HJR 1002 WOULD UNCONSTITUTIONALLY "RATIFY" 1972 FEDERAL E.R.A., WHICH CONTAINS LANGUAGE ALREADY USED AS PRO-ABORTION LEGAL WEAPON

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SUMMARY

HJR 1002 purports to ratify the Equal Rights Amendment that was proposed by Congress to the states in 1972. Arkansas Right to Life and National Right to Life strongly urge legislators to oppose HJR 1002 for two reasons: (1) The language of the proposed 1972 ERA is virtually identical to language that the major pro-abortion groups have used in other states (including New Mexico) for highly successful legal attacks on laws protecting unborn children and limiting tax funding of abortion. (2) HJR 1002 is part of an effort to evade the amendment process spelled out in the Constitution itself. When Congress proposed this language to the states in 1972, it attached a deadline –- a deadline that expired decades ago. In 1982 the U.S. Supreme Court explicitly declared that all legal issues surrounding the 1972 ERA resolution (including the validity of rescissions passed by five ratifying state legislatures prior to the deadline) were "moot" because this ERA was already dead. Congress could propose a new ERA – but if so, Arkansas Right to Life and National Right to Life will urge Congress to include an "abortion-neutral" clause in the text before sending the new resolution to the states for consideration.

WHY HJR 1002 EVADES CONSTITUTIONAL REQUIREMENTS

The original 1972 federal ERA resolution contained a seven-year deadline for ratification, which expired in 1979 with only 35 state legislatures having ever acted to ratify (of which five rescinded their ratifications prior to the deadline). In a highly controversial move, Congress then passed (by majority vote) a resolution that purported to extend the deadline into 1982, but when this disputed second "deadline" arrived, no new states had ratified. Subsequently, a federal district court ruled that the deadline extension was unconstitutional and that the five rescissions were valid. When that ruling was appealed to the U.S. Supreme Court, the Acting Solicitor General of the U.S. wrote a memorandum explaining that the ERA was dead any way you cut it -- under either deadline, and whether or not the rescissions were valid -- and in 1982 the Supreme Court agreed, dismissing the case on mootness grounds. (See documents posted at http://www.nrlc.org/Federal/era/Index.html)

In 1983 the leadership of the U.S. House of Representatives (then Democratic) also recognized that the 1972 ERA was dead by proposing that the same ERA language be sent out to the states again – but the House voted down this ERA because sponsors would not allow consideration of the abortion-neutral amendment and a women-in-combat amendment. Fourteen co-sponsors voted "no." (Nov. 15, 1983)

In short, HJR 1002 is an unconstitutional "resurrection resolution" -- part of an effort to evade the requirements for amending the U.S. Constitution that are spelled out in the Constitution itself. Such resolutions have been proposed in multiple states over the past 13 years, but no state has adopted one. (See "Night of the Living Dead Amendment," by George F. Will, at http://www.nrlc.org/Federal/era/GeorgeWillERALivingDead.pdf)

THE ERA-ABORTION CONNECTION

Leading pro-abortion groups – including NARAL, the ACLU, and Planned Parenthood -- have strongly urged state courts to construe state ERAs that contain language virtually identical to that of HJR 1002 to

invalidate laws that treat abortion differently from other "medical procedures," including laws restricting tax-funding of abortion and laws requiring parental notification or consent for minors' abortions.

Consider, for example, the case of New Mexico, which in 1973 adopted a state ERA ("Equality of rights under law shall not be denied on account of the sex of any person") virtually identical to the proposal that HJR 1002 purports to ratify. This ERA was subsequently used to attack the state policy against tax-funding of abortion. In 1998, every justice on the New Mexico Supreme Court agreed that the state ERA makes it unconstitutional for the state Medicaid program to refuse to fund "medically necessary" abortions (which merely means, abortions performed by licensed medical professionals) if procedures sought by men (e.g., prostate surgery) are funded. *NM Right to Choose / NARAL v. Johnson*, No. 1999-NMSC-005 – you can read or download the ruling here: http://www.nrlc.org/Federal/era/Index.html
(Moreover, similar arguments regarding tax-funding of abortion have been accepted by some courts in other states, including Connecticut.)

The New Mexico Supreme Court based its ruling *solely* on the state ERA, and the justices merely adopted the construction of the ERA urged upon it 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.

Writing for the unanimous court, 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."

This same analysis – that limits on abortion are by definition a form of sex discrimination and therefore impermissible under ERA – can be used to invalidate any federal or state restrictions even on partial-birth abortions or third-trimester abortions (since these are sought "only by women"); the federal and state "conscience laws," which allow government-supported medical facilities and personnel -- including religiously affiliated hospitals -- to refuse to participate in abortions; and parental notification and consent laws. Indeed, the ACLU "Reproductive Freedom Project" has published a booklet that encourages pro-abortion lawyers to use state ERAs as legal weapons against state parental notification and consent laws.

When questioned about the New Mexico ruling and other such rulings, some ERA proponents reply that the U.S. Supreme Court has previously reviewed abortion-related restrictions under a "privacy right" analysis, and ruled (5-4, in 1980) that this "privacy right" does not invalidate a law (the Hyde Amendment) restricting federal Medicaid funding of abortion. They go on to assert that the proposed federal ERA would not "change" these past "privacy" rulings. But this argument is transparently evasive, wholly begging the question. Obviously, past U.S. Supreme Court rulings on abortion issues have dealt only with the *current* U.S. Constitution – *without* the ERA's absolute prohibition on abridgement of "rights" on the basis of "sex." Whatever one thinks of the Supreme Court's "privacy" doctrine, that doctrine is *irrelevant* to the question of what legal impact the ERA itself – as a new constitutional provision -- would have on future cases involving abortion-related laws.

For additional documentation on the ERA-abortion connection, see the NRLC website at www.nrlc.org/Federal/ERA/Index.html. For further information, contact Douglas Johnson, legislative director, National Right to Life, (202) 626-8820 or Legfederal@aol.com, or Rose Mimms, executive director, Arkansas Right to Life, 501-663-4237 or artl@aristotle.net.