National RIGHT TO LIFE committee, inc.

512 10th Street, NW Washington, DC 20004-1401
(202) 626-8800 FAX: (202) 737-9189 Website: www.nrlc.org

To: The Honorable Members of the Illinois General Assembly

From: Douglas D. Johnson, Senior Policy Advisor
Jennifer Popik, Federal Legislative Director
National Right to Life Committee
(202) 626-8820, federallegislation@nrlc.org

Re: why you should oppose SCRCA0004,
purporting to ratify the 1972 federal "Equal Rights Amendment"

Date: March 10, 2017

SUMMARY: SJRCA 0004 purports to ratify the "Equal Rights Amendment" (ERA) that Congress submitted to the states in 1972. The National Right to Life Committee (NRLC) and our state affiliate, Illinois Federation for Right to Life, strongly urge legislators to oppose this resolution for two reasons: (1) The language of the proposed 1972 ERA, which cannot now be revised, 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 Illinois 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 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. For example, such new ERAs were introduced in January, 2017, for the current 115th Congress, as S.J. Res. 6 and H.J. Res. 33.

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 rejected by the leading advocates of the ERA. For more information on this aspect, see examples of letters from National Right to Life to members of Congress, such as the one posted here: http://www.nrlc.org/federal/era/nrlc-letter-to-u-s-house-era030515/

HOW THE RESOLUTION 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 the 35, 26 *explicitly referred to the deadline* in their ratification resolutions (and 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 both 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 U.S. Supreme Court agreed, dismissing the case on mootness grounds. (See documents posted at http://www.nrlc.org/uploads/era/ERASupremeCourtDeclaresDead1982sg.pdf.)

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." (Nov. 15, 1983)

In short, SJRCA0004 is 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 rejected (See "Night of the Living Dead Amendment," by George F. Will, http://www.nrlc.org/uploads/era/GeorgeWillERALivingDead.pdf)
In the ensuing 23 years, such resolutions have been proposed in multiple states. As of the date of this memorandum (March 10, 2017), no state legislature has adopted one – although the Nevada State Senate recently did approve such a resolution, and local observers predict that approval by the Nevada Assembly is likely to follow.

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 federal language that SCR 194/HCR 109 purports to ratify. In New Mexico, this ERA language was subsequently used as the sole basis for a successful 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 simply means any abortion performed by a licensed

medical professional) if procedures sought by men (e.g., prostate surgery) are funded. The case was *NM Right to Choose / NARAL v. Johnson*, No. 1999-NMSC-005 – you can read or download it here: http://nrlc.org/uploads/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 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.

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."

It should be obvious that this same analysis – that limits specific to 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, when *ERA-based* challenges come before judges.

For additional documentation on the ERA-abortion connection, see the NRLC website at http://www.nrlc.org/federal/era. For further information, contact Federal Legislation Department, National Right to Life Committee, (202) 626-8820 or federallegislation@nrlc.org.