

To: To the Honorable Members of the Alabama Legislature

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Re: why you should oppose House Joint Resolution 35,
which purports to ratify the pro-abortion 1972 federal Equal Rights Amendment

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SUMMARY: In March, 1972, the 92nd Congress approved and submitted to the states H.J. Res. 208, which contained both a proposed amendment to the U.S. Constitution -- the “Equal Rights Amendment” (ERA) – and a 7-year ratification deadline. The deadline arrived in March 1979 – 42 years ago -- without the ERA having garnered the required 38 state ratifications. **Alabama was among the non-ratifying states.** House Joint Resolution 35 purports to ratify this long-expired ERA. **Alabama Citizens for Life and the National Right to Life Committee (NRLC) strongly urge you to oppose HJR 35.** HJR 35 is part of a national scheme to evade the ratification requirements contained in Article V of the U.S. Constitution, and to instead amend the Constitution through an exercise in raw political power cloaked in legal subterfuge. The late Justice Ruth Bader Ginsburg repeatedly, and as recently as February 2020, urged ERA supporters to employ the only constitutionally proper route: “Start over.” We urge you to oppose HJR 35 or any similar measure, because:

- The language of the ERA that was proposed by Congress in 1972, which obviously cannot now be revised, is virtually identical to language that major pro-abortion groups have used in other states (e.g., New Mexico, Pennsylvania, Connecticut) for legal attacks on pro-life laws (e.g., to mandate tax funding of abortion). Moreover, numerous leaders of and attorneys associated with major pro-abortion advocacy groups now openly declare that the federal ERA, if enshrined in the Constitution, will provide them with a legal basis to more firmly establish “abortion rights” in the federal courts, and to expand the application of “abortion rights” even beyond the scope of *Roe v. Wade* and its progeny (for example, to require federal and state funding of abortion). This openly proclaimed intent alone provides ample basis for a “no” vote on any measure that is *intended* to revive the 1972 ERA language.
- The U.S. Supreme Court has explicitly recognized that it is within the power of Congress to establish in advance a binding deadline for ratification, which may appear either in the proposed constitutional text or in the Proposing Clause. Thus, the ERA has not been validly before any state legislature since it expired on March 22, 1979. HJR 35 purports to ratify a measure that no longer legally exists.

FURTHER DISCUSSION OF 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 as a legal weapon 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.” Many other such examples are readily available for your examination in documents separate from this memo, including some collected in a “quotesheet” available at this URL: <https://www.nrlc.org/uploads/era/ERA-AbortionQuotesheet3-5-20.pdf>

Moreover, pro-abortion litigants already 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 medical assistance program to fund abortions performed by medical professionals, since procedures sought by men (e.g., prostate surgery) were funded. In a ruling based *solely* on the ERA, Justice Pamela Minzner wrote that “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 restriction on funding abortions] undoubtedly singles out for less favorable treatment a gender-linked condition that is unique to women.” It is noteworthy that the ERA/abortion equation had been urged upon the court in briefs submitted by Planned Parenthood, NARAL, the ACLU, the Center for Reproductive Law and Policy, and the NOW Legal Defense and Education Fund. The doctrine that the ERA language invalidates limitations on tax-funded abortion was also supported in briefs filed by the state Women's Bar Association, Public Health Association, and League of Women Voters. You can read or download the ruling here: <http://nrlc.org/uploads/era/ERANewMexicoSupremeCourt.pdf>.

Further, the Women’s Law Project, in concert with Planned Parenthood, is currently pursuing a very similar lawsuit in Pennsylvania (*Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services*), arguing that it is “contrary to a modern understanding” of an ERA to argue that an ERA is consistent with limitations on government funding of abortion.

Once a court adopts the understanding that a law limiting abortion is by definition a form of discrimination based on sex, that doctrine could 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 additional documentation on the ERA-abortion connection, see the NRLC website at <http://www.nrlc.org/federal/era>.

THE "PRIVACY" DODGE

For decades, some ERA advocates have tried to deflect attention away from the ERA-abortion connection by observing that *past* Supreme Court rulings on abortion have relied on a purported due-process "privacy" or personal-autonomy right. Such observations are almost childish in their transparent evasiveness. Obviously, *past* U.S. Supreme Court rulings on abortion-related issues were interpretations of the *current* U.S. Constitution. Those precedents are essentially irrelevant to the outcome of future lawsuits based on the ERA's absolute prohibition on abridgement of "equality of rights...on account of sex," and the ERA's legislative history, which indicates that "the ERA could provide a basis for plaintiffs to challenge laws or policies that have a *disparate impact* on women" (U.S. House of Representatives Judiciary Committee report on H.J. Res. 79, purporting to remove ERA ratification deadline, no. 116-378, Jan. 16, 2020, emphasis added).

FURTHER DISCUSSION OF UNCONSTITUTIONALITY OF HJR 35

Each of the six constitutional amendment resolutions approved by Congress since 1960 – four of which were adopted -- has contained a seven-year ratification deadline in the Proposing Clause. (The Proposing Clause is not a mere "preamble," but a constitutionally required part of any submission to the states, instructing states regarding the mode of ratification.)

The U.S. Supreme Court has recognized that "Congress had the power to fix a reasonable time for ratification" for a proposed constitutional amendment (*Coleman v. Miller*, 1939). Such a deadline might appear, the Supreme Court indicated, "in the proposed amendment or in the resolution of submission." The Supreme Court earlier had held, "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 clearly conveys that the deadline must be fixed at the time a proposed amendment is submitted to the states. (*Dillon v. Gloss*, 1921, emphasis added).

In a highly controversial move, Congress in 1978 passed (by *majority* vote, not two-thirds) a resolution that purported to extend the ERA ratification deadline to June 1982. But no additional states ratified during the purported 39-month extension. A federal district court ruled that the deadline extension was unconstitutional *and* that a state could rescind before the original deadline. (*Idaho v. Freeman*, 1981) When various parties sought review of those issues by the U.S. Supreme Court, the Acting Solicitor General of the U.S. submitted a memorandum explaining that the ERA was dead any way you cut it -- under either deadline, and whether or not rescissions were valid. (Only 35 of the required 38 states had ratified the ERA, and five had rescinded before the true March 1979 deadline.) The U.S. Supreme Court agreed, dismissing the pending cases and vacating the district court ruling on grounds of mootness. (See documents posted at <http://www.nrlc.org/uploads/era/ERASupremeCourtDeclaresDead1982sg.pdf>)

In subsequent years, ERA supporters in Congress repeatedly introduced proposals to begin the entire amendment process anew-- explicitly or implicitly recognizing that the 1972 ERA was dead. Indeed, such a start-over ERA (numbered as H.J. Res. 1) was brought to the floor of the U.S. House of Representatives on November 15, 1983, but it went down to defeat, failing to muster the required two-thirds vote.

Nevertheless, beginning in 1994, some ERA advocates have claimed that the 1972 ERA could still be ratified -- because the "Congressional Pay Amendment" (CPA) was deemed by many to have been ratified in 1992, 203 years after Congress proposed it. However, the U.S. Supreme

Court in 1921 said that it was “quite untenable” to assert that the CPA was still a viable candidate for ratification – and to this day, no court has reviewed the CPA or ruled that it has been validly ratified. In any event, the question of whether or not the CPA was actually ratified has little relevance to the ERA, since the CPA had no deadline attached, nor did any state take action to rescind its ratification. **There is no plausible constitutional theory by which a later Congress can retroactively alter any component of what a previous Congress submitted to the states by the required two-thirds votes.** Even under President Carter, who endorsed a *pre-expiration* 39-month “deadline extension” in 1978, the Justice Department conceded that its rationale would not be applicable if the deadline had *already expired*. The liberal Brennan Center acknowledged in January 2020 that “there is no precedent for waiving the deadline after its expiration.”

In January, 2020, the federal Department of Justice Office of Legal Counsel (OLC) explained in [a well-reasoned opinion](#) that Congress may not retroactively modify a proposal, including any element of the Proposing Clause such as the ratification deadline, once it has been submitted to the states (an exercise that the OLC compared to the current Congress purporting to override a veto issued by a President who left office decades in the past). Thus, proposals that purport to “remove” the ratification deadline (and to do so by simple majority votes), such as S.J. Res. 1 and H.J. Res. 17 in the current 117th Congress, should be recognized as attempts to run roughshod over the Article V requirements for amending the Constitution. If any one of these resolutions were ever to be approved by Congress, whether by simple majorities or by two-thirds votes, the courts should regard that action as *ultra vires* (beyond the authority of the enacting body). The same is true of Alabama’s HJR 35.

On February 10, 2020, U.S. Supreme Court Justice Ruth Bader Ginsburg, long known for her attachment to the Equal Rights Amendment, at a forum at Georgetown University Law Center, was asked directly about the status of the ERA. She responded:

I would like to see a new beginning. I'd like it to start over. There's too much controversy about latecomers -- Virginia, long after the deadline passed. Plus, a number of states have withdrawn their ratification. So, if you count a latecomer on the plus side, how can you disregard states that said, "We've changed our minds"?

THE ABORTION-NEUTRALIZATION AMENDMENT FOR ANY START-OVER ERA

If ERA supporters ever return to the proper Article V process – starting over -- pro-life members of Congress will urge that a simple “abortion-neutralization” clause be added (as they did in 1983). The proposed revision – which obviously *cannot* be added to the language of the lapsed 1972 ERA, but which could be added by Congress to any *new* ERA proposal – reads as follows:

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 not change the current legal status of abortion, nor would it permit the ERA itself to be employed for anti-abortion purposes. Rather, the proposed revision would simply make *any new ERA itself* neutral regarding abortion policy. However, leading ERA proponents have adamantly refused to accept such an abortion-neutralization revision. Their determination to utilize the 1972 ERA as a pro-abortion legal weapon explains, in substantial part, their current fixation on evading the constitutionally proper route – to start over.