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January 13, 2011

Re: the “Equal Rights Amendment” and abortion

Dear Senator:

On January 6, 2011, Senator Robert Menendez participated in a press conference pertaining to the proposed “Equal Rights Amendment” (ERA) to the U.S. Constitution, at which he and others made statements indicating that this proposal might soon be re-introduced in Congress. For the reasons explained below, the National Right to Life Committee (NRLC) urges you not to cosponsor or otherwise support such a resolution, unless it is revised in the fashion that we propose below.

Senator Menendez and his allies wish to add to the U.S. Constitution the following amendment: “Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article. This Amendment shall take effect two years after the date of ratification.”

Congress proposed the same language to the states in 1972, with a seven-year ratification deadline. The deadline passed without ratification by the required number of states.

THE ERA-ABORTION CONNECTION

Leading pro-abortion groups – including NARAL, the ACLU, and Planned Parenthood -- have strongly urged state courts to construe *state* ERAs to require tax-funded abortion on demand, and state ERAs have been so construed in New Mexico and Connecticut.

The proposed federal constitutional amendment is very similar to the language of the ERA which New Mexico added to its state constitution in 1973, which says, “Equality of rights under law shall not be denied on account of the sex of any person.” On November 25, 1998, the New Mexico Supreme Court ruled 5-0 that such language prohibits the state from restricting abortion differently from “medically necessary procedures” sought by men, and the court ordered the state to pay for elective abortions under the state’s Medicaid program. (*NM Right to Choose / NARAL v. Johnson*, No. 1999-NMSC-005) (You can read the ruling and related documents on the ERA page of the NRLC website at <http://www.nrlc.org/Federal/ERA/Index.html>)

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In its ruling, the court adopted the construction of the ERA urged in the case by Planned Parenthood, the National Abortion and Reproductive Rights Action League, 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.

These briefs, and a court's agreement with their argument, should not come as any surprise to knowledgeable observers. During the 1970s and 1980s, many pro-ERA advocates insisted that there was "no connection" between ERAs and abortion, but NRLC warned otherwise. **As we predicted, pro-abortion advocacy groups have increasingly employed the ERA-abortion argument in state courts, and in New Mexico we saw the devastating result of enacting an ERA that does not include explicit abortion-neutral language.**

Once a court adopts the legal doctrine that a law targeting 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 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. Moreover, the ACLU's "Reproductive Freedom Project" published a booklet that encourages pro-abortion litigators to use state ERAs as legal weapons against state parental notification and parental consent laws.

THE REMEDY: AN ABORTION-NEUTRAL AMENDMENT

All of the pernicious results outlined above could be avoided if the following "abortion-neutral-amendment" -- originally proposed by Congressman F. James Sensenbrenner in 1983 -- is added:

"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 revision would simply make the ERA itself *neutral* regarding abortion policy.

NRLC will withdraw its opposition to the proposed federal ERA if this abortion-neutral amendment is added.

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**REGARDING THE THEORY THAT THE ORIGINAL 1972 ERA
IS STILL ALIVE BEFORE THE STATES ("THREE-STATE STRATEGY")**

Curiously, at the same time they are urging Congress to approve a new federal ERA resolution, many ERA proponents insist that the ERA that Congress approved in 1972 is still eligible for ratification by state legislatures. They also insist that only three more ratifications are needed to make the 1972 resolution part of the Constitution. The legal reasoning behind this "three-state strategy," originally set forth in 1994, is quite far-fetched -- so much so, that not a single state legislature has passed a ratification resolution in the 17 years since the theory was concocted.

At the January 6, 2011 press conference, Senator Menendez said, "It's time to finally pass in the House and the Senate and then ratify the Equal Right Amendment." Based on that statement and others, it appears to us that Senator Menendez and the other members of Congress who are preparing to re-introduce the ERA do not embrace the notion that the 1972 ERA is still alive before the state legislatures. After all, it would not make much sense for Congress to begin again the entire arduous process of proposing an amendment to the Constitution, if *identical amendment language* really was still pending and available for ratification before the state legislatures.

Additional information on the status of the 1972 ERA, and on the last vote that occurred in Congress on an ERA (in 1983), appears after our signatures in this letter.

CONCLUSION

In summary: If the "Equal Rights Amendment" is brought to the Senate floor, NRLC will urge adoption of the remedial abortion-neutral amendment described above. If the revision is not adopted, NRLC will oppose passage of the ERA, and will include the roll call on passage in its scorecard of key pro-life roll calls of the 112th Congress.

Thank you for your consideration of NRLC's position on this important issue.

Sincerely,



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<http://www.nrlc.org/Federal/era/Index.html>

ADDITIONAL INFORMATION ON THE 1972 ERA

The 1972 ERA was ratified by 35 legislatures before the seven-year ratification deadline expired. (Of these, 26 explicitly referred to the deadline in their resolutions of ratification.) However, five of these 35 states withdrew their ratifications before the deadline arrived. The only federal court to consider the issue ruled that these rescissions were valid.

In 1978, Congress passed a controversial bill, by majority vote, that purported to extend the ratification deadline for 39 months. During this disputed "extension," no new states ratified or rescinded.

In 1981 a federal court ruled that the rescissions were valid, and also ruled that the purported deadline extension was unconstitutional. In 1982, the Supreme Court declined to review this case, holding that the issue was moot because the ERA had failed ratification with or without the rescissions and with or without the purported extension. Documentation is posted on the NRLC website at <http://www.nrlc.org/Federal/era/Index.html>

In 1983, the House majority (Democratic) leadership also recognized that the 1972 ERA was dead. They brought to the House floor, under suspension of the rules, a new resolution containing the same proposed constitutional amendment, again with a seven-year deadline -- an effort that, if successful, would have begun the entire ratification process anew. However, the resolution was defeated on the floor of the House (278-147, November 15, 1983). Among those voting "no" were 14 cosponsors, most of whom were among the majority who wanted to add the abortion-neutral amendment. Neither house of Congress has voted on an ERA since that day.

Further documentation on these events is posted at <http://www.nrlc.org/Federal/ERA/index.html>