

January 27, 2020

202-626-8820

**Re: Pro-life scorecard alert on H.J. Res. 79 (pro-abortion 1972 Equal Rights Amendment)**

Dear Member of Congress:

During the week of February 10, the U.S. House of Representatives is likely to vote on H. J. Res. 79, a measure that purports to retroactively erase the seven-year ratification deadline that the 92<sup>nd</sup> Congress included in the Equal Rights Amendment resolution it submitted to the states in March, 1972. National Right to Life is strongly opposed to H. J. Res. 79, and intends to include the roll call on passage in our scorecard of key pro-life votes of the 116<sup>th</sup> Congress.

**In our scorecard, a vote in favor of H.J. Res. 79 will be accurately characterized as a vote intended to add language to the U.S. Constitution that both NARAL Pro-Choice America and National Right to Life say would likely be employed to invalidate laws protecting unborn children.**

Moreover, H. J. Res. 79 is not simply unconstitutional but anti-constitutional. It proposes to shred the protections embedded in Article V of the U.S. Constitution. As the Justice Department's Office of Legal Counsel (OLC) spelled out in a 38-page legal opinion issued January 6, 2020, the 1972 ERA died in March, 1979, and cannot be resurrected. The only constitutionally legitimate way for an ERA to become part of the Constitution is for Congress to submit a new proposal to the states.

#### **THE ERA-ABORTION CONNECTION**

**There is now broad agreement between key pro-life and pro-abortion groups that the language of the 1972 ERA could be employed by liberal federal judges to reinforce and expand "abortion rights." For example, NARAL Pro-Choice America, in a March 13, 2019 national alert, asserted that "the ERA would reinforce the constitutional right to abortion . . . [it] would require judges to strike down anti-abortion laws . . ." A National Organization for Women factsheet on the ERA states that "...an ERA -- properly interpreted -- could negate the hundreds of laws that have been passed restricting access to abortion care..." The general counsel of the National Women's Law Center told AP that the ERA would allow courts to rule that limits on abortion "perpetuate gender inequality." We could cite many other examples.**

**Already, pro-abortion activists have aggressively employed state ERAs to challenge pro-life policies.** For example, in New Mexico, state affiliates of Planned Parenthood and NARAL relied on the state ERA in a legal attack on the state version of the "Hyde Amendment," prohibiting Medicaid funding of elective abortions. In its 1998 ruling in *NM Right to Choose / NARAL v. Johnson*, No. 1999-NMSC-005, the New Mexico Supreme Court *unanimously* agreed that the state ERA required the state to fund abortions performed by medical professionals, since procedures sought by men (e.g., prostate surgery) are funded. The New Mexico Supreme Court based its ruling *solely* on the state ERA.

Moreover, in 2019 the Women's Law Project and the Planned Parenthood Federation of America (PPFA) filed a lawsuit (*Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services*) arguing that the Pennsylvania ERA must be construed to invalidate the state's limitations on Medicaid funding of abortion – using arguments that, by extension, would apply also to other limits on

abortion. The complaint argues that any previous judgment that the ERA did not apply to abortion is “contrary to a modern understanding . . .” of an ERA.

Once a court adopts the understanding that a law limiting abortion is by definition a form of discrimination based on sex, and therefore impermissible under an ERA, the same doctrine would invalidate virtually any limitation on abortion. For example, under this doctrine, the proposed federal ERA would invalidate the federal Hyde Amendment and all state restrictions on tax-funded abortions. **Likewise, it would nullify any federal or state restrictions even on partial-birth abortions or third-trimester abortions (since these too are sought only by women).** Also vulnerable would be federal and state “conscience laws,” which allow government-supported medical facilities and personnel -- including religiously affiliated hospitals -- to refuse to participate in abortions.

For decades, many ERA advocates have tried to evade this issue by observing that *past* Supreme Court rulings on abortion have relied on a purported due-process “privacy” right. This is almost childish in its transparent evasiveness -- obviously, past U.S. Supreme Court rulings on abortion issues dealt only with the *current* U.S. Constitution, *without* the ERA’s absolute prohibition on abridgement of “rights . . . on account of sex.” Perhaps Judiciary Committee Chairman Nadler, among others, has grown weary of this tiresome dodge – at the markup, he did not dispute the statements of minority members regarding the ERA-abortion connection, but instead affirmed his belief that “the right to full equality includes the right” to abortion (transcript at 25-26).

Beginning in 1983, pro-life members of Congress have insisted that a simple “abortion-neutralization” clause must be added to any *new* ERA before it is sent out to the states. The proposed revision – which cannot be added to the fixed and expired language of the 1972 ERA, but which could be added by Congress to any new (“start over”) ERA proposal – reads:

Nothing in this Article [the ERA] shall be construed to grant, secure, or deny any right relating to abortion or the funding thereof.

This proposed revision would simply make any new ERA itself neutral regarding abortion policy; it would not change the current legal status of abortion, nor would it permit the ERA itself to be employed for anti-abortion purposes. Tellingly, ERA proponents have adamantly refused to accept such an abortion-neutral revision. That refusal is one major reason why neither house of Congress has voted on an ERA since a “start-over” ERA was defeated on the House floor on November 15, 1983.

### **HOW H. J. RES. 79 VIOLATES CONSTITUTIONAL REQUIREMENTS**

When the 92<sup>nd</sup> Congress sent the ERA proposal to the states in 1972, the submitted resolution (H.J. Res. 208) included a seven-year deadline, which expired in 1979 – nearly 41 years ago. The U.S. Supreme Court had previously recognized that “Congress had the power to fix a reasonable time for ratification,” and indicated that such a deadline would be effective (*Coleman v. Miller*, 1939). Such a deadline might appear, the Court indicated, “in the proposed amendment or in the resolution of submission.” The Supreme Court had also said, “Whether a definite period for ratification shall be fixed, *so that all may know what it is and speculation on what is a reasonable time may be avoided*, is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification,” which is to say, any deadline must be fixed at the time a proposed amendment is submitted to the states. (*Dillon v. Gloss*, 1921, emphasis added).

H.J. Res. 79 purports to make the ERA part of the Constitution notwithstanding the language of the resolution that the 92<sup>nd</sup> Congress submitted to the states in 1972. The OLC opinion rightly compares this

to an attempt by the current Congress to override a veto by President Carter. As even the liberal Brennan Center for Justice commented on January 23, 2020, “there is no precedent for waiving the deadline after its expiration.” Congress’s powers are enumerated in Articles I and V of the Constitution; they do not include time travel.

Moreover, the authors of H.J. Res. 79 assert that they can accomplish this magic by *simple majority* votes, even though they purport to base the measure on Article V, which speaks only of *two-thirds* votes. (The authors tiptoed away from their original deadline-nullification resolution, H.J. Res. 38, after gathering 217 co-sponsors, because its enacting clause required a *two-thirds* vote.) **Nowhere does the Constitution empower Congress to make externally binding law on *any* matter without encountering a certain or potential *two-thirds* requirement – two-thirds being always required for proposals passed under Article V, and also required to enact ordinary legislation under Article I whenever a president vetoes a measure. Yet, the sponsors of H.J. Res. 79 assert that the resolution is somehow subject to *neither* of these safeguards. H.J. Res. 79 is, therefore, a wholly illegitimate legislative object, and is properly opposed on that ground as well.**

The committee’s feeble defense of this rogue resolution is that something similar was seen once before - - when the 95<sup>th</sup> Congress gave approval, by simple majorities, to a measure that purported to extend the ERA ratification deadline by 39 months, to June 30, 1982. This is “precedent” only in the sense that a first attempted bank robbery is precedent for a second; yet, in our view, the second attempt does not legitimize the first. The purported “deadline extension” was declared unconstitutional by the only federal court to review the matter (*Idaho v. Freeman*, 1981). The U.S. Supreme Court declined to review the case only because it accepted the position of the U.S. Solicitor General that the ERA had “failed of adoption” either way, since no additional states ratified the ERA during the 39-month pseudo-extension. As Prof. Michael S. Paulsen, a leading expert on the constitutional amendment process, explained in a letter to the Judiciary Committee, “The Supreme Court’s disposition of the case on mootness grounds logically entails the predicate conclusion that the proposed Equal Rights Amendment had failed of ratification and was no longer legally capable of being ratified.”

The U.S. House Democratic leadership of 1983 also recognized that the 1972 ERA was dead, which is why they brought a start-over ERA (same language) to the House floor on November 15, 1983 – only to see it defeated.

Because the intent of H.J. Res. 79 is to place the text of the 1972 ERA into the Constitution, National Right to Life intends to score the roll call on passage of H.J. Res. 79. In our communications with our members, supporters, and affiliates nationwide, a vote in favor of this resolution will be accurately characterized as a vote intended to insert language into the U.S. Constitution that could invalidate any limits whatsoever on abortion, including late abortions, and require government funding of abortion. Thank you for your consideration of National Right to Life’s strong opposition to this measure.

Respectfully submitted,



Carol Tobias  
President



Douglas D. Johnson  
Senior Policy Advisor



Jennifer Popik, J.D.  
Legislative Director



When the Equal Rights Amendment (ERA) was first introduced, it wasn't ratified, making protections against sexual discrimination under the Constitution incomplete for more than forty years.<sup>1</sup> Since then we've also seen federal courts shift into right-wing anti-choice hands and attacks on our right to legal abortion guaranteed under *Roe v. Wade* multiply.<sup>2,3</sup>

In order to protect our reproductive freedom today it's essential we pass the newly re-introduced bill to ratify the ERA. With its ratification, the ERA would reinforce the constitutional right to abortion by clarifying that the sexes have equal rights, which would require judges to strike down anti-abortion laws because they violate both the constitutional right to privacy and sexual equality.<sup>4,5</sup>

**[Without reproductive freedom, we are not truly free. Add your name in support of the ERA now!](#)**

It's past time that all Americans have the right, enshrined in our Constitution, to pursue our destinies free from discrimination based on sex. Now, the ERA has been re-introduced by Rep. Carolyn Maloney, and we have a new opportunity to ensure women will be treated equally under the law.<sup>6</sup> Without bodily autonomy, we are not fully free to participate in the workforce, fulfill our educational aspirations; or determine if, when, and how to begin or grow a family. **And there's no plainer truth than this: We deserve to be fully equal citizens under the Constitution.**

**[Join us in advocating for the passage of the ERA to help protect our rights and the rights of generations to come. Add your name!](#)**

Thank you for all you do for reproductive freedom,  
Jennifer Warburton,  
Director of Government Relations, NARAL Pro-Choice America

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Sources:

1. [Ratification Info State by State](#), Alice Paul Institute, 2018.
2. [Trump's Anti-Choice Judicial Nominees](#), NARAL Pro-Choice America, accessed March 13, 2019.
3. [Wanna Save Roe v. Wade? Don't Look To The Courts](#), *The Daily Beast*, Jul. 27, 2018.
4. *Ibid.*
5. [The Equal Rights Amendment Strikes Again](#), *The Atlantic*, Jan. 20, 2019.
6. [Equal Rights Amendment](#), *The Office of Rep. Carolyn Maloney*, Jan. 29, 2019.