Ruling Confirms NRLC Warnings of 1980s

New Mexico Supreme Court Says State ERA Requires State to Pay for Elective Abortions

By NRLC Federal Legislative Office

The New Mexico Supreme Court has ruled that the state's "Equal Rights Amendment" (ERA) requires the state to pay for abortion on demand for poor women.

The ruling validates years of warnings by NRLC and others that ERAs can be used as powerful pro-abortion legal weapons, unless they are suitably amended.

The New Mexico case involved Medicaid, the joint federal-state program that provides medical services for low-income people. Under the Hyde Amendment, the federal government does not pay for abortions under the program, except in cases of danger to the life of the mother, rape, or incest. In New Mexico, a state human services department rule also prohibited the use of *state* funds for Medicaid abortions, with the same three exceptions.

The state's pro-life policy was challenged in a lawsuit filed by state affiliates of Planned Parenthood and of the National Abortion and Reproductive Rights Action League (NARAL). These groups argued that the state policy violated several provisions of the New Mexico Constitution, including the state ERA, which was adopted in 1973.

In a 5-0 ruling handed down on November 25, the New Mexico Supreme Court agreed that the state's refusal to fund elective abortions violated the state ERA. The court ordered the state to pay for all so-called "medically necessary" abortions. Within the context of abortion law, "medically necessary" is a legal term of art that simply means that the abortion was performed by a licensed professional. Thus, the order actually requires the state to pay for abortion on demand for Medicaid-eligible women. (See sidebar on this page.)

Writing for the court, Justice Pamela Minzner wrote that the state's rule "undoubtedly singles out for less favorable treatment a gender-linked condition that is unique to women."

She also wrote, "Under the Department's regulations, there is no comparable restriction on medically necessary services relating to physical characteristics or conditions that are unique to men. Indeed, we can find no provision in the Department's regulations that disfavor any comparable, medically necessary procedure unique to the male anatomy."

The ruling was based entirely on the state ERA, which says, "Equality of rights under law shall not be denied on account of the sex of any person."

NRLC Federal Legislative

What Does "Medically Necessary" Really Mean?

As reported in the article on this page, in November the New Mexico Supreme Court ordered that state to pay for all so-called "medically necessary" abortions for Medicaid-eligible women.

To the layperson, the term "medically necessary" suggests that an abortion is performed because of some sort of medical emergency arising from a woman's pregnancy. However, under federal court decisions going back more than 20 years, "medically necessary abortion" is a legal term of art which simply means that an abortion is performed by a licensed medical professional.

Thus, a decision to pay for "medically necessary" abortions under Medicaid is in fact a decision to pay for *all* abortions performed on Medicaid-eligible women — the vast majority of which are performed simply as a method of birth control.

Pro-abortion advocacy groups understand this very well. A few examples:

- In 1993, William Hamilton, vice president of the Planned Parenthood Federation of America, told *Knight-Ridder Newspapers* that "medically necessary" abortions include "anything a doctor and a woman construe to be in her best interest, whether prenatal care or abortion" (*Philadelphia Inquirer*, Sept. 8, 1993).
- The National Abortion and Reproductive Rights Action League (NARAL) defined "medically necessary" as "a term which generally includes the broadest range of situations for which a state will fund abortion" (*Who Decides? A Reproductive Rights Issues Manual*, 1990).
- A senior Clinton Administration health official told Congress, "When we're talking about medically necessary or appropriate [abortion] services we are also talking about all legal services" (Judith Feder, principal deputy assistant secretary for planning and evaluation, Department of Health and Human Services, Jan. 26, 1994).

Director Douglas Johnson commented, "These five judges in effect ruled that the state may not recognize any difference between a man's enlarged prostate gland and an unborn child. By that cold-blooded logic, even restrictions on late-term abortions or parental consent laws would be a form of illegal sex discrimination."

The court rejected the state's argument that the policy was a legitimate cost-saving measure, noting that abortion during the "early stages of pregnancy" is less expensive to the state than the costs of bringing a pregnancy to term and "coverage for newborn infants."

During the 1996-97 budget year, during which the pro-life rule was not enforced because of the lawsuit, the state paid for 1,370 abortions, only one of which was to save a mother's life, according to the *Associated Press*.

National Groups Involved

Besides the involvement by NARAL and Planned Parenthood, several other national pro-abortion groups filed friend-of-the-court briefs urging the court to strike down the pro-life policy: the ACLU, the Center for Reproductive Law & Policy, and the NOW Legal Defense and Education Fund. In addition, such briefs were filed by the state Women's Bar Association, Public Health Association, and Leagues of Women Voters.

New Mexico Attorney General Tom Udall (D) refused to defend the state policy, instead filing a brief urging its invalidation. On Nov. 3, Udall was elected to the U.S. House of Representatives, defeating pro-life Rep. Bill Redmond (R).

Pro-life attorneys James Bopp, Jr., and John K. Abegg filed a friend-of-the-court brief in support of the pro-life policy on behalf of the Right to Life Committee of New Mexico, the state NRLC affiliate. Bopp is NRLC's general counsel.

Implications for Federal ERA

The New Mexico court's ruling has implications for ongoing efforts to enact an ERA to the federal Constitution.

The New Mexico ERA language, "Equality of rights under law shall not be denied on account of the sex of any person," is very close to the proposed ERA approved by Congress in 1972, which said, "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."

The 1972 ERA resolution contained a seven-year deadline for ratification, which expired in 1979 with only 35 state legislatures having ever acted to ratify.

Beginning in 1983, with attempts underway to revive the ERA in Congress, NRLC insisted on the need for adoption of an "abortion-neutralization amendment" to the ERA. Sponsored by Congressman James Sensenbrenner (R-Wi.), the amendment would have added to the ERA the sentence, "Nothing in this article [the ERA] shall be construed to grant, secure, or deny any right relating to abortion or the funding thereof."

Leading ERA supporters branded the amendment as unacceptable. On November 15, 1983, then-Speaker Tip O'Neill tried to ram the ERA through the House under a procedure that did not permit consideration of amendments, but that move failed when it was strongly opposed by pro-life forces, including NRLC and the National Conference of Catholic Bishops.

ERA-Abortion Link Was Denied

During the 1970s and 1980s, most prominent ERA supporters argued that an abortion-neutral amendment was "unnecessary," because, they claimed, there was no rational basis for NRLC's insistence that ERAs could be used to attack pro-life policies.

For example, Prof. Thomas Emerson of Yale Law School, often cited by ERA supporters as

the leading authority on the legal meaning of the proposed federal ERA, said government regulations on abortion "would not be affected one way or the other by the passage of the ERA. This allegation is pure red herring."

When Sen. Orrin Hatch (R-Utah) held a hearing in 1984 examining the ERA-abortion issue, Prof. Anne Freedman of Rutgers University Law School testified as the consensus legal expert for ERA proponents. When asked if the ERA would "create any new abortion rights" or "have impact on the Federal, State, or local limitations on public funding of abortions," Prof. Freedman responded, "No."

Likewise, liberal Catholic activists Maureen Fiedler and Elizabeth Alexander, co-founders of Catholics Act for ERA, said in a 1980 cover story in the Jesuit magazine *America*, "The Equal Rights Amendment is not connected with abortion," and suggested that those who argued otherwise were laboring under "misconceptions and distortions." In 1983, Fiedler spoke of the NRLC-backed abortion-neutral amendment as one among several "dishonest amendments proposed by people who wanted to kill ERA."

NRLC's Johnson commented, "The New Mexico Supreme Court ruling demonstrates that ERA supporters who denied an ERA-abortion connection were disingenuous or terribly naive. This ruling underscores the necessity of attaching airtight abortion-neutral language to any future proposals for a federal ERA, and to any ERAs that may be proposed in states that do not already have them. In addition, pro-life federal and state legislators should be urged not to sponsor or support any ERA that does not contain explicit abortion-neutralization language."

For the last several years, the National Organization for Women (NOW) and some other ERA proponents have sought to persuade additional state legislatures to adopt resolutions "ratifying" the 1972 ERA, based on a novel legal theory that the seven-year time limit imposed by Congress has no binding legal force. So far, no state legislature has done so.

Others, such as Sen. Ted Kennedy (D-Mass.) and Rep. Carolyn Maloney (D-NY), have introduced proposals for Congress to send a new ERA to the states for ratification - - but this time without any time limit. These proposals have received no action from the Republican-controlled Congress.

For a copy of the New Mexico Supreme Court ruling and other documentation on the ERA/abortion connection, write to the NRLC Federal Legislative Office, 419-Seventh Street, Northwest, Suite 500, Washington, D.C. 20004, fax (202) 347-3668.