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ERA Project Summary of Argument Before PA Supreme Court on Whether Medicaid Abortion Ban Amounts to Sex Discrimination

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Advisory

Date: October 26, 2022

Subject: ERA Project Summary of Argument Before PA Supreme Court on Whether Medicaid Abortion Ban Amounts to Sex Discrimination

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This morning, the Pennsylvania Supreme Court heard oral arguments in *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services*, a case in which reproductive rights advocates have challenged the state's ban on Medicaid funding for abortion (Coverage Ban), arguing that the ban violates the state constitution's explicit prohibitions against sex discrimination. Appellants, Pennsylvania abortion providers, ask the court to rule that the statutory ban on public funding for abortion violates the state's Equal Rights Amendment (ERA), which added specific sex equality protections to the Pennsylvania constitution in 1971. The ERA Project at Columbia Law School submitted an amicus brief in the case providing an overview of how the denial of reproductive health care in general, and access to abortion in particular, have been found by many courts, and many prominent legal scholars, to amount to a form of sex-based discrimination.

Our brief explains how denial of access to abortion violates the Pennsylvania ERA and is a form of sex discrimination in several different ways:

- i) The ban burdens women's access to health care in ways that men are not similarly burdened;
- ii) The ban is based on stereotypes about gender-based identities and roles in society, and forces pregnant people to conform to an outdated gendered destiny in the home raising children rather than in the workplace, the boardroom, the statehouse, or other more traditionally "masculine" spheres of life; and
- iii) The capacity to rationally plan or space parenthood by people who bear the largest burden of childrearing—typically women—renders them incapable of participating equally in the workplace, in education, in politics, and in other contexts fundamental to robust citizenship.

In today's oral arguments, the Justices probed the question of whether and how the denial of funding for abortion amounts to a form of sex discrimination. Susan Frietsche from the Women's Law Project in Pennsylvania argued to the court that:

- The law is facially discriminatory and contains text banning funding for abortion which specifically mentions “women who are pregnant” and that there is no comparable medical care for men that is not covered by Medicaid. This case is about limits on health care access provided to women, with no similar limit on men's access to comparable care. Pennsylvania gives fewer benefits to people with a uterus.
- The equality provisions of the state constitution, including the ERA, exceed those contained in the Equal Protection Clause of the federal constitution.
- Banning funding for abortion amounts to a form of sex stereotyping, in so far as it reflects the stereotype that women are and should be mothers, and is inextricably linked to women's equal status as citizens.
- The Pennsylvania ERA, adding explicit sex equality protections to the state constitution, requires courts to apply strict scrutiny to sex-based classifications in state laws. Frietsche urged the court to look to New Mexico, where the state Supreme Court found that a similar ban on Medicaid funding for abortion violated their state ERA.
- The case does not require the court to rule whether there is a constitutional right to abortion in Pennsylvania, nor a right to state-funded health care. But if the state does subsidize healthcare via Medicaid, it must do so in a way that does not discriminate on the basis of sex. As such, the Supreme Court's recent decision in *Dobbs* has no relevance to this case.
- Limits on public funding for abortion disproportionately impact low-income women and women of color in the state, and their rights are particularly abridged by this law.
- When asked by one of the Justices about the state's duty to protect a right to life, Frietsche responded that the ban on covering abortion undermines a right to life, while providing access to abortion promotes life and health, especially the life and health of women. She noted that this is not a pro-life or pro-choice case, it's a case about equality in health care funding, and concluded that women have rights protected by the constitution, fetuses do not.
- The ban on funding for abortion amounts to a commandeering of women's bodies by forcing pregnancy and birth.

Attorney Matthew Haverstick argued the case in favor of the Coverage Ban on behalf of several state legislators who have intervened in the case. With respect to the ERA he argued:

- A state policy limiting funding for abortion does not amount to sex discrimination, because it is not based in sex stereotyping.

- There is no constitutional right to funding for health care, abortion, or any fundamental right (such as guns).
- The state's refusal to fund abortion through Medicaid does not make it any more difficult to obtain an abortion, and the fact that poor women cannot afford to pay for abortions is not due to any action on the part of the state, as their lack of funds derives from other sources.

We note that there was also an extremely unfortunate, and transphobic, colloquy between Mr. Haverstick and one of the Justices in which they made fun of, if not ridiculed, the fact that not only women can become pregnant and need abortion services, insofar as trans men can become pregnant.

The Court also heard argument on the question of whether abortion providers had legal standing to bring this case and whether state legislators could intervene on both sides of the case, some challenging the Medicaid ban and others defending it. Professor David Cohen from Drexel Kline School of Law argued the case in favor of standing for the providers, offering a masterclass to the court and audience on the state law of standing.

The Court is expected to issue a decision in several months.

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[The ERA Project](#) at Columbia Law School's Center for Gender and Sexuality Law is a law and policy think tank established in January 2021 to develop academically rigorous research, policy papers, expert guidance, and strategic leadership on the Equal Rights Amendment (ERA) to the U.S. Constitution, and on the role of the ERA in advancing the larger cause of gender-based justice.

The ERA Project does not engage in lobbying, but instead develops academic, legal and policy expertise to support efforts to expand protections for gender-based equality and justice.

