

# The Burger Court Opinion Writing Database

*Maher v. Roe*

432 U.S. 464 (1977)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



To: Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Powell  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens

From: The Chief Justice

Circulated: MAY 11 1977

Recirculated: \_\_\_\_\_

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 75-1440

Edward W. Maher, Commissioner of Social Services of Connecticut, Appellant, v. Susan Roe et al.	}	On Appeal from the United States District Court for the District of Connecticut.
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[May —, 1977]

MR. CHIEF JUSTICE BURGER, concurring in the judgment.

I do not read any decision of this Court as requiring a State to finance a nontherapeutic abortion. The Court's holdings in *Roe* and *Doe, supra*, simply require that a State not create an absolute barrier to a woman's decision to have an abortion. These precedents do not require that the State assist her in procuring it.

From time to time, every state legislature determines that, as a matter of sound public policy, the government ought to provide certain health and social services to its citizens. Encouragement of childbirth and child care is not a novel undertaking in this regard. Various governments, both in this country and in others, have made such a determination for centuries. In recent times, they have similarly provided educational services. The decision to provide any one of these services—or not to provide them—is not required by the Federal Constitution. Nor does the providing of a particular service require, as a matter of federal constitutional law, the provision of another.

Here, the State of Connecticut has determined that it will finance certain childbirth expenses. That legislative determination places no state-created barrier to a woman's choice to procure an abortion, and it does not require the State to provide it. Accordingly, I concur in the judgment.



Substantive n stylistic  
changes on all pages

To: The Chief Justice  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Brennan  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Burger

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-1440

Edward W. Maher, Commissioner  
of Social Services of Connecticut,  
Appellant,  
v.  
Susan Roe et al.

On Appeal from the  
United States District  
Court for the District  
of Connecticut.

[May —, 1977]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN join, dissenting.

The District Court held:

"When Connecticut refuses to fund elective abortions while funding therapeutic abortions and prenatal and postnatal care, it weights the choice of the pregnant mother against choosing to exercise her constitutionally protected right to an elective abortion. . . . Her choice is affected not simply by the absence of payment for the abortion, but by the availability of public funds for childbirth if she chooses not to have the abortion. When the state thus infringes upon a fundamental interest, it must assert a compelling state interest." 408 F. Supp. 660, 663-664 (1975).

This Court reverses on the ground that "the District Court misconceived the nature and scope of the fundamental right recognized in *Roe v. Wade*, 410 U. S. 113 (1973)," *ante*, at 7, and therefore that Connecticut was not required to meet the "compelling interest" test to justify its discrimination against elective abortion but only "the less demanding test of rationality that applies in the absence of . . . the infringement of a fundamental right," *ante*, at 13. This holding, the Court insists, "places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion"; she is still at liberty

6/14/77

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

April 28, 1977

75-1440, Maher v. Roe

Dear Lewis,

Upon the understanding that you are willing to make the minor verbal change on page 6 that we discussed, I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

75-1440

Supreme Court of the United States

Memorandum

-----, 19-----

holding to acquiesce in it  
unless Bill Rehnquist feels  
differently and can come  
up with another alternative  
satisfactory to you.

Many thanks for giving  
me a "sneak preview" of  
this.

P.S.,

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

April 29, 1977

Re: No. 75-1440 - Maher v. Roe

Dear Lewis:

I think I shall wait for the  
dissent in this case before finally  
coming to rest.

Sincerely,



Mr. Justice Powell

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 1, 1977

Re: No. 75-1440 — Edward W. Maher, Commissioner  
of Social Services of Connecticut v.  
Susan Roe, et al.

---

Dear Lewis:

Please join me in your circulation of  
May 6, 1977.

Sincerely,



Mr. Justice Powell

Copies to the Conference



circulated?

JAN 10 1977

No. 75-1440, Maher v. Roe  
No. 75-554, Beal v. Doe  
No. 75-442, Poelker v. Doe

MR. JUSTICE MARSHALL, dissenting.

It is all too obvious that the governmental actions in these cases, ostensibly taken to "encourage" women to carry pregnancies to term, are in reality intended to impose a moral viewpoint that no state may constitutionally enforce. Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973). Since efforts to overturn those decisions have been unsuccessful, the opponents of abortion have attempted every imaginable means to circumvent the commands of the Constitution and impose their moral choices upon the rest of society. See, e.g., Planned Parenthood of Missouri v. Danforth, Singleton v. Wulff, 428 U.S. 106 (1976); Bellotti v. Baird, 428 U.S. 52 (1976); 428 U.S. 132 (1976). The present cases involve the most vicious attacks yet devised. The impact of the regulations here falls tragically upon those among us least able to help or defend themselves. As the Court well knows, these regulations inevitably

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 31, 1977

Re: No. 75-1440, Maher v. Roe

Dear Bill:

Please join me.

Sincerely,



T.M.

Mr. Justice Brennan

cc: The Conference

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: \_\_\_\_\_

Recirculated: JUN 10 1977

No. 75-1440, Maher v. Roe  
No. 75-554, Beal v. Doe  
No. 75-442, Poelker v. Doe

MR. JUSTICE MARSHALL, dissenting.

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 1, 1977

Re: No. 75-1440 - Maher v. Roe

Dear Bill:

Please join me in your dissent.

Sincerely,

*HAB*

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

April 15, 1977

No. 75-1440 Maher v. Roe

MEMORANDUM TO THE CONFERENCE:

I circulate herewith a first draft of a proposed opinion for the Court in the above case.

This case addresses the constitutional issue. I also am writing Beal v. Doe that involves the statutory question. Normally, I would circulate both opinions at the same time, but it will be perhaps another week before I have a first printed draft of Beal.

*L.F.P.*  
L.F.P., Jr.

SS

To: The Chief Justice  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: APR 15 1977

Recirculated: \_\_\_\_\_

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 75-1440

Edward W. Maher, Commissioner of Social Services of Connecticut, Appellant, v. Susan Roe et al.	}	On Appeal from the United States District Court for the District of Connecticut.
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[April —, 1977]

MR. JUSTICE POWELL delivered the opinion of the Court.

In *Beal v. Doe*, ante, at —, we hold today that Title XIX of the Social Security Act does not require the funding of nontherapeutic abortions as a condition of participation in the joint federal-state medicaid program established by that statute. In this case, as a result of our decision in *Beal*, we must decide whether the Constitution requires a participating State to pay for nontherapeutic abortions when it pays for childbirth.

### I

A regulation of the Connecticut Welfare Department limits state medicaid benefits for first trimester abortions<sup>1</sup> to those that are "medically necessary," a term defined to include psychiatric necessity. Connecticut Welfare Department, Public Assistance Program Manual, Vol. 3, c. III, § 275.<sup>2</sup> Connecti-

<sup>1</sup> The procedures governing abortions beyond the first trimester are not challenged here.

<sup>2</sup> Section 275 provides in relevant part:

"The Department makes payment for abortion services under the Medical Assistance (Title XIX) Program when the following conditions are met:

"1. In the opinion of the attending physician the abortion is medi-

pp. 5, 6, 8, 9, 10, 12, 13

To: The Chief Justice  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: \_\_\_\_\_

Recirculated: APR 28 1977

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 75-1440

Edward W. Maher, Commissioner of Social Services of Connecticut, Appellant, v. Susan Roe et al.	}	On Appeal from the United States District Court for the District of Connecticut.
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[April —, 1977]

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2, 4, 6, 14

To: The Chief Justice  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: \_\_\_\_\_

Recirculated: MAY 6 1977

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 75-1440

Edward W. Maher, Commissioner  
 of Social Services of Connecticut,  
 Appellant,  
 v.  
 Susan Roe et al.

On Appeal from the  
 United States District  
 Court for the District  
 of Connecticut.

[April —, 1977]

MR. JUSTICE POWELL delivered the opinion of the Court.

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✓ Stylistic Changes Throughout.

p. 13

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
✓ Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: \_\_\_\_\_

Recirculated: JUN 2 1977

4th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 75-1440

Edward W. Maher, Commissioner  
of Social Services of Connecticut,  
Appellant,

v.

Susan Roe et al.

On Appeal from the  
United States District  
Court for the District  
of Connecticut.

[June —, 1977]

MR. JUSTICE POWELL delivered the opinion of the Court.

In *Beal v. Doe*, ante, at —, we hold today that Title XIX of the Social Security Act does not require the funding of nontherapeutic abortions as a condition of participation in the joint federal-state medicaid program established by that statute. In this case, as a result of our decision in *Beal*, we must decide whether the Constitution requires a participating State to pay for nontherapeutic abortions when it pays for childbirth.

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 13, 1977

75-1440 Maher v. Roe (and associated cases)

Dear Bill:

In view of your extensive changes circulating today, and other opinions that are now engaging my full attention, it may be a couple of days before I decide whether to make any response.

I, therefore, see little possibility of bringing these cases down on Thursday.

Sincerely,

*Lewis*

Mr. Justice Brennan

Copies to the Conference

LFP/lab

13, 15

To: The Chief Justice  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 — Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: \_\_\_\_\_

Recirculated: **JUN 17 1977**

5th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 75-1440

Edward W. Maher, Commissioner  
 of Social Services of Connecticut,  
 Appellant,  
 v.  
 Susan Roe et al.

On Appeal from the  
 United States District  
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[June —, 1977]

MR. JUSTICE POWELL delivered the opinion of the Court.

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

April 28, 1977

Re: No. 75-1440 - Maher v. Roe

Dear Lewis:

Please join me.

Sincerely,



Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

April 18, 1977

Re: 75-1440 - Maher v. Roe

Dear Lewis:

Please join me.

Respectfully,

*JP*

Mr. Justice Powell

Copies to the Conference