-related services except for abortion and by prohibiting the performance of all but life saving abortions in public medical facilities. In effect, income eligible women whose religious beliefs or principles of conscience require them to carry their pregnancies to term may act upon those convictions with full financial assistance from the commonwealth, however, equally income-eligible women who need to seek medically necessary abortions, are discriminated against. These women are denied equal access to public funds because their religious and moral precepts permit, advise or in some cases even require abortion in certain circumstances. For women to freely exercise their constitutionally protected religious and moral beliefs, they must be able to make their reproductive choices without governmental interference, burdens or coercion. The Kentucky legislature must make public medical funding equally available to all low income pregnant women regardless of their specific reproductive decisions.

ARGUMENT

I. The Question of Whether Abortion is Morally Right or Wrong in a Particular Circumstance Necessarily Involves Competing Claims Based on Widely Divergent Moral and Religious Beliefs.

Abortion implicates questions of the value of life and the meaning of moral personhood that are at the theological core of many religions. Religious teachings on abortion vary among different religious groups. Although some faiths consider abortion a sin under any circumstances, a variety of religious faiths permit, counsel or even mandate abortion in

certain circumstances. The specific views of all the religious groups in Kentucky obviously can not be detailed here. However, a brief summary of the relevant doctrines of three major groups, Jewish, Protestant, and Roman Catholic, demonstrates that there is no modern uniformity of moral opinion in Judeo-Christian thought regarding the permissibility or advisability of abortion.

A. Under Jewish Law, the Life and Health of a Pregnant Woman Take Precedence Over Those of Her Fetus.

The Jewish religion encompasses several traditions including Orthodox, Conservative, Reform, and Reconstructionist. Even the most traditional Jews, the Orthodox, believe that a Jewish woman whose life is threatened by her pregnancy has not only permission but an obligation to abort the fetus. See Rabbi Hayim Halevy Donin, *To Be a Jew: A Guide to Jewish Observance in Contemporary Life Selected and Compiled from the Shulhan Arukh and Responsa Literature and Providing a Rationale for the Laws and Traditions* 140-41 (1972). A more recent consideration from the extremely orthodox perspective which views abortion as a permissible option only in the most limited context concurs that the life and health of the woman outweighs other concerns. *Medicine and Jewish Law* 118 (F. Rosner, M.D., ed. 1990). The religious principle that underlies this mandate is that existing life takes precedence over potential life. Under Talmudic law, the primary basis for Orthodox practice, the fetus is deemed to be part of the woman, not an independent entity, and thus lacking in juridical significance. Until the head or greater part emerges during childbirth, the fetus is thus not regarded as a person. See Mishnah, *Oholot* 7.6. Consequently, abortion is permissible not only when the woman's life is at stake, but also when it would save her pain. Pain, in this context, includes mental anguish, mental or physical suffering, or shame. The woman's welfare, as she understands it, is primary.

Rabbi Ben Zion Uziel, former Chief Rabbi of Israel, summarized the manner in which these principles are applied in the rabbinical Responsa, as follows:

It is clear that abortion is not permitted without reason. That would be destructive and frustrative of the possibility of life. But for a reason, even if it is a slim reason ("ta'am kalush"), such as to prevent her nonphysical suffering or disgrace ("nivvul"), then we have precedent and authority to permit it.

Resp. Mishp'tei Uziel, Vol. III, H.M., No. 47 (1940).

Jews who observe traditional law less strictly take positions similar to the Orthodox view with respect to abortion. In the official statement of the United Synagogue of America, the Conservative movement proclaimed:

Jewish tradition cherishes the sanctity of life, even the potential of life which a pregnant woman carries within her. Under certain unfortunate circumstances, such as when the life or health of the mother are in jeopardy, Judaism sanctions, even mandates, abortion.

Therefore, under special circumstances, Judaism chooses and requires abortion as an act which affirms and protects the life, well being and health of the mother.

Biennial Convention (1975, reaffirmed 1989), reprinted in Religious Coalition for Abortion Rights, *We Affirm -- National Religious Organizations Statements on Abortion Rights* 28 (1990) (hereinafter "We Affirm"); see also Central Conference of American Rabbis "Statement on Abortion," Annual Convention (of the Reform movement, 1980), reprinted in *We Affirm*, supra, at 10; Federation of Reconstructionist Congregations and Havurot, *Statement on Abortion* (1981), reprinted in *We Affirm*, supra, at 13.

To deny a Jewish woman and her family the ability to obtain a safe, legal abortion when it is permitted or mandated by Jewish traditions, is to deprive Jews of their fundamental right of religious freedom. Kentucky's Medicaid funding scheme and public hospital ban do exactly that: they impermissibly infringe upon Jewish women's constitutional right of religious freedom by not allowing income-qualified women equal access to health care services approved by their religious and moral beliefs.

B. Many Protestant Denominations Hold That Abortion is an Option for Women Who Choose It as an Act of Conscience.

Many Protestant denominations teach that individuals are free before God to act according to the dictates of their conscience. That means individuals must decide consciously and responsibly upon their proper course of action, in consideration of the moral imperatives that they recognize, the values involved in the situation, and the likely consequences of the available choices.

The Protestant principle of conscientious decision-making applies when a woman is considering an abortion. In this connection, the Episcopal Church has stated:

In those cases where an abortion is being considered, members of this Church are urged to seek the dictates of their conscience in prayer, to seek the advice and counsel for members of the Christian community, and, where appropriate, the sacramental life for this Church.

General Convention (1988), reprinted in *We Affirm*, supra, at 12.

Similarly, the United Church of Christ instructs that abortion is a theologically appropriate decision when an unplanned or unwanted pregnancy threatens a woman's physical, emotional, or spiritual well-being, and emphasizes that each woman must make the decision with regard for her own unique circumstances. See United Church of Christ, General Synod, 16, *Sexuality and Abortion: A Faithful Response* (1987), reprinted in *We Affirm*, supra, at 25.

The Presbyterian Church (U.S.A.) General Assembly has recognized both the central role of a woman's faith in the abortion decision and the needs of indigent women, believing such women should have the same opportunity to exercise their moral choices as women with more economic means. Although the General Assembly states abortion should not be used as a method of birth control, the abortion decision must remain with the individual, must be made on the basis of conscience and personal religious principles in consultation with others (as appropriate) and must remain free from governmental interference.

We affirm the ability and responsibility of women, guided by the Scriptures and the Holy Spirit, in the context of their communities of faith, to make good moral choices in regard to problem pregnancies.

...

Courts and legislatures have not always well represented the interests of the economically disadvantaged, the undereducated, and women.

No law or administrative decision should limit or prohibit public funding for necessary abortions for the socially and economically disadvantaged.

The 204th General Assembly of the Presbyterian Church (U.S.A.) Problem Pregnancies and Abortion 10-11, 14, 15 (1992).

Respect for the innate value of a woman's life also prompted the General Assembly of the Unitarian Universalist Association to endorse the right of reproductive choice:

Unitarian Universalists believe that the inherent worth and dignity of every person, the right of individual conscience, and respect for human life are inalienable rights due every person; and that the personal right to choose in regard to contraception and abortion is an important aspect of these rights

Unitarian Universalist Association, *Right to Choose* (1963, reaffirmed 1968, 1973, 1975, 1977, 1978, 1980, 1987), reprinted in *We Affirm*, supra, at 23.

Other Protestant groups also recognize that circumstances may warrant an abortion

despite the recognition of and concern for the value of the fetus's life. As the United Methodist Church has stated:

Our belief in the sanctity of unborn human life makes us reluctant to approve abortion. But we are equally bound to respect the sacredness of life and well-being of the mother for whom devastating damage may result from an unacceptable pregnancy.... Therefore, a decision concerning abortion should be made only after thoughtful and prayerful consideration by the parties involved, with medical, pastoral, and other appropriate counsel.

General Conference (1988), reprinted in *We Affirm*, supra, at 27.

As this brief review reveals, many Protestant denominations, like the Jewish traditions, recognize that abortion may in certain circumstances be a moral necessity. To deny a Protestant or Jewish woman the right to choose abortion, when that choice is dictated by her conscience or her religious tradition, is thus to deny her basic religious freedom.

C. Official Roman Catholic Doctrine Condemns Abortion,
However, the Issue Remains Subject to Theological Debate.

The Roman Catholic Church is widely known for its absolute prohibition of abortion. As recently as March, 1995, Pope John Paul II proclaimed, "since the bishops of the church have shown unanimous agreement concerning this doctrine -- I declare that direct abortion, that is, abortion willed as an end or as a means, always constitutes a grave moral disorder." *Encyclical Evangelium Vitae*, Para. 62 (March 1995).

At the core of the belief system of Roman Catholics is the tenet that God grants each person an immortal soul. Before there is a soul there is no person. Tauer, *The Tradition of Probabilism and the Moral Status of the Human Embryo in Abortion and Catholicism: The American Debate* 57 (Jung and Shannon eds. 1988). The Church's current position grows out of centuries of debate as to when the fetus is infused with an immortal soul and thus qualifies as an individual person. See John Connery, *Abortion: The Development of the Roman Catholic Perspective* 306-08 (1977).

The decentralized nature of the Christian church during its first six centuries allowed controversies regarding abortion to flourish. See Jane Hurst, *History of Abortion in the Catholic Church*, 12 *Conscience* 1, 5 (1991). The mainstream view of the early church represented by St. Augustine, argued that abortion was not homicide in the earliest stages of pregnancy, because the fetus was not fully formed and thus not an individual human being. *Id.* (citing St. Augustine, *Enchiridion*). The minority position held that hominization -- the point at which a developing embryo becomes a human being -- occurred immediately upon

conception and that abortion was homicide at any point. See *Id.* (citing Tertullian, *Anologetics* 9 at 8).

In 1140, Gratian compiled the first codification of Catholic canon law. In it, he concluded that "abortion was homicide only when the fetus was formed, implying a theory of delayed hominization." See Hurst, *supra*, at 8 (quoting *The Morality of Abortion: Legal and Historical Perspectives* 20 (John Noonan ed. 1970)). That doctrine, as later explicated by St. Thomas Aquinas, was adopted by the Council of Vienne in 1312. See *id.* at 9.

The pre-modern period of the Catholic Church, from 1500 through 1700, began the trend toward the current view of immediate hominization. By the end of that period, delayed ensoulment was still the dominant view, but the time of ensoulment was in doubt. See Hurst, *supra*, at 8-10. Abortion was discouraged, however, to avoid inadvertent murder in case ensoulment had occurred.

The modern position is expressed in the Declaration on Abortion issued by the Sacred Congregation for the Doctrine of Faith in 1974. The declaration expressly leaves aside the question of when the spiritual soul is infused but bans abortion on the grounds that "even if a doubt existed concerning whether the fruit of conception is already a human person, it is objectively a grave sin to dare to risk murder." See Hurst, *supra*, at 25 (quoting the Declaration on Abortion). On this ground, the Catholic Church now condemns direct abortion under any circumstances.

Although the Pope has unequivocally declared abortion morally wrong in every circumstance, the debate on ensoulment and the concomitant controversy concerning the permissibility of abortion continues within the Catholic Church. Catholic theologians who believe that the soul is not infused in the earliest stages of pregnancy continue to argue that a pregnancy may be terminated during that time, provided that there are serious reasons for the abortion. See Joseph Doncell, S.J., *A Liberal Catholic's View*, in *Abortion and Catholicism: The American Debate* 48 (Jung & Shannon eds., 1980). Other scholars stress that the modern position on abortion is not infallible and that Catholics of conscience must continue to question the teaching of the Church. See Hurst, *supra*, at 14-16; Richard P. McBrien, *Catholicism* 1004 (1980).

Thus even within the Roman Catholic church, where the official tenet is that abortion is categorically immoral, equally devout and thoughtful persons hold differing but sincere, theologically based views on abortion. For all Catholics, however, abortion is necessarily a matter of deep religious concern. The diversity of religious thought on the abortion issue underscores the importance of the commonwealth's neutrality and the inappropriateness of Kentucky's Medicaid funding scheme and public hospital ban.

II. Kentucky's Medical Funding Scheme and Public Hospital Ban are Unconstitutional Because They Codify One Religious Tenet While Impermissibly

Burdening Womens' Freedom of Religion.

A. The Kentucky Constitution Guarantees and Protects the Freedom of Religion and Conscience of All People.

The Kentucky Courts have clearly and consistently recognized in numerous cases that the Kentucky Constitution's specific and detailed Bill of Rights provides greater protection of individual rights than the more limited protections in the federal constitution. *Com. v. Wasson*, Ky., 842 S.W.2d 487, 497 (1992) (citations omitted).

[The issue] is not whether the challenged statute passes muster under the federal constitution as interpreted by the United States Supreme Court, but whether it satisfies the much more detailed and explicit proscriptions of the Kentucky Constitution.

Id. (citing *Fannin v. Williams*, Ky., 655 S.W.2d 480, 483 (1983)).

The Bill of Rights of the Kentucky Constitution provides the following explicit guarantee of religious freedom:

§5. Right of Religious freedom. No preference shall ever be given by law to any religious sect, society, or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; ... and the civil rights, privileges and capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience.

Kentucky Constitution, Section 5.

The Kentucky Courts have looked to the debates held during the adoption of the present Constitution to explain and guide their interpretation. *Kentucky State Bd. Edu. v. Rudesil*, Ky., 589 S.W.2d 877, 879-80 (1979).

The drafters of the Bill of Rights believed that protecting freedom of conscience was of paramount importance, with the unequivocal purpose being to "declare the almost sacred principles of civil and religious liberty." *Debates of the 1890-91 Constitutional Convention*, at 645 (hereinafter "1890-91 Constitutional Debates") As one delegate stated during the 1890-91 Constitutional debates:

I would be glad to see this convention become known as having been inspired by the love of liberty and absolute freedom of conscience to all men.... I would be glad to see this convention, representing the sovereignty of Kentucky as it does, declare that there should be absolute freedom of conscience whenever the occasion comes forth, that all its citizens of today and of the hereafter will feel that they are free to worship God as they please and that they are preserved from every effort of the lawmakers to force their wills in any way different from that in which their conscience would lead them.

1890-91 Constitutional Debates at 847. As delegate Rhodes succinctly expressed it, "we maintain that we must respect the conscientious convictions of the people." *Id.* at 848.

The Kentucky courts have consistently and emphatically honored this right of freedom of conscience and prevented the state legislature from infringing upon this absolute guarantee unless such infringement is absolutely necessary to protect the welfare of Kentucky's citizens. "[I]t is not within the competency of a free government to invade the sanctity of the absolute rights of the citizen any further than the direct protection of society requires." *Commonwealth v. Campbell*, 133 Ky. 50, 117 S.W.2d 383, 385 (1909).

No legislative body has the constitutional authority to enact, and no court has the constitutional power to enforce, a law to control or to interfere with the right of conscience.

Commonwealth v. Phoenix Amusement Company, 241 Ky. 678, 44 S.W.2d 830, 834 (1931). Under Kentucky's tradition of protecting the freedom of conscience of all people, women of all faiths should be equally free to act upon their religious convictions in deciding whether or not to carry a pregnancy to term. The commonwealth should not attempt to impose the moral beliefs of a few on all poor women by the coercive effect of its reproductive funding scheme.

Under our institutions there is no room for that inquisitorial and protective spirit which seeks to regulate the conduct of men ... and to make them conform to a standard not of their own choosing but the choosing of the lawgiver.

Commonwealth v. Campbell, 117 S.W.2d at 387.

B. Kentucky's Guarantee of Religious Freedom Requires the Commonwealth to Treat All Religions in an Even-Handed Manner.

It is a fundamental precept of the Kentucky Constitution that where competing

religious or moral beliefs are concerned, the commonwealth must be rigorously neutral. Kentucky Constitution §5. The commonwealth must not only ensure that each individual is free to act according to the dictates of his or her own conscience, but it must not use its power to further or enshrine any one religious view. Any regulation of religious freedom must be by "general and non-discriminatory" legislation. *Lawson v. Commonwealth*, 291 Ky. 437, 164 S.W.2d 972, 973 (1942); see also *Rawlings v. Butler*, Ky. 290 S.W.2d 801, 803 (1956) (no one denomination is to be favored at the expense of the rest). Similarly, the Kentucky legislature may not grant benefits or impose burdens in such a way that the it, in effect, becomes entangled in religious affairs. *Cabinet for Human Resources v. Prov. Convent*, Ky. App., 701 S.W.2d 137, 139 (1985).

Nor can the Kentucky legislature limit freedom of conscience indirectly where it could not do so directly. "In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Lawson*, 164 S.W.2d at 973.

In appraising the validity of the statute we must look through the form of the statute to the substance of what it does. The courts may not countenance an evasion or even an unintentional avoidance of our fundamental law.

Fannin v. Williams, Ky., 655 S.W.2d 480, 484 (1983) (citing *Commonwealth v. O'Harrah*, Ky., 262 S.W.2d 385, 389 (1953)).

As explained more fully in the Appellants Brief, the Commonwealth of Kentucky believes it is the duty and responsibility of state government to provide medical assistance to those citizens who would otherwise not be able to obtain necessary medical care. KRS 205.010 et seq. Such provided medical services include pregnancy-related services such as prenatal care, delivery and postpartum care. KRS 205.592, 907 KAR 1:640. Consequently, if a pregnant woman decides to carry her pregnancy to term, the Commonwealth provides full medical support. However, the legislature also enacted an impermissible restriction: if a woman decides that it would not be in her best interest to continue the pregnancy, she is denied medical assistance or even access to public medical facilities. In effect, the Kentucky statutory scheme affirmatively rescinds the religious freedom of some women, such as Jewish women, whose religion requires abortion in certain circumstances. See Argument at 4, supra.

While women whose religion prohibits abortion may freely act in compliance with their faith, other women can not freely make religious or conscientious decisions to terminate their pregnancies. This statutory abortion exclusion violates Kentucky's constitutional guarantee of religious tolerance by providing financial assistance to income-eligible women whose religion opposes abortion, while denying the same funding to equally qualified women whose religion authorizes abortion and who must seek to terminate their pregnancies for health reasons. The commonwealth ignores the obstacles it poses to those women. The legislative adoption of one competing religious viewpoint over others which are equally sincere and equally rooted in serious theological tradition, violates the Kentucky Constitution's mandate

of neutrality in religious and moral controversies.

CONCLUSION

Kentucky's protection of religious freedom has long been cherished by the people of this state. While some religions view abortion as a sin under any circumstance, a variety of religious faiths permit, counsel and even mandate abortion in certain circumstances. No single religious teaching should be favored by the state. The Kentucky Medicaid funding scheme and public hospital ban are inconsistent with Kentucky's tradition of freedom of conscience and governmental neutrality toward religion. Amici now look to this Court to ensure that women of all religions fare equally under the law and respectfully request that the challenged statutes be declared unconstitutional.

Respectfully submitted,

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