Illinois: The ERA harms the unborn child

(with more documentation/information)

What is the ERA?

The proposed Equal Rights Amendment, as an amendment to the U.S. Constitution, would restrict all laws and practices that make any distinctions based on gender. Under the ERA men and women could not be treated differently, even if the different treatment is due to physical differences such as pregnancy.

> Section 1 (the substantive portion) of the amendment reads: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."

What's the connection between abortion and the ERA?

Since abortion is unique to women, state courts with a state ERA have reasoned that attempts to restrict a woman's access to abortion is a form of sex discrimination. **They use two rationales**: (1) women are being singled out for different treatment due to a characteristic unique to their gender in a manner that harms them, or (2) If men have access to medical care for issues unique to men (circumcision, prostatectomies, vasectomies, etc), then women must also have access to medical care for ALL issues unique to women, including abortion.

Do we have any proof that the ERA would expand abortion rights?

Yes- In several states with state ERAs, the state courts ruled in favor of expanding taxpayer funding for Medicaid abortions. In each of these states, the courts and/or litigants argued that the state ERA required expanded taxpayer funding for Medicaid abortions to provide equal access to women for healthcare. This expanded coverage went well beyond abortions that save the life of the mother or cases of rape and incest. The following are excerpts from court decisions in 2 of these states:

- In **New Mexico**, the Mexico Supreme Court unanimously ruled, solely on the basis of the strict requirements of their state ERA, that since New Mexico provided funding for health care services unique to men, and only women undergo abortions, the denial of taxpayer funding for abortions is "sex discrimination" (*N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998)). The rationale for the ruling was:

  > "Rule 766 [which restricts Medicaid funding for abortions] undoubtedly singles out for less favorable treatment a gender-linked condition that is unique to women…. We determine that Rule 766 employs a gender-based classification that operates to the disadvantage of women and is therefore presumptively unconstitutional….because the State fails to provide a compelling justification for treating men and women differently with respect to their medical needs in this instance, we conclude that Rule 766 violates the [state's] Equal Rights Amendment."

- In **Connecticut**, a state superior court ruled:

  > "Since time immemorial, women's biology and ability to bear children have been used as a basis for discrimination against them…. Since only women become pregnant, discrimination against pregnancy by not funding abortion … when all other medical expenses are paid by the state for both men and women is sex oriented discrimination. …In sum, by adopting the ERA, Connecticut determined that the state should no longer be permitted to disadvantage women because of their sex including their reproductive capabilities. It is therefore clear, under the Connecticut ERA, that the regulation [prohibiting Medicaid funding] discriminates against women, and, indeed, poor women." (*Doe v. Maher*, 515 A. 2d 134 (Conn. Super. Ct. 1986).

Supporters of the ERA agree that the ERA requires expanded abortion rights:

The following are excerpts from amicus court briefs filed by ERA supporters and abortion rights advocates in 3 court challenges regarding expanding Medicaid funding for abortions:

- The **National Organization of Women (NOW)** filed an amicus brief in *N.M. Right to Choose/NARAL v. Johnson* in which it argued: "[B]y denying Medicaid funding to women …the enjoined regulation undermines gender equality; it … imposes constraints on women's reproductive choices, in violation of the ERA. The fact that only women need abortions does not alter this conclusion. Under the ERA, strict scrutiny is accorded even those classifications based on physical characteristics unique to one sex."

- In *Moe v. Secretary of Administration and Finance* (382 Mass. 629 (1981)), the **Civil Liberties Union of Massachusetts** (CLUM) argued: "By singling out for special treatment and effectively excluding from coverage an operation [abortion] which is unique to women, while including without comparable limitation a wider range of other operations including those which are unique to men, the statutes constitute discrimination on the basis of sex, in violation of the Massachusetts Equal Rights Amendment."

- In *Hawaii Right to Life v. Chang*, The **American Civil Liberties Union (ACLU)** argued that: the "first claim …as a matter of right rests on the Hawaii Constitution's guarantee of due process and equal protection and [state ERA] which provides that 'equality of rights under the law shall not be denied or abridged by the State on account of sex.' Abortion is a medical procedure performed only for women; withdrawing funding for abortions while continuing to reimburse other medical procedures sought by both sexes or only by men would be tantamount to a denial of equal rights on account of sex." (The text underlined is the language of Hawaii's ERA, and is the same language proposed for the federal ERA).

Would the ERA affect more than funding for abortions?

Yes - Using this same 'sex discrimination' logic, legal scholars have reasoned that the ERA would:

- Eliminate all abortion regulations and restrictions including federal and state bans on partial-birth abortions, prohibitions on third-trimester and post-viability abortions, health and safety standards for abortion providers, and state laws requiring parental involvement for minors seeking abortions.
- Provide a new federal constitutional basis for abortion rights. *Roe v. Wade* is predicated on an unwritten "right to privacy" assumption that is vulnerable to legal challenges. The federal ERA would insert a written, well-defined right to abortion, based on sex discrimination, into the U.S. Constitution and thus provide a strong legal basis for overturning all abortion regulations and restrictions in all 50 states.
- End conscience protections for nurses, doctors, and hospitals who do not want to participate in performing abortions.
- Threaten tax exemptions of private religious schools that discourage abortion.
- Overturn the Hyde Amendment.

We see this same sex discrimination logic with a state ERA being used In Armstrong v. State of Montana (1999), where **the Montana Supreme Court struck down a statute prohibiting non-physicians from performing abortions**. Although the case was decided principally on the basis of the privacy language in the Montana Constitution, **the majority opinion also cited state ERA language** in art. II, sec. 4, of the state constitution in support of its holding (par. 72 of the opinion). Article II, sec. 4, provides, in part, "Neither the state nor any person,…shall discriminate against any person in the exercise of his civil or political rights on account of . . . sex . . . ."

Have there been any instances in a state with an ERA where a court ruled against expanding abortion rights? If so, what does that predict for a federal level court decision?

Yes – there have been instances where a state court chose to interpret the ERA more narrowly. However, **the important point to consider is that the ERA has been used in state courts, and very likely would be used on the federal level, to expand abortion rights and overturn abortion restrictions. Those who value the life of the unborn child won't be willing to take that risk.**

Do we have any indication of how our Supreme Court Justices might interpret abortion rights under the federal ERA?

Yes – **Several U.S. Supreme Court Justices** have signaled their willingness to use the rationale of sex discrimination to strengthen abortion rights in several court opinions that they've written:

In Planned Parenthood v Casey, Supreme Court Justice Blackmun used a sex discrimination argument for the first time as an alternative basis for protecting the right to abortion when he wrote his opinion on the case (in his partial concurrence and partial dissent). He stated: "[a] State's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality", Casey, 505 U.S. at 928

Supreme Court Justice Ruth Bader Ginsburg also made it very clear that she believes any abortion restriction violates the equality principle for women when she wrote the dissenting opinion for Gonzales v Carhart, the 2007 U.S. Supreme Court case that upheld the ban on partial birth abortions. In her dissent, Justice Ginsburg was joined by Justices Stevens, Souter, and Breyer when she stated that: "legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature." 550 U.S. at 172 (Ginsburg, J., dissenting).

Adoption of a federal Equal Rights Amendment would provide Constitutional support for the view that these Justices voiced, (which is likely shared by several of the new Supreme Court Justices) that abortion regulation and restrictions on abortion funding discriminate against women on account of their sex and, therefore, would be ruled unconstitutional under the federal ERA.

Why don't we add an abortion neutral clause to the ERA?

We tried, but the supporters of the ERA refused to allow the amendment to proceed with abortion neutral language which shows their real intent. The courts will look at this legislative history of rejecting abortion neutral language to help them interpret the legislators' intent. The intent is clear that they want no restrictions on abortions.

If you truly value the life of the unborn child and want to guarantee that the ERA won't be used to strengthen abortion rights, insist that the ERA be rewritten with an abortion neutral clause that reads: *"Nothing in this Article shall be construed to grant or secure any right relating to abortion or the funding thereof."*

If there's no abortion neutral clause, you're taking a losing gamble with the life of unborn children.

The Equal Rights Amendment, as it now stands, will have a negative impact on both women and their unborn children by overturning important abortion regulations and restrictions. The vague, broad language of the ERA gives judges a "blank check" to write full abortion rights into the U.S. Constitution. Those who believe we need an ERA should write a better amendment that won't harm women or their unborn children. Please contact your Illinois state senator and state representative and urge them to vote no on the ERA (SJRCA-4).

For more information, please contact Elise Bouc, State Chairman, Illinois Stop-ERA at 847-707-1217 or ebouc7@gmail.com