

The New Mexico Supreme Court has ruled that the State must cover all medically necessary abortions in its Medicaid program using State-only funds. [\[1\]](#) While federal Medicaid dollars are available to pay for abortions only in the cases of rape, incest, or when necessary to save the mother's life, [\[2\]](#) the Court ruled that the Medicaid agency must use state funds to cover all other medically necessary abortions. The Court based its decision to expand coverage of abortion services on the State Constitution's Equal Rights Amendment (ERA). Specifically, the Court found that the Medicaid agency's rule prohibiting State funding for certain medically necessary abortions denies Medicaid-eligible women equal rights. The agency's rule results in a program that does not apply the same standard of medical necessity to both men and women, and there is no compelling justification for treating men and women differently with respect to their medical needs.

The Court reached this conclusion using a four-step analysis. First, the Court examined whether the State constitution affords women greater protection against gender discrimination than they receive under federal law. The Court concluded that it did after finding that there was no counterpoint to the State's ERA in the U.S. Constitution; the ERA specifically prohibits and provides a legal remedy for the consequences of gender discrimination; and the ERA requires that the Court apply a "searching judicial inquiry" standard to State laws that employ gender-based classifications where federal law would require only "intermediate scrutiny." Thus, on its face, the State rule limiting coverage of abortion services is presumptively unconstitutional. The Court also noted that while the U.S. Constitution does not require the State to provide funding for medically necessary abortions that fall outside of the restrictions of the federal law, nothing in federal law prohibits States from affording greater protections to women. [\[3\]](#)

Second, the Court rejected the State's argument that men and women are not similarly situated (and thus allowing unequal treatment) because of women's unique characteristics, namely the ability to become pregnant and bear children. Because of these unique characteristics, the State argued, its restrictions on abortion are exempt from heightened scrutiny under the State's ERA. In this regard, the Court states that "it would be error . . . to conclude that men and women are not similarly situated with respect to a classification simply because the classifying trait is a physical condition unique to one sex." To determine whether men and women are similarly situated, it is necessary to look beyond the classification to the purpose of the law.

Looking at the purpose of the Medicaid statute, the Court states that men and women who meet the agency's general criteria regarding financial and medical need are similarly situated with respect to their eligibility for Medicaid. It is the basic objective of the Medicaid Act to provide

qualified individuals with necessary medical care. Similarly, the mission of the New Mexico program is to maximize the health status of Medicaid-eligible individuals by providing payment for quality health services at levels comparable to private health plans. The federal Medicaid law imposes a general obligation on States to fund medically necessary services that are covered. Apart from the restrictions on federal funding imposed by federal law, abortion falls under several mandatory coverage categories.

Third, the Court determined whether the State's restriction on abortion operated to the disadvantage of women. Whereas the New Mexico rule limited abortion services provided to women in cases of rape, incest, or to save the woman's life, the State imposed no comparable restriction relating to physical characteristics or conditions unique to men. There are no rules that would prohibit any comparable, medically necessary procedure unique to the male anatomy (e.g., conditioning provision of service to eligible male Medicaid beneficiaries on a physician's certification that the care is necessary to save the life of the patient).

Fourth, in order for the rule to survive scrutiny, the State must have shown that it had a compelling justification. The State asserted that it had two compelling interests – to save costs and to protect the life of the unborn. The Court did not find these to be credible arguments where the costs of carrying a pregnancy to term is, in fact, more expensive than the costs of an abortion. The Court also rejected this argument on the basis that once the State has elected to provide medically necessary services to low-income persons, it cannot do so in a manner that discriminates against some on the basis of gender.

With respect to the State's interest to protect the life of the unborn, the Court found that the State's interest in the potential life of the unborn is never compelling enough to outweigh the interest in the life and health of the mother. This is especially the case where the State did not utilize the least restrictive means of advancing this interest: the State prohibits funding for most medically necessary abortions at all stages of a woman's pregnancy and without regard to her health, except in life threatening situations. This restriction would be in place even in the case in which the fetus will not be viable due to a fatal physical or mental impairment. Thus, the Court held that there was no compelling State justification for treating men and women differently with respect to their medical needs under the State's ERA.

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1 New Mexico Right to Choose/NARAL v. Johnson, No. 23239 (NM Nov. 25, 1998).

2 These limits are imposed by the Hyde Amendment which is an explicit exception to coverage of medically necessary services that could be covered by Medicaid. The Hyde Amendment is attached annually to legislation which appropriates funds to federal agencies for one fiscal year. See, e.g., Balanced Budget Act of 1997, Pub. L. No. 105-33, § 2105(c)(1),(7), 111 Stat. 251, 561, 562-63 (1997).

3 See Harris v. McRae, 448 U.S. 297, 309 (1980) (finding that the Medicaid Act does not obligate participating States to pay for medical services for which federal reimbursement is not available).