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To: The Honorable Members of
the Florida Senate and the Florida House of Representatives

From: Douglas Johnson, Federal Legislative Director, National Right to Life Committee
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Re: why you should oppose HCR 8001 and SCR 54, resolutions
purporting to ratify the 1972 federal "Equal Rights Amendment"

Date: April 10, 2013

SUMMARY: HCR 8001 and SCR 54 purport to ratify the "Equal Rights Amendment" (ERA) that Congress submitted to the states in 1972. The National Right to Life Committee (NRLC) and Florida Right to Life strongly urge legislators to oppose this resolution 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) The resolution is part of an effort to evade the federal constitutional amendment process spelled out in the U.S. Constitution itself. When Congress proposed the ERA to the states in 1972, it attached a deadline -- a deadline that most of the ratifying states explicitly referred to in their ratification resolutions, and 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.**

In more recent years, ERA supporters in Congress have repeatedly introduced new ERA proposals, implicitly recognizing that the 1972 ERA is long dead. In the current 113th Congress, for example, a new ERA has been introduced by Senator Robert Menendez (D-NJ) as Senate Joint Resolution 10, and currently has 12 Senate cosponsors.

Pro-life members of Congress have proposed the addition of a simple "abortion-neutral" clause before any such new ERA is sent out to the states for possible ratification – a proposal so far not accepted by the leading advocates of the ERA. For more information on this aspect, see the letters from National Right to Life to members of Congress posted here:
http://www.nrlc.org/Federal/ERA/index.html

HOW HCR 8001 AND SCR 54 EVADE 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 26 explicitly referred to the deadline in their ratification resolutions (and 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 majority leadership of the U.S. House of Representatives (then Democrat-controlled) 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." (November 15, 1983)

In short, HCR 8001/SCR 54 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. Virginia was the first state in which such an unconstitutional "resurrection resolution" was attempted, in 1994. It was rightly rejected at that time -- and should be rejected again. (See "Night of the Living Dead Amendment," by George F. Will, www.nrlc.org/Federal/ERA/GeorgeWillERALivingDead.pdf)

Resolutions like HRC 8001/SCR 54 have been proposed in multiple states over the past 19 years, *but not a single state legislature has adopted one* -- a recognition of their manifest constitutional defects. After a public hearing on a similar resolution in the Arkansas House during 2007, 20 cosponsors withdrew their co-sponsorships, and the resolution was voted down in committee.

THE ERA-ABORTION CONNECTION

Leading pro-abortion groups – including NARAL, the ACLU, and Planned Parenthood -- have strongly urged state courts to construe state ERAs, containing language virtually identical to the language of the 1972 federal ERA proposal, 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 ERA that HCR 8001/SCR 54 purports to ratify. The New Mexico 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/ERANewMexicoSupremeCourt.pdf.
(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 http://www.nrlc.org/Federal/ERA/index.html. For further information, contact Douglas Johnson, Legislative Director, National Right to Life Committee, (202) 626-8820 or federallegislation@nrlc.org.