THE ABSENCE OF AN EQUAL RIGHTS AMENDMENT (ERA) RELATIONSHIP TO THE ISSUE OF ABORTION

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The purpose of this brief is to analyze the major case law that exists in the various states on the relationship between passage of an Equal Rights Amendment ("ERA") and the right (or non-right) to an abortion.

Initially, it is important to note that there are several conditions, diseases, or disorders that affect only females, based simply on the biological nature of males versus females.

These include, but are not limited to, pregnancy[2] (neither a disease nor a disorder), menopause, postpartum depression, Turner syndrome, Rett Syndrome, and premenstrual dysphoric disorder (PMDD). Additionally cervical, uterus, and ovarian cancer are limited to females. Lastly breast cancer, while not exclusively limited to females, is predominantly female in nature (the percentage of male to female breast cancer is 1%).[3]

The Federal Government has yet to recognize the ERA as the 28th Amendment[4] as of the date of this writing. In order to analyze the issue of whether a relationship exists between the Federal ERA and abortion rights, we turn to an analysis of state level ERA's which have passed in 26 states. We review herein the analysis that was performed by the various state courts and, based upon those rulings, make reasonable conclusions about what the United States Supreme Court could do should similar case come before it based upon the 28th Amendment (once recognized).

Also for purposes of this brief, we note that different abortion related statutes, case law and proposals, are organized based on the time frame of the abortion in question.

These include:

> Prior to implantation (contraceptives which inhibit a fertilized egg to attach to the uterus)
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> Conception to 1st trimester
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> Conception to viability
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> Post viability

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[1] Representative Steven A. Andersson (Retired) JD 1992, Chief Republican Co-Sponsor of Illinois Joint Resolution SJRCA4 successfully ratifying the ERA in Illinois 2018.

[2] Trans-males can become pregnant, however for the specific purposes of this brief, we are limiting our focus to cis-males.

[3] https://www.nichd.nih.gov/health/topics/womenshealth/conditioninfo/whatconditions#:~:text=Other%20disorders%20and%20conditions%20that,and%20bone%20health%2C%20and%20menopause. https://www.psychguides.com/female-specific/

[4] https://apnews.com/article/4913397a57f671c62989a1a5ec10df17

Partial birth abortions

Abortions immediately prior to natural, induced or caesarian birth

Also, some laws distinguish on the basis of the stated need for abortion:

Elective (not needed)

Based on a condition that threatens the life or health of the mother

Additionally, some laws distinguish between the conditions which gave rise to the pregnancy:

Due to rape

Due to incest

Finally, some laws affect who pays for, or must offer coverage for, an abortion procedure:

Private Insurance (state regulations)

Public Insurance (e.g. Medicaid)

Government

1) We can begin this analysis by addressing those types of abortion related conditions in which no ERA related nexus has ever been articulated by any court in any jurisdiction:

No jurisdiction has ever opined that abortions <u>past</u> the standard of viability are mandated by the ERA. None. This would, therefore eliminate concerns over Post viability abortions, Partial birth abortions, or Abortions immediately prior to natural, induced or caesarian birth. While we are aware of politicians raising the specter of such circumstances, there is simply no support in law for these propositions.

Therefore, we are left with analysis of pre-viability abortions. In that context we have sets of case law to examine.

A) The first and prevailing view of the states that have addressed this issue (all states have not considered the issue) can be summarized from a Pennsylvania case as follows:

"The mere fact that only females are affected by this statute does not necessarily mean that females are being discriminated against on the basis of sex. In this world there are certain immutable facts of life which no amount of legislation may change. As a consequence there are certain laws which necessarily will only affect one sex. Although we have not previously addressed this situation, other ERA jurisdictions have; and the prevailing view amongst our sister state jurisdictions is that the E.R.A. "does not prohibit differential treatment among the sexes when, as here that treatment is reasonably and genuinely based on physical characteristics unique to one sex." People v. Salinas, 191 Colo. 171, 174, 551 P.2d 703, 706 (1976). See, State v. Rivera, 62 Hawaii 120, 612 P.2d 526 (1980); City of Seattle v. Buchanan, 90 Wash. 2d 584, 584

P.2d 918 (1978). See also, Holdman v. Olim, 59 Hawaii 346, 581 P.2d 1164 (1978)." Fischer v. Department of Pub. Welfare, 509 Pa. 293 (1985).[5]

In other words, abortions may be banned as a matter of public policy, even though it only affects one sex. The distinguishing feature here is that it is not whether a law affects only one sex, but if it discriminates against one sex and in favor of another. Here, there is no such discrimination. As males cannot get pregnant, they are not being favored over females. They simply do not need the procedure, by definition.

To use a non-sexual example, females can suffer from Turner Syndrome. Turner syndrome is a condition in which a girl or woman is partially or completely missing an X chromosome. It can cause infertility, heart problems and alter a female's appearance.[6] Should a state, for example, decide not to mandate insurance coverage for Turner Syndrome, this would not be a discriminatory action based on sex. It affects only one sex, but *no more favorable treatment is granted males*. Males simply don't need or benefit from such coverage.

One possible way how insurance coverage is determined could cause an ERA violation would be in ***how*** a state defines what is covered by insurance. If the key to coverage is based on "medical necessity" (as opposed to a laundry list of covered or non-covered conditions, disorders, etc as determined by private insurance regulations[7]) this could trigger a violation. If a state wishes to choose which items are covered or not covered, instead an overarching definition of medical necessity, they can avoid such an ERA based argument. We will discuss the reasoning behind a possible violation based on "medical necessity" in the next section of this brief.

B) The second category of cases occurs in only two states; Connecticut[8] and New Mexico[9]. In these cases the courts addressed head on the scenario envisioned in section A of this brief specifically regarding Medicaid coverage only.

In these two state cases, as a matter of policy, the legislature or the executive branch chose to ban abortions from coverage by changing the definition of what is "medically necessary."

> "Since only women become pregnant, discrimination against pregnancy by not funding abortion when it is medically necessary and when all other medical[ly necessary] expenses are paid by the state for both men and women is sex oriented discrimination." New Mexico Right to Choose/NARAL v. Johnson, 975 P.2d 841 (1998) at 844.

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[5] https://law.justia.com/cases/pennsylvania/supreme-court/1985/509-pa-293-1.html
[6] https://www.nichd.nih.gov/health/topics/turner
[7] Private insurance is largely regulated at the state level and has discretion in determining covered versus non-covered services. Medicaid coverage is largely governed by federal statutes which have less flexibility, "the Tenth Circuit, ha[s] interpreted Title XIX and its accompanying regulations as imposing a general obligation on [participating] states to fund those mandatory coverage services that are medically necessary." New Mexico Right to Choose/NARAL v. Johnson, 975 P.2d 841 (1998)
[8] Doe v. Maher, 515 A.2d 134 (Conn. Super. Ct. 1986)
[9] https://law.justia.com/cases/new-mexico/supreme-court/1998/23239-0-0.html

For males, the term meant, for the most part, its literal term; if a doctor determines a treatment is medically necessary, it is covered. However, for females, it meant many similar items would be covered, but abortions were deemed NOT "medically necessary" (with certain very limited exceptions).

These courts looked at the facts from the standpoint whether a distinction between males and females discriminates against one sex (or the other) rather than only affect one sex (or the other). In this case the court acknowledged that altering the legal term "medical necessity" did not simply affect females versus males, it discriminated against them *to their detriment.* Males were assured of financial coverage for any qualified condition. Females were not similarly treated. Because both males and females unquestionably suffer from medically necessary conditions, the fact that males are fully covered for such conditions and females are not fully covered, by definition, is discriminatory.

Again, should these states wish to ban abortion treatments, they could utilize a system consistent with Pennsylvania's approach. The most that can be stated about Medicaid coverage for abortions based on these two cases, and in the 50+ year history of state level ERA's, is that a medically necessary abortion may be covered. It is significant that virtually all abortion prohibition statutes and regulations exempt abortions to protect the life of the mother. This ruling of "medical necessity" is consistent with those statutes and regulations and with most positions taken by pro-life elected officials and candidates.

2) Another category of abortion issues is whether any case law has suggested that elective abortions would be mandated by the ERA. One again, there is no case law that has ever suggested the ERA would mandate elective abortion. None. No substantive good faith analysis supports the proposition that elective abortions must be covered because of the ERA. There is no support for this argument.

3) In summary, the case law supports the following statements:

A) Post viability elective abortions will not be mandated or covered because of the ERA.

B) Elective abortions will not be mandated or covered because of the ERA.

C) Correctly drafted, medically necessary abortions would not be mandated or covered because of the ERA under state regulations of private insurance.[10]

D) Pre-viability medically necessary abortions could be covered because of the ERA under Medicaid only, consistent with a commonly accepted exemption for the life/health of the mother.

4) Could the ERA expand existing abortions beyond what is currently required under the 14th Amendment, Roe v. Wade and its progeny?

[10] Abortions can be covered by a given state should it desire to do so. That would be a legislative act, not based on the ERA.

While the answer to this question cannot be resolved by looking at state level ERA's, as it would be a federal issue, we can look at the history of Roe v Wade[11] for guidance.

It is the opinion of this author that such a thing is not possible based on the existing precedents of Roe v. Wade et al and political reality. Roe v. Wade and its progeny created two principles; (i) penumbral rights (specifically the right to privacy) and (ii) a standard in abortion cases of viability. To expand abortion rights (for example to expand to post-viability abortions) would be to violate both privacy rights and viability tests. Moreover going beyond viability would infringe on each state's ability to protect the life and liberty interests of the unborn (but post viability) child. Many forget Roe v. Wade does allow for state protection of [12] the unborn child at, and after, the stage of viability.

Also, political reality must be recognized.

A conservative court (as we appear to have now and into the future), will not be using the ERA or the 14th Amendment to uphold or expand abortion rights. That is a self-evident statement.

However, a liberal court would also not seek to overturn Roe v. Wade and its progeny. It is perhaps the seminal case law on liberal interpretations of the U.S. Constitution. And, as Roe v. Wade *does allow states to protect* unborn children <u>beyond</u> viability, it is not possible for a liberal court to expand those rights through the ERA without eviscerating Roe v. Wade's logic and protections. This is something a liberal court simply would not do.

As such, it is the position of this author that the ERA will not affect the status of existing rights to abortion based on Roe v. Wade and its progeny.

5) Conclusion: the ERA based on all existing case law, has no significant impact on abortion rights either positively or negatively.

[11] Roe v. Wade, 410 U.S. 113 (1972)

[12] In conjunction with state laws protecting the unborn.