In The

Supreme Court of New Mexico

Docket No. 23239

NEW MEXICO RIGHT TO CHOOSE, et al.,	)	
	)	Appeal from the
Plaintiffs-Appellees,	)	First Judicial
	)	District Court
vs.	)	State of New Mexico
	)	County of Santa Fe
DOROTHY DANFELSER, Secretary of the New Mexico Human Services Department,	)	
	)	Hon. Steve Herrera,
Defendant-Appellant.	)	Judge Presiding

BRIEF AMICUS CURIAE OF THE NEW MEXICO WOMEN'S BAR ASSOCIATION AND NEW MEXICO PUBLIC HEALTH ASSOCIATION, IN SUPPORT OF PLAINTIFFS-APPELLEES

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SUMMARY OF ARGUMENT

The New Mexico Equal Rights Amendment (the "ERA"), overwhelmingly ratified by the voters in 1972, reflects the commitment of the citizens of New Mexico to ensure equality of the sexes in this state. As the court below concluded, by denying Medicaid funding to women requiring medically necessary abortions, the enjoined regulation undermines gender equality: it reinforces historic stereotypes of women's role in society and 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. The enjoined regulation, which is not supported by any compelling state interest, cannot pass muster under this strict standard.

The lower court's decision enjoining implementation of the challenged regulation is also consistent with New Mexico's statutory history of abortion regulation. In general, that statutory history has been more liberal than that of other states, with long recognition that protecting women's health should be a factor in any abortion restrictions. On the other hand, to the extent that New Mexico's statutory history conforms to the more restrictive measures adopted by sister states, it clearly evinces a discriminatory animus against women inconsistent with the principles and standards embodied in New Mexico's ERA. Accordingly, the lower court's decision should be affirmed.

ARGUMENT

THE NEW MEXICO EQUAL RIGHTS AMENDMENT PROHIBITS IMPLEMENTATION OF THE CHALLENGED REGULATION

A. The New Mexico ERA Provides Independent Protection Against Sex Discrimination And Should Be Interpreted To Require At Least Strict Scrutiny

New Mexico's Equal Rights Amendment provides

> No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under the law shall not be denied on account of the sex of any person.

New Mexico Const., Art. II, §18. Ratified in November 1972 and effective July 1973, the New Mexico ERA was adopted the context of a nationwide debate on women's equality at both the state and federal levels. See generally Leo Kanowitz, The New Mexico Equal Rights Amendment: Introduction and Overview, 3 N.M. L. Rev. 1 (1973).

Most courts in states that adopted ERAs in the 1970s have determined that cases challenging sex-discriminatory programs under those amendments must be adjudicated under the most rigorous standard of judicial review. That determination reflects awareness of the historical context in which the federal and state constitutional amendments were proposed. In view of this history, the New Mexico ERA should be interpreted to preclude the discriminatory regulation challenged in this case.

Between 1971 and 1976, the United States Supreme Court decided a series of cases that ultimately established the standard of

review to be applied in cases challenging sex discrimination under the Equal Protection Clause of the United States Constitution. See, e.g., Craig v. Boren, 429 U.S. 190 (1976); Kahn v. Shevin, 416 U.S. 351 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971). After apparently swinging from "rational basis" review in Reed to strict scrutiny in Frontiero and back to the rational basis test in Kahn, the Supreme Court settled upon an intermediate standard of review for sex discrimination cases. See Craig, 429 U.S. at 197 ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

This development in federal equal protection jurisprudence provided the constitutional context for the ERAs -- both federal and state -- proposed in the early and mid-1970s. The proposed federal amendment, passed by Congress on March 22, 1972, was clearly intended to elevate sex to the same constitutional status as race, creed, or national origin, which were deemed "suspect" classifications under the Equal Protection Clause. As the plurality recognized in Frontiero following passage of the proposed federal ERA, "Congress itself has concluded that classifications based upon sex are inherently invidious." 411 U.S. at 687.

The proposed federal ERA declared that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." H.R.J. Res. No. 208, 92d Cong., 2d Sess. (1972), quoted in Frontiero, 411 U.S. at 687. At approximately the same time, provisions in essentially the same

language were added to the state constitutions of ten states: Colorado, Hawaii, Illinois, Maryland, Massachusetts, New Hampshire, New Mexico, Pennsylvania, Texas, and Washington.[1] Other states -- including Alaska, Connecticut, Louisiana, Montana, and Virginia -- amended their constitutions to create protection against sex discrimination in slightly different terms.

The state ERAs modeled on the federal ERA were intended to guarantee more rigorous judicial scrutiny of sex-based classifications than was afforded under the United States Constitution. In some cases, the broad language of the amendment was held to impose an absolute ban on discrimination based on sex. As the Supreme Court of Washington reasoned:

> Any other view would mean the people intended to accomplish no change in the existing constitutional law governing sex discrimination, except possibly to make the validity of a classification based on sex come within the suspect class under Const. art. 1, section 12 . . . Had such a limited purpose been intended, there would have been no necessity to resort to the broad, sweeping, mandatory language of the Equal Rights Amendment.

Darrin v. Gould, 540 P.2d 882, 889 (Wash. 1975). Accordingly, "if equality is restricted or denied on the basis of gender, the classification is discriminatory and, thus, violative of the Washington Constitution." Washington v. Burch, 830 P.2d 357, 362-63 (Wash. App. 1992).

Even state courts that have not interpreted their ERAs as an

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[1] See Colo. Const. art. II, § 29 (1972); Haw. Const. art 1, § 21 (1972); Ill. Const. art. 1, § 18 (1971); Md. Const., Declaration of Rights art. 46 (1972); Mass. Const. pt. I, art. 1 (1976); N.H. Const. pt. I, art. 2 (1975); N.M. Const. art. II, § 18 (1973); Pa. Const. art. I, § 28 (1971) ; Tex. Const. art. I, § 3a (1972); Wash. Const. art. XXXI, § 1 (1972).

absolute ban have recognized that their ERAs were intended to heighten judicial scrutiny in sex discrimination cases. In establishing the standard of review to be applied under the Massachusetts ERA, the Justices of the Supreme Judicial Court of Massachusetts commented:

> To use a standard in applying the Commonwealth's equal rights amendment which requires any less than the strict scrutiny test would negate the purpose of the equal rights amendment and the intention of the people in adopting it.

Opinion of Justices to House of Representatives, 371 N.E.2d 426, 428 (Mass. 1977) (citation omitted).

The Supreme Court of Illinois reached a similar conclusion on the basis of the express language of the Illinois ERA and the legislative debates surrounding its passage:

> [W]e find inescapable the conclusion that [the ERA] was intended to supplement and expand the guaranties of the equal protection provision of the Bill of Rights and requires us to hold that a classification based on sex is a 'suspect classification' which, to be held valid, must withstand 'strict judicial scrutiny.'

People v. Ellis, 311 N.E.2d 98, 101 (Ill. 1974).

Courts in Hawaii, Connecticut, Colorado, Maryland and Texas have also ruled that sex discrimination cases require the most stringent judicial review. See, e.g., Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993) ("[W]e hold that sex is a 'suspect category' . . . and that [a sex-discriminatory statute] is subject to the 'strict scrutiny' test."); Daly v. DelPonte, 624 A.2d 876 (Conn. 1993) (holding that all of the classifications enumerated in the state equal protection clause -- which expressly mentions sex -- are subject to strict scrutiny); Colorado Civil Rights Comm'n v.

Travelers Ins. Co., 759 P.2d 1358, 1363 (Colo. 1988) (the ERA "requires that legislative classifications based exclusively on sexual status receive the closest judicial scrutiny"); Tyler v. State, 623 A.2d 648, 651 (Md. 1993) ("sex . . . is a suspect classification subject to strict scrutiny"); Mercer v. Board of Trustees, 538 S.W.2d 201, 206 (Tex. Civ. App. 1976) ("Any classification based upon sex is a suspect classification, and any law or regulation that classifies persons for different treatment on the basis of their sex is subject to strictest judicial scrutiny.").[2]

The legislative history justifying absolute or strict review under the ERAs in the states discussed above also warrants rigorous judicial review of sex-based classifications under the New Mexico ERA. Since 1973, New Mexico courts have looked to the ERA to ensure equal treatment of women and men in a broad range of contexts, including domestic relations law, Swink v. Fingado, 115 N.M. 275, 279-80, 850 P.2d 978, 982-83 (1993); jury selection,

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[2] The courts of Alaska and New Hampshire have not explicitly decided which standard of review applies in cases of sex discrimination. Only the courts of Virginia, Louisiana and Montana appear to apply standards of review less rigorous than strict scrutiny. Intermediate review is applied under Virginia's constitutional amendment, which by its terms contemplates that sex discrimination will be treated differently from discrimination based on race, color, or national origin. See Virginia Const. art. I, § 11. The Louisiana ERA, which explicitly incorporates a "reasonableness" standard, has been construed as identical to the federal Equal Protection Clause. See State v. Vining, 609 So.2d 984 (La. Ct. App. 1992). The lone Montana case specifically discussing the applicable standard of review cited the now superseded United States Supreme Court decision in Reed as authority for a rational basis test. See State v. Craig, 545 P.2d 649, 653 (Mont. 1976).

State v. Gonzales, 111 N.M. 590, 598-99, 808 P.2d 40, 48-49 (Ct. App.), cert. denied, 111 N.M. 416, 806 P.2d 65 (1991); and criminal prosecutions, State v. Sandoval, 98 N.M. 417, 418-19, 649 P.2d 485, 486-87 (Ct. App. 1982). See also Schaab v. Schaab, 87 N.M. 220, 223, 531 P.2d 954, 957 (1974) (state alimony statute must treat husband and wife with exact equality).

Consistent with this broad reach of the ERA, the applicable standard of review under the New Mexico ERA should be at least strict -- if not absolute -- scrutiny. As an initial matter, in Gonzales, 111 N.M. 590, 808 P.2d 40 (Ct. App. 1991), the Court of Appeals based its decision to invalidate gender-based peremptory challenges on a prior case striking down race-based peremptories, suggesting that strict scrutiny would apply to both race and sex classifications. Id. at 47-49.

Further, the State Attorney General has concluded that at least strict scrutiny is required by the ERA. 1975 Op. Att'y Gen. No. 74 (1975). Employing this standard, the Attorney General opined that the New Mexico Military Institute, an all-male state-operated school, violated the state constitution. According to the Attorney General, "if the New Mexico ERA is interpreted to absolutely prohibit sex-based classifications, [the Institute's] utilization of sex as a criterion for admission as a cadet clearly is banned by this amendment." Id. at 196. The exclusion of women was also found to violate the ERA under the strict scrutiny standard of review, because the Attorney General could not perceive any compelling state interest that was achieved by the use of the

sex-based classification. Id. at 196-97.

In light of this historical context and case law from both this state and sister states, this Court should hold that the ERA requires at least strict scrutiny of sex-based classifications.

B. Discrimination On The Basis Of Need For Abortion Is Sex Discrimination In Violation Of The ERA

Though pregnancy, and thus abortion, is unique to women, the enjoined regulation is not exempt from scrutiny under the ERA. As set out below, this regulation must be examined in light of the historic role of restrictions on reproductive choice in limiting women's full participation in society and the continuing harms done to women by such restrictions.

1. Reproductive Choice Is Central To Women's Autonomy And Citizenship

Like African Americans, women have faced a long history of discrimination in this country. Frontiero, 411 U.S. at 684-86; Hewitt v. State Accident Ins. Fund, 653 P.2d 970, 977 (Or. 1982); Sail'er Inn v. Kirby, 485 P.2d 529, 540-41 (Cal. 1971). One of the primary justifications for women's subordination has been their reproductive capacity. Justice Bradley's concurrence in Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873), illustrates the 19th century view that women's capacity to bear children destined them to lead a life solely in the home:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, women's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as the nature

> of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood . . . [T]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things . . . .

Id. at 141-42 (Bradley, J., concurring).

Such discriminatory assumptions about women's proper roles have been reflected in a range of state and federal laws that created a separate, inferior legal status for women. For example, until the passage of the Nineteenth Amendment to the federal constitution in 1920, women were denied the right to vote. Laws also excluded women from jury duty. As recently as 1961, the United States Supreme Court stated that women could be excluded from jury duty because "woman is still regarded as the center of home and family life." Hoyt v. Florida, 368 U.S. 57, 62 (1961).

Additionally, "[c]oncern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities." International Union, UAW v. Johnson Controls, 499 U.S. 187, 211 (1991). State laws banned women from entering many professions such as the practice of law. Even when women were not legally excluded from a field, discriminatory labor laws imposed restrictive conditions on working women. See, e.g., Muller v. Oregon, 208 U.S. 412, 422 (1908) (upholding maximum hour laws for women based on a woman's need to "proper[ly] discharge . . . her maternal functions"). The protective labor practices upheld in these cases, and struck down as recently as 1991 in Johnson Controls helped create a sex-segregated labor market.

Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 959 n.14 (1984).

Throughout history, "women's biology and ability to bear children have been used as a basis for discrimination against them." Doe v. Maher, 515 A.2d 134, 159 (Conn. Super. Ct. 1986) (citations omitted). Thus, though women alone can avail themselves of the right to choose an abortion, sexual equality can be achieved only if this right is guaranteed under the New Mexico Constitution.

Indeed, the joint opinion in Planned Parenthood v. Casey explicitly links restrictive abortion laws to a narrow vision of women's roles:

> [T]he liberty of a woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love alone cannot be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.

Planned Parenthood v. Casey, 505 U.S. 833, 852 (1992) (joint opinion). See also id. at 928 (Blackmun, J., concurring in part and dissenting in part) (assumption that women have a "duty" to bear children "rest[s] upon a conception of women's role that has triggered the protection of the Equal Protection Clause."). In sum, the right to choose an abortion must be accorded women because of, and as a counter-weight to, the very characteristic -- their

reproductive capacities -- that renders women vulnerable to being treated unequally in the first place.

2. Reproductive Restrictions Presently Impose Unjustifiable Burdens On Women

The enjoined regulation burdens women in a manner that reflects stereotypes about women's proper roles, penalizing women who do not conform to traditional assumptions. Under the regulation, if a woman decides to carry to term the State will pay for all of the medical expenses associated with childbirth. If a woman is unable to carry a child to term, however, without endangering her own medical condition (short of risking her life), she is denied all funding for an abortion. The State's decision to provide funding for the woman's health care turns on whether the woman has chosen the result desired by the State. Through this coercive funding scheme, the regulation pressures women to conform to the traditional assumption that their primary purpose is to bear and raise children, and to sacrifice their own health and well-being to those purposes if necessary.

By compelling a woman to be a mother, the enjoined regulation prevents her from choosing her own social role and destiny and inhibits her ability to become a full citizen. Because parenthood has a dramatic impact on a woman's educational prospects, employment opportunities, and self-determination, restrictive abortion laws deprive her of the right to participate fully in society as well as taking from her the basic control of her life. See Henshaw Aff. ¶ 21, 22. For example, having a child before age 20 reduces

schooling attained by almost three years, and significantly reduces the likelihood that a woman will attend college. Daniel H. Keplinger et al., Adolescent Fertility and the Educational Attainment of Young Women, 27 Fam. Plan. Persp. 23, 26 (1995). By age 25, less than 60 percent of women who were teenage mothers have obtained a high school degree, compared with 90 percent of women who did not have a baby while they were teenagers. Namkee Ahn, Teenage Childbearing and High School Completion: Accounting for Individual Heterogeneity, 26 Fam. Plan. Persp. 17, 18 (1994). Teenage mothers who do not complete school have particular difficulties in the job market: although more males than females drop out of high school, the negative effect on earning capacity of dropping out is greater for women. Larry D. Dorrell, A Future at Risk: Children Having Children, 67 Clearing House 224, 224-25 (1994). See also Will Jordan et al., Exploring the Complexity of Early Dropout Causal Structures, Baltimore, Maryland: Center for Research on Effective Schooling for Disadvantaged Students (1994).

Similarly, employment opportunities for women with children are severely limited. See Henshaw Aff. § 23. Although many more women with young children are engaged in market work now than in the past, childbearing nevertheless has a significant negative impact on women's employment and earnings. Most of the negative effect is caused by interruptions in women's labor force participation as they bear or care for children. Intermittency in employment results not only in lost earnings during the time a woman is out of work caring for a child, but also limits her

opportunities for gaining on-the-job training, experience, and seniority that lead to wage increases. Sanders Korenman & David Neumark, Marriage, Motherhood and Wages, 27 J. Hum. Resources 233, 235-36 (1992). A first child, on average, reduces a woman's lifetime work experience by about 2.5 years, a second by about 2 years and a third by 1 year. Through this effect on work experience, each additional child lowers the mother's lifetime wage profile further. James P. Smith, Women, Mothers, and Work, in Martha N. Ozawa, ed., Women's Life Cycle and Economic Insecurity 43-70 (1989). See generally Judy Koenigsberg, Michael S. Garet and James E. Rosenbaum, The Effect of Family on the Job Exits of Young Adults, 21 Work and Occupations 33, 34 (1994); Reva Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L. Rev. 261, 375-77 (1992); Victor R. Fuchs, Women's Quest For Economic Equality, 3 J. Econ. Persp. 25 (1989).

Women, who generally bear primary responsibility for young children, are also disadvantaged because many workplaces do not accommodate parental responsibilities and because childcare is often unavailable or unaffordable. Many women are forced to leave jobs to care for their children. See Barbara F. Reskin & Heidi I. Hartmann, eds., Women's Work, Men's Work: Sex Segregation on the Job 73-74 (1986). Others obtain part-time work or lower paying, less skilled positions in order to meet parental responsibilities. Id. at 74. Approximately one-fifth of unemployed women are jobless due to lack of child care. Marjorie Starrels et al., The

Feminization of Poverty in the United States: Gender, Race, Ethnicity, and Family Factors, 15 J. Fam. Issues 590, 592 (1994). When a woman raises a child alone, the economic consequences are even more devastating. U.S. Bureau of the Census, Current Population Reports, Series P-23, No. 162, Studies in Marriage and the Family 23 (1989) (approximately half of children in households headed by women live in poverty).

Finally, pregnancy and childbearing may also have negative effects on women's employment opportunities due to employers' discrimination against pregnant women and new mothers. One controlled study found that pregnant employees were consistently rated lower in performance assessments than non-pregnant employees, although the actual performances were identical. Jane A. Halpert et al., Pregnancy as a Source of Bias in Performance Appraisals, 14 J. Organizational Beh. 649 (1993).

As the California Supreme Court noted in invalidating a ban on funding for medically necessary abortions, the right to choose abortion is "central to a woman's control not only of her own body, but also to the control of her social role and personal destiny." Committee to Defend Reproductive Rights v. Myers, 625 P.2d 779, 792 (Cal. 1981). See also Ruth Bader Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C. L. Rev. 375, 383 (1985) (reproductive freedom is crucial to woman's "ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen"). If women are no longer "destined solely for the home and the rearing of the family,

and only the male for the marketplace and the world of ideas," Stanton v. Stanton, 421 U.S. 7, 14-15 (1975), then women must exercise control over the decision whether and when to bear children. By pressuring women to conform to the stereotype that their function is to bear children, the regulation's discriminatory funding scheme violates the ERA.

3. The Challenged Regulation Is Not Exempt From Scrutiny Under The ERA

HSD's legislative amici assert that this Court should ignore the history of using abortion restrictions and other pregnancy-specific regulations to discriminate against women, and find that the challenged regulation is outside the scope of the ERA. However, as set out below, this argument ignores both persuasive precedent from other states and the legislative history of the ERA.

First, HSD's legislative amici argue that the reasoning in Geduldig v. Aiello, 417 U.S. 484 (1974), precludes heightened scrutiny of the challenged regulation. In Geduldig, the United States Supreme Court held that a state disability plan that excluded pregnancy from coverage did not constitute sex discrimination under the federal equal protection clause. In its infamous footnote 20, the Court stated

> The program divides potential recipients into two groups -- pregnant women and nonpregnant persons. While the first group is exclusively female, the second group includes members of both sexes.

417 U.S. at 496 n.20. See also General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (Title VII prohibition on sex discrimination does not include pregnancy discrimination; reversed by Act of

Congress, 42 U.S.C. § 2000e(k)); Bray v. Alexandria Women's Clinic, 113 S. Ct. 753 (1993) (harassment of women seeking abortions does not constitute sex discrimination in violation of 42 U.S.C. § 1985(3)).

Professor Laurence Tribe has termed this reasoning -- that there is no discrimination so long as pregnant men and pregnant women are treated the same -- as "so artificial as to approach the farcical." Laurence H. Tribe, American Constitutional Law 1578 (2d ed. 1988). See also Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 995 (1984) (collecting commentaries critical of Geduldig).

This Court should reject the Geduldig doctrine out of hand, not only for its artificiality, but also for reasons of federalism. Reliance on federal law is "particularly inappropriate" when interpreting state constitutional language not duplicated in the federal constitution. Colorado Civil Rights Comm'n v. Travelers Ins. Co., 759 P.2d 1358, 1363 (Colo. 1988). Similarly, New Mexico has recognized that differences in state and federal constitutional language is evidence that the framers intended broader state protection. City of Farmington v. Fawcett, 114 N.M. 537, 544-45, 843 P.2d 839, 846-47 (Ct. App. 1992) (comparing state and federal freedom of expression guarantees). This principle should apply with greater force when the state language has no federal counterpart, and when the level of scrutiny under the state ERA is at least strict scrutiny.

In contrast to the federal courts, the New Mexico Court of

Appeals has ruled, if only implicitly, that discrimination on the basis of sex-specific characteristics is sex discrimination, in violation of the state ERA. In State v. Sandoval, 98 N.M. 417, 649 P.2d 485 (Ct. App. 1982), the Court of Appeals upheld state statutes imposing different penalties for prostitution and for patronizing prostitution. In rejecting an ERA challenge, the Court emphasized that prostitutes could be male or female, and patrons could be male or female. Id. at 419, 649 P.2d at 487. Thus, neither providing nor soliciting sex work was a proxy for gender. In the instant case, however, all persons in need of the abortions are female; no man will ever be in medical need of the procedure. Pregnancy and pregnancy-related conditions are an exact proxy for gender.

This Court has also embraced this proposition in a statutory context. In Behrmann v. Phototron Corp., 110 N.M. 323, 795 P.2d 1015 (1990), the Court unanimously ruled that a woman who had been fired from her job because of pregnancy was discriminated against because of her sex, in violation of the Human Rights Act. The Court so ruled even though the statute does not explicitly forbid discrimination based on pregnancy, but only discrimination on the basis of sex. N.M. Stat. Ann. § 28-1-7(A)(1978) (1987 Repl. Pamp.). Other state courts have held that similar human rights statutes prohibiting sex discrimination inherently prohibit pregnancy discrimination. See, e.g., Massachusetts Elec. Co. v. Massachusetts Comm'n Against Discrimination, 375 N.E.2d 1192, 1198-2000 (Mass. 1978); Minnesota Mining and Mfg. Co. v. Minnesota, 289

N.W.2d 396, 397 (Minn. 1979) (exclusion of pregnancy-related absences from income support program "is per se sex discrimination"); Quaker Oats Co. v. Cedar Rapids Human Rights Comm'n, 268 N.W.2d 862 (Iowa 1978). It would be legally inconsistent to recognize this principle in a statutory, but not a constitutional, context.

Sister states have also adopted similar reasoning under their respective ERAs. In Colorado Civil Rights Comm'n v. Travelers Ins. Co., 759 P.2d 1358, 1363-64 (Colo. 1988), the Colorado Supreme Court held that the exclusion of pregnancy and well baby care from otherwise comprehensive insurance coverage constitutes sex discrimination in violation of the Colorado ERA. As the court stated:

> The failure to provide coverage for the treatment of pregnancy in an otherwise comprehensive insurance policy discriminates against women on the basis of sex as surely as, for example, the failure to provide coverage for the treatment of prostate conditions in a comprehensive policy would discriminate against men on the basis of sex.

Id. at 1364.

In a case exactly analogous to the present one, a Connecticut court invalidated on state ERA grounds a Medicaid restriction on funding of medically-necessary abortions. As the court stated, "[s]ince only women become pregnant, discrimination against pregnancy by not funding abortion when it is medically necessary and when all other medical expenses are paid by the state for both men and women is sex-oriented discrimination." Doe v. Maher, 515 A.2d 134, 159 (Conn. Super. Ct. 1986) (footnote omitted).

The American Law Division of the Library of Congress also agrees with this approach. That organization concluded that if strict scrutiny were applied "the ERA would reach abortion and abortion funding situations" and that such classifications would be "almost always invalidated as being violative of the Constitution." Library of Congress, American Law Division, A Legal Analysis of the Potential Impact of the Proposed Equal Rights Amendment (ERA) on the Right to an Abortion or the Funding of an Abortion 61-62 (Oct. 20, 1983).

HSD's legislative amici cite a number of decisions from other states that exclude classifications based upon "unique physical characteristics" from state ERA coverage. See Brief Amicus Curiae of Sen. Duncan Scott, Rep. Frank Bird, and Other Members of the New Mexico Legislature at 16-17 n.10 (hereinafter, "HSD's Legislative Amici"). This Court should not find those cases persuasive for three reasons. First, courts applying a standard of review less than strict scrutiny to their state ERAs will almost always reach results less protective than those that flow from the New Mexico ERA. Eight of the cases cited by legislative amici apply such such lower standards. State v. Bell, 377 So.2d 303 (La. 1979); State v. Vining, 609 So.2d 984 (La. App. 1992); State v. Fletcher, 341 So.2d 340 (La. 1976); State v. Craig, 545 P.2d 649 (1976); Finley v. State, 527 S.W.2d 553 (Tex. Crim. App. 1975); Cox v. Cox, 532 P.2d 994 (Utah 1975); Archer v. Mays, 194 S.E.2d 707 (Va. 1973) (applying federal equal protection standards to interpretation of state ERA); Shaheed v. Winston, 885 F. Supp. 861 (E.D. Va. 1995)

(same). Further, two of the cases cited, Cox, 532 P.2d 994 (Utah 1975), and A v. X, Y, & Z, 641 P.2d 1222 (Wyo. 1982), construe ERAs enacted in 1896 and 1890, respectively, which have no common history with the ERA at issue here.

Second, the Court should not be persuaded by cases upholding sex-specific rape, statutory rape, or incest statutes against ERA challenges. Though the harms of sex crimes surely fall disproportionately on women, both men and women can be sexually violated. The New Mexico legislature recognized that, when, in response to ratification of our ERA, it made our sex crime statutes sex-neutral. See, e.g., N.M. Stat. Ann. §§ 30-9-11, 30-9-12. Nine of the cases cited by legislative amici uphold sex-specific sex crime statutes, and should be discounted in light of New Mexico's long-standing approach to this issue. People v. Salinas, 551 P.2d 703 (Colo. 1976); State v. Bell, 377 So.2d 303 (La. 1979); State v. Vining, 609 So.2d 984 (La. App. 1992); State v. Rivera, 612 P.2d 526 (Haw. 1980); State v. Fletcher, 341 So.2d 340 (La. 1976); Brooks v. State, 330 A.2d 670 (Md. Ct. Spec. App.), cert. denied, 275 Md. 746 (1975); State v. Craig, 545 P.2d 649 (1976); Finley v. State, 527 S.W.2d 553 (Tex. Crim. App. 1975); People v. Boyer, 349 N.E.2d 50 (Ill. 1976).

Finally, it is undisputed that only one state -- Pennsylvania -- has rejected an ERA challenge to an abortion funding restriction. Fischer v. Dep't of Pub. Welfare, 502 A.2d 114 (Pa. 1985). Some of the other cases cited by amici present intriguing and difficult questions of constitutional law, such as same-sex

marriage, Singer v. Hara, 522 P.2d 1187 (Wash. 1974), and female nudity, City of Seattle v. Buchanan, 584 P.2d 918 (Wash. 1978). Indeed, contrary to HSD's legislative amici's assertions, the latter case applies an analysis much like that urged by Plaintiffs here, i.e., recognizing that unique physical characteristics of the sexes may require differential treatment to ensure equality. Nevertheless, these matters are a far cry from the issues before this Court, and add little to an analysis of the New Mexico ERA's applicability to abortion restrictions.

HSD's legislative amici also rely heavily on the idea that the ERA does not have any application to laws based on physical characteristics unique to one sex. This idea of "unique physical characteristics" originated in a famous law review article, Barbara A. Brown, Thomas I. Emerson, Gail Falk and Ann E. Freedman, The Equal Rights Amendment: A Constitutional Basis For Equal Rights For Women, 80 Yale L.J. 871 (1971), which was distributed to all members of Congress and made part of the legislative history of the never-ratified federal ERA. 117 Cong. Rec. 35012 (1972); 118 Cong. Rec. 9097 (1972). Amici fundamentally misunderstand the authors' argument. In discussing unique physical characteristics, 80 Yale L.J. at 893-96, the authors never state that there should be a blanket, automatic exception for any law based on such characteristics. Exactly to the contrary, the authors recognize the unique physical characteristics doctrine can be misused in order to evade sex equality:

> Unless that principle is strictly limited . . . it could be used to justify laws that in overall effect seriously

> discriminate against one sex. A court faced with deciding whether a law relating to a unique physical characteristic was a subterfuge would look to a series of standards of relevance and necessity.

Id. at 894.

To avoid this problem, the authors assert that classifications based on unique physical characteristics must be strictly scrutinized -- not exempt, as HSD's legislative amici argue. Id.

Furthermore, the Yale authors do not mention abortion restrictions as illustrative of the unique physical characteristics principle. Rather, the examples offered include laws regarding wet nurses, sperm donors and determination of fatherhood. Id. at 894. Such laws are not evasions of the equality guarantee. Unlike restrictions on abortion, they have never been the font of historically pervasive discrimination against either sex.[3] Significantly, this short list of operative unique physical characteristics is consistent with contemporaneous evidence concerning the New Mexico ERA. According to Professor Leo Kanowitz, writing in 1973, the circumstances where such unique physical characteristics are relevant are "very rare and narrowly defined." Leo Kanowitz, The New Mexico Equal Rights Amendment: Introduction and Overview, 3 N.M. L. Rev. 1, 7 (1973). Laws which classify on the basis of pregnancy or abortion could hardly be so characterized.

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[3] Only three of the cases cited by HSD's legislative amici fall under this very narrow "unique physical characteristics" idea. People v. Morrison, 584 N.E.2d 509 (Ill. App. 1991) (maternity and paternity determination); Commonwealth v. MacKenzie, 334 N.E.2d 613 (Mass. 1975) (same); A v. X, Y, & Z, 641 P.2d 1222 (Wyo. 1982) (same).

Applying the strict criteria suggested by the Yale authors, 80 Yale L.J. at 894-96, the enjoined regulation clearly fails. The state simply cannot advance any compelling justification to support the regulation. As set out above, the abortion restrictions embodied in the regulation are discriminatory and work to deny women's citizenship and autonomy. Any asserted state interest in protecting potential life falls in light of these countervailing interests, and the interest in protecting the health of women requiring medically necessary abortions. See, e.g., Casey, 505 U.S. 833 (1992). Further, though the state has asserted an interest in bringing state Medicaid regulations into conformity with federal reimbursement practices, the enjoined regulation will not save the state money. Henshaw Aff.¶ 24-26. Each time a woman is compelled to carry a pregnancy to term because she cannot afford a medically necessary abortion, the state's expenditures will increase five-fold. Henshaw Aff.¶ 24. As demonstrated during the time that the prior regulation has been in effect, the costs of providing this funding are not beyond the ability of the State. In light of the harm to women and the poor fit between the ostensible problem and the effects of the regulation, the enjoined regulation clearly fails when tested against the factors set out in the Yale Law Journal article.

Restrictions on reproductive choice such as the enjoined regulation are intimately connected to the social, economic and political inequality of women. The enjoined regulation is thus inconsistent with principles of equal citizenship long-recognized

in this State. For most of its history, New Mexico has treated abortions more liberally than have sister states. See Section C, infra at 22. Insofar as New Mexico ever treated abortion harshly, that treatment was consistent with a nationwide anti-abortion campaign that was consciously and cruelly discriminatory against women. See Section C.2, infra at 27. The state ERA can countenance neither such historic animus nor the continuing tragic harms to women that are its legacy. Accordingly, this Court should reject the disingenuous Geduldig reasoning, as well as the misapplication of the "unique physical characteristics" exception, and hold that enjoined regulation constitutes sex discrimination subject to strict scrutiny.

C. The History Of Abortion In New Mexico, Insofar As Relevant, Argues In Favor Of Affirmance Of The Lower Court

The New Mexico legislature, since territorial times, has spoken repeatedly to the question of abortion. While that history is not binding on this Court, it generally supports Plaintiffs' argument that abortion should be understood as a fundamental right under the New Mexico Constitution. Further, insofar as the legislature restricted abortion for a period before Roe v. Wade, that history should be repudiated as oppressive of women. That period of statutory history supports Plaintiffs' argument that discrimination on the basis of reproductive capacity is sex discrimination, in violation of the New Mexico ERA.

The statutory history of abortion in New Mexico is divisible into four basic parts. First is the period 1853-1919, when abortion was criminalized only after "quickening" of the fetus, as

determined by the pregnant woman. Second is the period 1919-1953, when most abortions were criminalized. The third period, 1953-1973, is representative of the historic "medicalization" of abortion. During this time, our legislature made availability of abortion dependent on medical judgment, but did so in ways significantly different from the national trend. The fourth period follows the decision of the United States Supreme Court in Roe v. Wade in 1973. Since that time, the New Mexico legislature has repeatedly, if only implicitly, recognized that judgments regarding termination of pregnancy are solely the province of individual women.

1. The Statutory History Of Abortion In New Mexico Is More Liberal Than That Of Sister States.

Insofar as the history of abortion legislation in New Mexico is relevant, that history has been relatively liberal. In Roe v. Wade, 410 U.S. 113, 129-52 (1973), Justice Blackmun provides a detailed history of abortion, beginning with ancient times. New Mexico has, in general, accepted Justice Blackmun's account. State v. Strance, 84 N.M. 670, 672, 506 P.2d 1217, 1219 (Ct. App. 1973) (referring to Justice Blackmun's "scholarly discussion"). In that history, Justice Blackmun made the point that criminal abortion laws "are of relatively recent vintage," 410 U.S. at 129, and that, therefore, condemnation of abortion should be viewed with some historical skepticism.

Contrary to the assertions of HSD's legislative amici at pp. 10-11, Justice Blackmun states, "[i]t is undisputed that at common law, abortion performed before 'quickening' . . . was not an

indictable offense." 410 U.S. at 132 (emphasis in original). "The use of quickening to distinguish criminal from legal abortion meant that under the law a woman had complete dominion over her womb until the first fetal movements, generally in the fourth or fifth month of pregnancy." Michael Grossberg, Governing the Hearth: Law and Family in Nineteenth-Century America 160 (1985) [hereinafter "Grossberg"].

Further, Justice Blackmun notes that, "[i]t was not until after the War Between the States that legislation began generally to replace the common law." 410 U.S. at 139. In the paragraph central to this litigation, he states:

> Gradually, in the middle and late 19th century the quickening distinction disappeared from the statutory law of most States and the degree of the offense and the penalties were increased. *By the end of the 1950's, a large majority of the jurisdictions banned abortion, however and whenever performed, unless done to save or preserve the life of the mother.*

Id. (footnote omitted) (emphasis added). It is this description to which our Court of Appeals surely referred when it stated that the general history of abortion in American law recounted in Roe v. Wade, "is *not* a statement of New Mexico law." Salazar v. St. Vincent Hosp., 95 N.M. 150, 153, 619 P.2d 826, 829 (Ct. App.), writ of cert. quashed, 94 N.M. 806, 617 P.2d 1321 (1980) (emphasis added).

As in other jurisdictions, New Mexico law regarding abortions underwent a sea change in the middle of this century. Rejecting the distinction between quick and unquickened fetuses relied on in the past, see section 3, infra, New Mexico went to the "medical

model": restrictions on abortion became dependent on health consequences.

In this new era, the New Mexico legislature never "banned abortion, however and whenever performed, unless done to save or preserve the life of the mother." Roe, 410 U.S. at 139 (emphasis added). Rather, New Mexico was among the slender minority of jurisdictions that allowed abortions in additional circumstances -- those necessary to preserve the mother's health. The New Mexico legislature was swimming against the national tide in its repeated refusals to distinguish between "life" and "health." Significantly, it is exactly the distinction between "life-saving" and "medically-necessary" abortions which is the defect in the challenged regulation.

Thus, the 1953 law, N.M. Stat. Ann. § 40A-5-1 (1953) exempted from its definition of "criminal abortion[s]" those procedures defined as "justified medical terminations." In the 1953 law and all subsequent recodifications, "justified medical termination" included those abortion procedures where the medical experts have certified that:

> the continuation of the pregnancy, in their opinion, is likely to result in the death of the woman *or the grave impairment of the physical or mental health of the woman.*

N.M. Stat. Ann. § 40A-5-1(C)(1) (1953) (emphasis added). The 1953 law and subsequent codifications also included within "justified medical terminations" situations where "the child would have a grave physical defect," id. at sub-§ (2), and terminations of pregnancies resulting from rape or incest, id. at sub-§§ (3) and

(4). The language allowing abortion for health reasons still appears in the New Mexico statutes. N.M. Stat. Ann. § 30-5-1(C)(1) (1994 Repl. Pamp.) (the entire "Abortion" article, id. at §§ 30-5-1 through 30-5-3, including the referenced subsection, is largely unenforceable after the Court of Appeals' decision in State v. Strance, 84 N.M. 670, 506 P.2d 1217 (Ct. App. 1973), but that is irrelevant to the historical analysis herein).

In sum, during the modern era, the New Mexico legislature has always recognized that abortion is justified to preserve not just the life, but also the health, of the pregnant woman. In this regard, New Mexico has been consistently more liberal regarding the availability of abortion than the majority of its sister states.

The state legislature has continually maintained this liberality since January 22, 1973, the date of decision in Roe v. Wade. Since that date, twenty-three abortion-restrictive bills have been introduced in the New Mexico legislature. See Appendix A hereto. These have ranged from a prohibition on referring patients for abortions, see, e.g., H.B. 401, 30th Leg., 1st Sess., 1973; to 24-hour "waiting periods" and similar restrictions, see, e.g., H.B. 314, 34th Leg., 1st Sess. 1979; H.B. 595, 41st Leg., 1st Sess., 1993; to calls for amendment of the state and/or federal constitutions to protect fetuses, see, e.g., H.J.R. 36, 30th Leg., 1st Sess., 1973; H.J.R. 11, 35th Leg., 1st Sess., 1981.

Most directly on point, the state legislature on five occasions considered bills that would have the same effect as the challenged regulation, that is, to restrict the use of state funds

to pay for abortions except to the extent mandated by federal law. Three of these bills were introduced in the last two years -- after November 1993 -- when Secretary Danfelser's predecessor made known his intention to extend Medicaid coverage to medically necessary abortions. H.B. 238, 33d Leg., 2d Sess., 1978; H.B. 368, 34th Leg., 1st Sess., 1979: S.B. 408, 41st Leg., 2d Sess., 1994; H.B. 76, 42d Leg., 1st Sess., 1995; S.B. 52, 42d Leg., 1st Sess., 1995.

All twenty-three of these attempts to restrict abortion access were defeated, either by Committee vote, by adjournment, or -- on one occasion -- by gubernatorial veto. See Appendix A. Not a single abortion-restrictive bill has been passed in this state since Roe v. Wade. This is in sharp contrast to the intense legislative activity in other states. See Rachel Pine & Sylvia Law, Envisioning a Future for Reproductive Liberty: Strategies for Making the Rights Real, 27 Harv. C.R.-C.L. L. Rev. 407, 446 n.168 (1992).

Therefore, contrary to the assertions of HSD's legislative amici, the statutory history of abortion in New Mexico, insofar as relevant to the task before this Court, is in significant respects more liberal than that of its sister states, and argues in favor of affirmance of the decision of the lower court.

2. The History Of Abortion Regulation In New Mexico, Insofar As Consistent With That In Sister States, Evinces Discrimination Against Women

There is one period in New Mexico statutory history when treatment of abortion was consistent with the harsh treatment provided by the majority of United States jurisdictions: the period

between 1919 and 1953, when New Mexico criminalized abortions without regard to the "quickening" distinction. That interim period, however, should not influence the Court's decision here. Insofar as New Mexico followed the national trend, it was an egregiously discriminatory trend, and should be repudiated as inconsistent with modern norms of equality as mandated by our State ERA.

Prior to 1919, New Mexico imposed criminal penalties for abortion only when the fetus was "quick." Thus, the territorial legislature provided in 1853:

> Every person who shall administer *to any woman pregnant with a quick child* any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, and shall have been advised by a physician to be necessary for such purposes, shall, in case of the death of such child or such mother be thereby produced, be deemed guilty of murder in the third degree.

Laws 1853-54, art. 28, ch. III, § 11 (emphasis added). In subsequent codifications, the territorial and state legislatures maintained the quickening distinction. See C.L. 1865, ch. LI, § 11 (same language); C.L. 1884, ch. 51, § 698 (same); C.L. 1897, ch. 51, § 1074 (same); C.L. 1907, ch. 36, § 6 (offense elevated to murder in second degree); N.M. Stat. Ann. § 1464 (1915) (same as 1907 law). In the 1919 recodification, the Legislature left out the "quickening" distinction:

> Any person who shall administer to any pregnant woman any medicine, drug or substance whatever, or attempt by operation or any other method or means to produce an abortion or miscarriage upon such

woman, shall be guilty of a felony...

C.L. 1919, ch. 4, § 2.

As Justice Blackmun stated in Roe, after the Civil War, most jurisdictions lost the quickening distinction. Roe, 410 U.S. at 139. What Justice Blackmun did not note, but which has been amply demonstrated elsewhere, is that the demise of "quickening" was part of a national campaign of discrimination against women. See Grossberg, supra at 170-75, 179-86. See also Reva Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L. Rev. 261 (1992) [hereinafter "Siegel"].

The post-Civil War era saw the professionalization of medicine, and "abortion-law reform became one of the means by which doctors established a monopoly on health care." Grossberg, supra at 171. The doctors made quickening their target, arguing that it was an absurd distinction and a "relic of religious superstition." Id. at 172. Asserting instead that life began at conception, the physicians were able to invest themselves with the sole authority to determine when abortions could legitimately be performed. For example, women were repeatedly characterized as having only "partial capacity." Id. at 164. Dr. Augustus Gardner went so far as to characterize women who asserted authority over their own bodies as incapacitated:

> It is . . . women who do not pretend to guide the course of events, or make the laws of nature conform to their wishes, who are in health. . . . while the wise in their own conceit are sufferers, invalids, and useless.

Augustus Gardner, Conjugal Sins Against the Laws of Life and Health 199, 230 (1870) (hereinafter "Gardner"), quoted in Siegel, supra at 295, n.126.

In addition, the campaign depended on pervasive and blatant portrayals of women as destined to be breeders. As Dr. Gardner said of a woman's decision to terminate a pregnancy:

> Is it not arrant laziness, sheer, craven, culpable cowardice, which is at the bottom of this base act? . . . Have you the right to choose an indolent, selfish life, neglecting the work God has appointed you to perform?

Gardner, supra at 225, quoted in Siegel, supra at 303. The nineteenth century anti-abortion movement was also anti-immigrant and racist. According to Dr. Horatio Storer, the leader of the 19th century anti-abortion movement, women had a responsibility to replenish the greatly diminished male population following the Civil War. Storer asked,

> Shall [these gaps] be filled by our own children or by those of aliens? This is a question that our own women must answer; upon their loins depends the future destiny of the nation.

Horatio Robinson Storer, Why Not? A Book for Every Woman 85 (1866), quoted in Siegel, supra at 299. In a passage referring specifically to the anti-contraceptive movement of the same era, Professor Grossberg sums up the political situation:

> Fears aroused by the immigration of seemingly fecund non-Protestant women, charges of race suicide leveled against non-immigrant mothers who regulated their child bearing, and the everpresent concern over changes in gender responsibilities reinvigorated the stigma attached to the practice.

Grossberg, supra at 192.

The history of reproductive regulation in the United States has an unseemly heritage. Insofar as the New Mexico legislative history of abortion tracks that heritage, this Court should repudiate it. The rights guaranteed by the ERA must include women's control of their reproductive lives. As the great nineteenth century feminist Lucy Stone observed in 1855:

> It is very little to me to have the right to vote, to own property, &c. if I many not keep my body, and its uses, in my absolute right. Not one wife in a thousand can do that now, and as long as she suffers this bondage, all other rights will not help her to her true position.

Letter from Lucy Stone to Antoinette Brown (Blackwell) (July 11, 1855), quoted in Siegel, supra at 305-6.

3. The Statutory History Of Abortion Cited by HSD's Legislative Amici Is Not Dispositive Of This Case

In denying that the New Mexico Constitution protects the right of reproductive choice, HSD's legislative amici contend that "[a]bortion has always been treated as a serious criminal offense in New Mexico law." HSD Legislative Amici at 9. As described above, this statement is far from accurate. Moreover, it is irrelevant.

First, even if reproductive choice were not independently protected by the New Mexico Constitution, the right to choose abortion is still guaranteed by federal law. Planned Parenthood v. Casey, 505 U.S. 833 (1992); Roe v. Wade, 410 U.S. 113 (1973); State v. Strance, 84 N.M. 670, 506 P.2d 1217 (Ct. App. 1973) (state criminal abortion statute largely unconstitutional given federal decisions).

Further, even if New Mexico had always treated all abortions as serious criminal offenses, that would be insufficient reason to hold that the state Constitution does not presently protect reproductive choice. Of course, laws in effect at the time the Constitution was approved can "shed light" on the task before this Court. HSD's Legislative Amici at 9. That history, however, is not dispositive here. As this Court has recently stated in a case interpreting N.M. Const. art. IV, § 10:

> Both Petitioner and Respondents have presented competing historical arguments as bolstering their respective interpretations of the term "compensation." However, we agree with the Court of Appeals' determination that we need not consider the historical context of Article IV, Section 10 to determine the intent of the framers with respect to the term "compensation." *The Constitution is not a static document; it is a living work intended to endure.*

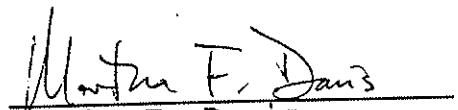
State ex rel. Udall v. PERA, slip op. at 14 n.5 (Nov. 22 1995), 1995 N.M. LEXIS 392, at *10 (Nov. 22, 1995) (upholding state Legislative Retirement Plan against constitutional challenge) (emphasis added).

Therefore, even if this Court were to conclude that both the framers of our Constitution and subsequent legislatures were hostile to abortion, the Court would still be obligated to interpret both Constitutional and statutory law in an organic way which recognizes the changes in and needs of contemporary society. See State v. Gutierrez, 116 N.M. 431, 435, 863 P.2d 1052, 1056 (1993).

CONCLUSION

For the foregoing reasons, this Court should find that the challenged regulation violates the ERA's prohibitions on sex discrimination and affirm the decision below.

Respectfully submitted,



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APPENDIX A

ABORTION-RESTRICTIVE BILLS DEFEATED IN NEW MEXICO LEGISLATURE SINCE ROE v. WADE (1973)

1. H.B. 401, 30th Leg., 1st Sess., 1973

Contents: Contained restrictions on abortion, such as making it a crime to refer someone for an abortion.

Disposition: Passed House though called unconstitutional by Attorney General; referred to Senate Public Affairs Committee; died on adjournment.

2. H.J.R. 36, 30th Leg., 1st Sess, 1973

Contents: Sought amendment of State Constitution to protect rights of the unborn.

Disposition: Passed House though called unconstitutional by Attorney General; referred to Senate Rules Committee; died on adjournment.

3. H.B. 440, 33rd Leg., 1st Sess., 1977

Contents: Required reporting to state agency of all spontaneous or induced abortions, including names of mother and father, with no confidentiality provisions.

Disposition: A substitute bill -- regarding only induced abortions and not including reporting of confidential information -- was passed and signed into law. See N.M. Stat. Ann. § 24-14-18 (1994 Repl. Pamp.).

4. H.J.M. 3, 33rd Leg., 2d Sess., 1978

Contents: Petitioning Congress to call constitutional convention to pass anti-abortion amendment to U.S. Constitution.

Disposition: Died in House Judiciary Committee.

5. H.B. 238, 33rd Leg., 2d Sess., 1978

Contents: Limited expenditure of state funds for abortion to cases of life endangerment, and to termination of pregnancies resulting from rape or incest.

Disposition: Passed by both houses; vetoed by Governor Apodaca.

6. H.B. 368, 34th Leg., 1st Sess., 1979

Contents: Limited expenditure of state funds for abortion to cases of life endangerment, and to termination of pregnancies resulting from rape or incest.

Disposition: Passed by House; died on adjournment in Senate.

7. H.J.M. 16/H.J.R. 10, 34th Leg., 1st Sess., 1979

Contents: Joint memorial/resolution requesting Congress to call constitutional convention to pass anti-abortion amendment to U.S. Constitution.

Disposition: Given "do not pass" by House Consumer and Public Affairs Committee, recommendation accepted on house floor.

8. H.B. 314, 34th Leg., 1st Sess., 1979

Contents: Imposed various restrictions on access to abortion, including specific "counseling" of pregnant woman, a 48-hour waiting period between counseling and procedure, and that second-trimester abortions be done only in hospitals.

Disposition: Amended bill passed House; died on adjournment on Senate floor.

9. H.B. 315, 34th Leg., 1st Sess., 1979

Contents: Imposed various restrictions on access to abortion, including setting "viability" at 24 weeks, requiring that abortion method employed be that most likely to preserve life and health of fetus, requiring presence at procedure of second physician, and providing that live-born fetuses became wards of State.

Disposition: Amended version passed House; died on adjournment on Senate floor.

10. H.J.R. 11, 35th Leg., 1st Sess., 1981

Contents: Called on Congress to call constitutional convention to consider Senator Helms' "Human Life Amendment."

Disposition: Tabled in House Judiciary Committee; motion to bring it to House floor failed on voice vote.

11. S.B. 108, 36th Leg., 1st Sess., 1983

Contents: Established the crime of "feticide," defined as fetal death as result of commission of a felony. Passed Senate. House passed an amended bill that would have required only enhancement of penalty for injury of pregnant woman.

Disposition: Died on adjournment.

Note: In 1985, a bill was signed into law that merely enhanced penalty for injury done to a pregnant woman that resulted in miscarriage or stillbirth. See N.M. Stat. Ann. § 30-3-7 (1994 Repl. Pamp). This law avoided the conceivably abortion-restrictive approach, which could have portrayed the fetus generally as a legally-protected "person."

12. H.B. 201, 36th Leg., 1st Sess., 1983

Contents: Required a physician to give 24 to 48 hours notice to parent of minor before performing abortion.

Disposition: Tabled by House Judiciary Committee. Motion to bring to House floor failed (24-32). Died on adjournment.

13. H.B. 502, 37th Leg., 1st Sess., 1985

Contents: Required parental notification for minors seeking abortions.

Disposition: Tabled by House Judiciary Committee. Died on adjournment.

14. H.B. 419, 38th Leg., 1st Sess., 1987

Contents: Required parental notification for minors seeking abortions.

Disposition: Given "do not pass" by House Consumer and Public Affairs Committee.

15. S.B. 15, 38th Leg., 1st Sess., 1987

Contents: Required parental notification for minors seeking abortions.

Disposition: Though essentially gutted by floor amendment, passed Senate. Tabled by House

Appropriations and Finance Committee; died on adjournment.

16. S.B. 394, 39th Leg., 1st Sess., 1989

Contents: Required parental consent for minors seeking abortions.

Disposition: Tabled by Senate Judiciary Committee; died on adjournment.

17. S.B. 682, 39th Leg., 1st Sess., 1989

Contents: Required parental notification for minors seeking abortions.

Disposition: Never heard by any committee; died on adjournment.

18. S.B. 394, 40th Leg., 1st Sess., 1991

Contents: Added "judicial bypass" option to existing (constitutionally unenforceable) law, see N.M. Stat. Ann. §§ 30-5-1 (C) (1994 Repl. Pamp.), regarding minors' access to abortion.

Disposition: Tabled in Senate Judiciary Committee; attempt to bring to Senate Floor failed (16-26); died on adjournment.

19. H.B. 595, 41st Leg., 1st Sess., 1991

Contents: Required that physicians give specific "counseling" to women seeking abortion at least 24 hours prior to procedure.

Disposition: Tabled in House Consumer and Public Affairs Committee; died on adjournment.

20. S.B. 791, 41st Leg., 1st Sess., 1993

Contents: Required that health care facilities performing abortions have at least $500,000 in malpractice insurance.

Disposition: Tabled by Senate Public Affairs Committee; died on adjournment.

21. S.B. 408, 41st Leg., 2d Sess., 1994

Contents: Prohibited use of state funds for abortion unless to save the woman's life or unless pregnancy

resulted from rape or incest.

Disposition: Tabled by Senate Public Affairs Committee; died on adjournment.

22. H.B. 76, 42nd Leg., 1st Sess., 1995

Contents: Prohibited expenditure of state funds for abortion unless to save life of woman or to the extent required by federal law for continued participation in the Medicaid program.

Disposition: Tabled by House Consumer and Public Affairs Committee; died on adjournment.

23. S.B. 52, 42nd Leg., 1st Sess., 1995

Contents: Prohibited expenditure of state funds for abortion unless to save life of woman or to the extent required by federal law for continued participation in the Medicaid program.

Disposition: Tabled by Senate Public Affairs Committee; attempt to bring to Senate floor failed (10-21); died on adjournment.

CERTIFICATE OF SERVICE

I hereby certify that today, January 29, 1996, a copy of the above and foregoing document was served upon the following counsel by first class mail, at the following addresses:

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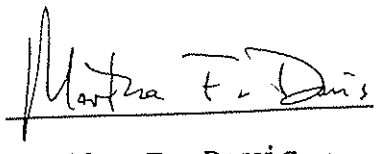

Martha F. Davis