Ms. LeRoy. Well, the Air Force pilot said she wanted to be a fighter pilot.

General Hoisington. Oh, yes, and I know some women who want to go into combat, too. But they don't know what it's like.

Ms. LeRoy. And you know better, is that—

General Hoisington. No, I didn't say I knew better. Wait a minute. I said that you ask the people who have been there. I have been on the battlefield, who have told me it is not the proper place for a woman.

Ms. LeRoy. Why is that? I guess I don't understand. Why is it better for Professor Stanmeyer to be there than for you to be there? I guess I just don't understand. Why is it better for him to be mutilated than for you?

General Hoisington. Oh, I don't—it isn't any better for him to be mutilated—

Ms. LeRoy. Then where is the basis of your concern? If it isn't better for him, why can't—

General Hoisington. I'm saying that the majority of women cannot meet the qualifications.

Ms. LeRoy. I'm not suggesting that they can. I'm suggesting that we simply draw a gender-neutral standard, so that if Captain Graf can meet those standards, she can be a fighter pilot.

General Hoisington. Well, if you don't care, I think the way our society is set up, we don't want the women to be over there—

Ms. LeRoy. My time has expired.

Mr. Edwards. I believe we have to move on. We are glad to have had these very interesting witnesses.

Professor Monaghan, we do appreciate your suggestion that we should make it clear in the legislative history the standard that is to be used. I think it is very important and we will make a note of it. All the witnesses, thank you very much. We enjoyed having you and you have provided very useful information.

Mr. Edwards. We have another panel. We welcome Ms. Paige Cunningham, who is Executive Director of Americans United for Life, Legal Defense Fund, and Mr. Allen Quist, State Representative of the Minnesota House of Representatives. We are glad to have both of you here.

Miss Cunningham, you may proceed.

STATEMENTS OF PAIGE COMSTOCK CUNNINGHAM, ESQ., EXECUTIVE DIRECTOR AND GENERAL COUNSEL, AMERICANS UNITED FOR LIFE LEGAL DEFENSE FUND; AND ALLEN QUIST, MEMBER, HOUSE OF REPRESENTATIVES, STATE OF MINNESOTA

STATEMENT OF PAIGE CUNNINGHAM

Ms. Cunningham. Mr. Chairman and members of the subcommittee, my name is Paige Comstock Cunningham. I am presenting this statement in my capacity as Executive Director and general Counsel of Americans United for Life and the AUL Legal Defense Fund. The AUL Legal Defense Fund is the only public interest law firm in the nation that devotes its full-time efforts to litigation involving the right-to-life issues of abortion, infanticide, and euthanasia.

I would like to point out that the views I express on the propriety of an Equal Rights Amendment are my own. Americans United for Life is neutral with respect to the ERA, apart from its implications for abortion. AUL is not a political organization and is not involved in lobbying. I am here today only to testify to the legal effect of the Equal Rights Amendment on abortion.

As an individual, attorney and woman, I endorse the principle of equal treatment of women under the law. No class of citizens should be excluded from constitutional guarantees of equal protection. As a pro-life advocate, I believe these fundamental rights extend to the class of the unborn, both male and female. It is therefore with dismay that I must conclude that the proposed ERA, intended to fill the gaps in eliminating discrimination against women, may also be used to buttress and amplify the so-called "right to abortion".

In my legal opinion, the plain language of this proposed constitutional amendment does not require any connection with abortion rights or funding. However, it is instructive to examine the intentions of ERA advocates which, in the absence of a clear legislative history, could affect how the amendment is interpreted. These intentions have been made clear in legal arguments made under equal rights provisions in state constitutions.

In 1980, the Civil Liberties Union of Massachusetts filed a complaint in Moe v. King, arguing that state refusal to fund abortions violated the Massachusetts Equal Rights Amendment. Although the Massachusetts court did not address the ERA argument, it upheld tax funds for abortions under due process guarantees.

The CLUM is a state affiliate of one of the most prominent groups to support ERA ratification. The executive director explained the decision to pursue abortion funding under the state ERA: "Because a strong coalition is being forced between the anti-ERA coalition and the anti-abortion people, it was our hope to be able to save Medicaid payments for medically necessary abortions through the federal court route without having to use the state Equal Rights Amendment and possibly fuel the national anti-ERA movement. But the loss in McRae was the last straw. We now have no recourse but to turn to the State Constitution for the legal tools to save Medicaid funding for abortions." It is thus clear that an equal rights amendment could be a potential vehicle for attempts to require tax funding of abortion.

Moe v. King is not unique. In 1978, several physicians attempted to intervene in a case where Hawaii Right to Life sued the State of Hawaii to stop funding abortions. On behalf of the physicians, the American Civil Liberties Union argued that: "Applicants' first claim to reimbursement as a matter of right rests on the Hawaii Constitution's guarantees of due process and equal protection and Article I, Section 21, 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 Motion to Intervene was denied and the court did not address the equal rights argument, but abortions still are tax funded in Hawaii.

And in Fisher v. Commonwealth, a case that is still being litigated, the American Civil Liberties Foundation of Pennsylvania argued that "Pregnancy is unique to women. [Pennsylvania laws] which expressly deny benefits for health problems arising out of pregnancy discriminate against women recipients because of their sex. [The Pennsylvania laws] and the regulations issued pursuant thereto constitute a gender-based classification in violation of the Pennsylvania Equal Rights Amendment." It is true that none of these cases have held that the state equal rights provisions make abortion immune from state regulatory control or require abortion to be funded by the state. On the other hand, no court has ever denied that such equal rights provisions do have an impact on abortion policies. Quite simply, we have no direct judicial guidance on this matter.

But we do have the comments of ERA proponents regarding their intentions. Leading ERA interpreters Thomas Emerson of Yale Law School, former Columbia Law School Professor Ruth Bader Ginsburg, now a Federal judge, and others, as argued in an amicus brief in General Electric v. Gilbert that pregnancy classifications under the ERA would be subject to strict scrutiny and "would not survive the ERA." Abortion and childbirth, according to Justice Brennan, in a dissent joined by Justices Marshall and Blackman, "are simply two alternative medical methods of dealing with pregnancy." Thus, an abortion regulation, under this line of reasoning, would be a pregnancy-related classification, and therefore unconstitutional, under the ERA.

It is therefore quite obvious from these cases and comments that abortion advocates would attempt to employ a Federal ERA as a basis to argue anew that abortion must be funded by both the states and the Federal Government. It is also clear how their argument would proceed: since restrictions on abortion practices or abortion funding affect women, but not men, they constitute a form of invidious discrimination against women and are therefore unconstitutional. An analogy suggested by Professor Grover Reese of the University of Texas School of Law is instructive. Suppose that a state forbade treatment for sickle cell anemia or refused to fund such treatment, although it funded every other form of medically necessary care. Let us further suppose that only black people could acquire sickle cell anemia. It might easily be argued then that such legislation constitutes a form of discrimination based on race, since it affects only blacks. Since classifications in the law based on race are inherently suspect, they are subject to strict judicial scrutiny. Hence, such legislation could be upheld against constitutional attack only in the exceedingly unlikely event that there exists some compelling state interest that would justify the discrimination inherent in such legislation and that the legislation would be narrowly drawn only to satisfy that interest.

In similar fashion, it would be argued that restrictive abortion legislation affects only women—now a "suspect class" for equal protection purposes under the new ERA. Hence, it would certainly be claimed that only some compelling interest could justify this form of discrimination. Since, in accord with Supreme Court decisions, there exists no compelling interest that justifies significant regulation of abortion, at least until the point of viability, abortion laws and funding restrictions must fail.

It is true that the Supreme Court has held that state and federal governments were based on the premise that such restrictions did not involve a "suspect class." The ERA, by making classifications based on sex inherently suspect, must thus be employed to reverse prior Supreme Court decisions warranting government restrictions on abortion funding.

It is also true that the Supreme Court has already held that almost all state restrictions on abortion practices are unconstitutional under the Fourteenth Amendment to the U.S. Constitution. The ERA is hardly needed to establish the existence of the "right to abortion" that already undercuts almost every direct state restriction on abortion practice. Nevertheless, the ERA could certainly create another constitutional hook on which the court could hang "abortion rights." Abortion proponents could add "violation of the ERA" to their claims that abortion restrictions violate other constitutional guarantees. Even the minimal power that the state presently maintains to regulate abortion could be lost. Moreover, should the Supreme Court some day consider reversing its decision recognizing a right to abortion under the Fourteenth Amendment, the ERA could represent an alternative basis for maintaining the continued existence of such a right.

This analysis is not intended to imply that the ERA, of necessity, would reverse court decisions acknowledging the right of government to refuse to fund or facilitate abortion practices, to abrogate further the power of government to restrict abortion practices, or to provide some alternative basis for recognition of a right to abortion. By the better reasoning, the ERA would do none of these things. Restrictions on abortion or abortion funding are universal and facially neutral—they apply to both men and women. They would affect men, if men could bear children. That they do not affect men is not a circumstance that arises as a result of state action, but due to biological fact. It cannot be logically argued that any discriminatory effect that arises as the result of restriction abortion laws is caused by the State in enacting such laws, and the ERA represents only a restriction on the power of the state to discriminate between the sexes. Therefore, the ERA would have no effect whatever on the authority of the State to restrict abortion practices or funding if normal logic and usual principles of constitutional adjudication prevailed.

But, of course, it is too often the case that the judiciary twists logic and refuses to apply proper principles of constitutional analysis in order to achieve a preferred result. Indeed, the law of abortion is a striking example of this process. The development of the "abortion right" can only be understood in the context of the current judicial bias that abortion should not be controlled by the state. The present law of abortion cannot be rationalized simply by reference to the text or history of the Constitution. And, unfortu-
nately, the ERA provides an additional weapon in the crusade for permissive abortion.

In the present climate, it is highly likely that the courts would develop a sex-based discrimination test that measured the disparate impact of an abortion law, rather than a test that simply measured the extent to which a law created or embodied discrimination by its terms. At the very least, it is certain that the ERA would deepen the courtroom hostility against abortion legislation in view of the obvious fact that such laws affect only one sex. In the volatile world of abortion litigation, such a mere change in climate is enough to destroy entirely the power of the state to regulate abortion and, indeed, enough to generate a new body of law that compels the state to positively encourage the practice by funding and facilitating it.

If you wish to avoid the result of the ERA directly implicating abortion funding and abortion rights, then, in my legal opinion, there are several options.

First, new language might be offered as a substitute for the present language, which expresses abstract idealism, but it is also exceedingly vague and open to various interpretive abuses.

Second, a specific disclaimer which denies that the ERA implicates abortion might be added to the present language of the amendment.

Third, clear, absolute and unequivocal legislative history to the effect that the ERA may not be construed to affect the power of government to restrict abortion practices, to refuse to fund or facilitate abortion practices, or to implicitly recognize a right to abortion should suffice. This third method of removing any implication that ERA affects abortion law by legislative history is offered with considerable hesitation.

As an individual, I am well aware that at least some proponents of the ERA regard permissive abortion as the cornerstone of sexual equality, rather than demanding that society accommodate female reproductive capacity. There is no doubt this branch of the feminist movement would prefer that there be no legislative history regarding the ERA's effect on abortion, or that its legislative history be vague and ambiguous, so that once in the hands of the friendly judiciary the ERA could be used as a sword to deprive the government of any remaining authority to restrict abortion or abortion funding and as a shield to defend the right to abortion against erosion or collapse.

It is also the case that the judiciary may disregard legislative history that is only slightly unclear in order to reach some preferred result. Only an utterly unambiguous record that cannot be avoided by the judiciary—a record that would require intellectual dishonesty to ignore—could suffice.

At the very minimum, such a legislative history would contain the following elements:

First, the Committee Reports in both the House and Senate must state unequivocally: (1) that the ERA is not intended and may not be construed to establish, affirm, or expand any right to abortion; (2) that the ERA is not intended and may not be construed to affect or alter in any way any power of the local, state or Federal Government to restrict or prohibit any abortion; (3) that the ERA is not intended and may not be construed to compel any private individual, any individual acting under color of law, or any local, state or federal government to participate in, fund, or otherwise facilitate in the performance of any abortion; and (4) that the reason the ERA does not in any way affect or alter the power of government to restrict abortion or abortion funding and does not compel any private individual or state actor to facilitate performance of any abortion is because the ERA is solely intended to forbid only discrimination by the State as between the sexes and, further, that any discriminatory impact that might result from any abortion restriction arises on account of the sole capacity of the female to bear children and not as the result of state action.

In addition, the House and Senate sponsors should specifically inform the members of each body on the record immediately preceding their vote on the ERA of each of the same elements that are in the committee report. A preferable alternative would be a resolution enacted at the same time as the ERA, reciting the elements of the Committee Report.

In my legal opinion, failure to recite any element in either committee report, failure of the sponsors in either the House or the Senate to recite plainly all the elements on the floor in the manner described, or failure of either the House of the Senate to enact a contemporaneous resolution with these elements included, would render the legislative history of the ERA suspect and would implicate abortion rights.

To state generally for the record that there is no relationship between the ERA and abortion without the emphasis and specifics that I have described would not be adequate. Casual recitation of the fact that no court has so far held an equal rights provision to implicate abortion will not prevent future courts from holding that it does. The charges and counter-charges made in the public debate on ERA and the ambivalent testimony before this subcommittee demand that the legislative history made by the Congress be in the nature of a directive to the courts which will subsequently construe the ERA that they are forbidden to find that it implicates abortion because to do so would be contrary to the expressed intent of its framers, sponsors, and those who voted to enact it.

There are those who would protest that nothing short of a specific disclaimer included within the plain language of the ERA suffices to assure that the judiciary will not subsequently employ this amendment as a vehicle to expand or to secure permissive abortion. A careful study of the canons of judicial construction makes it clear, however, that only a patently corrupt judiciary with no sense of honor or propriety would or could choose to disregard the unambiguous legislative history I have described. The plain language of the ERA does not speak to abortion. Thus, the judiciary would be compelled to construe the ERA in light of its legislative history. Committee Reports are regarded as particularly illuminating guides to legislative intent. Likewise, the clear statements of sponsors and contemporaneous resolutions of enacting bodies are given great weight.

Similarly, there are those who might claim that the history of the ERA is too muddled and uncertain on this issue to be cured by remedial legislative history of the kind I have described. But the
public debate on possible implication of abortion by the ERA by its advocates and opponents in the absence of a clear legislative history is one thing. The expressed intent of the ERA by the Congress—the body that would make legislative history—is quite another. I believe that the rigorous, unambiguous legislative history I have described will effectively put the matter to rest.

In the absence of any contrary or ambivalent expressions in the official record, the combined legislative history I have described would, in my view, warrant the good faith conclusion of any objective observer that the ERA could not be construed to affect abortion law. A judiciary that is so disreputable that it would disregard or distort such a history could far more easily distort some other provisions of the Constitution to accomplish the same result. From this point of view, if a firm legislative history is inadequate to prevent the judiciary from employing the ERA to expand or to secure permissive abortion, then neither would plain language in the ERA disclaiming any effect on abortion law be adequate.

In conclusion, the language of the ERA does not, on its face, implicate abortion. However, in view of positions taken by abortion advocates under state equal rights provisions, the views of leading ERA proponents, and the decisions of the judiciary in abortion-related matters, this potential connection is obvious. Only new language, or a specific abortion disclaimer, or a rigidly drafted legislative history, could assure that this result would not occur.

Otherwise, the Federal courts would have a blank check to interpret the ERA in the abortion context as they choose—a result that as an advocate of the right to life for all human beings I must oppose.

Thank you, Mr. Chairman.
Mr. Edwards. Thank you, Ms. Cunningham.

[The prepared statement of Paige Cunningham follows:]

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Statement of Paige Comstock Cunningham, Esq.
Before the House of Representatives, Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary
Wednesday, October 26, 1983

Introduction

Mr. Chairman, and members of the Subcommittee, my name is Paige Comstock Cunningham. I am presenting this statement in my capacity as Executive Director and General Counsel of Americans United for Life and the AUL Legal Defense Fund. The AUL Legal Defense Fund is the only public interest law firm in the nation that devotes its full-time efforts to litigation involving the right-to-life issues of abortion, infanticide, and euthanasia.

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For purposes of identification, I am a graduate of Northwestern University School of Law, and an attorney. My articles on abortion have appeared in several periodicals, including Update, a Journal of the American Bar Association. I am co-author of a monograph on the abortion decisions rendered by the Supreme Court this summer. My comments on a religious freedom issue appeared in the Northwestern University Law Review.

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