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MEDIA ADVISORY:

U.S. House of Representatives acts on a resolution purportedly reviving pro-abortion Equal Rights Amendment, as advocates and most media downplay long string of court defeats

WASHINGTON—On Wednesday, March 17, 2021, the House of Representatives will take up H.J. Res. 17, a measure that purports to "remove the ratification deadline" from the 1972 Equal Rights Amendment Resolution, and thereby (proponents claim) make the 1972 ERA part of the Constitution.

The House passed such a measure on February 13, 2020, and is expected to do so again more narrowly, on a nearly party-line vote. However, the measure will face a much steeper climb in the U.S. Senate (the Senate companion measure is S.J. Res. 1). As discussed below, the overall level of support for the ERA has dropped precipitously in Congress since 1972, in major part because of the likely impact of the language in solidifying and expanding "abortion rights," which is now acknowledged by leading groups on both sides of the abortion issue.

"The mainstream media has been receptive to the creative narrative promoted by ERA activists and associated Hollywood stars, backed by a bevy of ambitious politicians, that after a hundred-year struggle, the 1972 ERA is on the verge of becoming part of the Constitution," said National Right to Life Committee (NRLC) Senior Policy Advisor Douglas D. Johnson, who directs NRLC's ERA Project. "But the ERA-is-alive drive is really a political pressure campaign, dressed up in legal terminology. Pro-ERA and pro-abortion advocacy groups, Democratic congressional leaders, and Democratic attorneys general hope to intimidate the federal courts into permitting them to air-drop the long-expired ERA into the Constitution. We take seriously this well-resourced effort to evade constitutional requirements, but their scheme is unlikely to ultimately succeed."

Johnson explained: "If an ERA revival measure [such as H.J.Res. 17] were ever to pass both houses, it will face long odds in the federal courts. The key legal claims of the ERA-is-alive movement fall apart like wet cardboard when subjected to the scrutiny of federal judges, regardless of their political background. By my count, ERA advocates have approached four different federal courts, and have given 20 federal judges and justices opportunities to vote to validate any of the key elements of ERA-is-alive theories. Yet, the ERA-is-alive advocates have so failed to win a single vote from any of 20 federal judges and justices on any of their key legal claims. The 20 judges included 13 appointed by Republican presidents, and 7 by Democratic presidents. The judges who reached the substantive constitutional issues have rejected or set aside legal claims on which the ERA-is-alive movement is premised. The judges who disposed of cases on purely procedural grounds did so despite the contrary pleadings of ERA advocates."

"Journalists, purportedly trained in skepticism, might want to consider that such a one-sided pattern of judicial actions, by judges of diverse judicial backgrounds and philosophies, might suggest that the constantly losing side is on exceedingly flimsy legal footing – or just plain making stuff up for political purposes," Johnson concluded.

The most recent judicial defeat for the pro-ERA forces was handed down on March 5, 2021, by U.S. District Judge Rudolph Contreras (D.C.), in the case of *Virginia v. Ferriero*. Judge Contreras ruled that the deadline included in the 1972 ERA Resolution was a valid use of Congress's power under Article V, noting that the Resolution cleared Congress by the required two-thirds vote. Therefore, the judge ruled, the ERA expired decades ago, and as a matter of law, the legislative actions by the legislatures of Nevada (2017), Illinois (2018), and Virginia (2020) were without legal effect. Judge Contreras said it would be "absurd" for the Archivist of the U.S. to certify the ERA – in effect vindicating, regarding the ERA ratification deadline, the legal position taken by the Justice Department's Office of Legal Counsel (OLC) in January, 2020.

Judge Contreras, an appointee of President Obama, cited five times a 1981 ruling handed down by federal District Judge Marion Callister, an appointee of President Ford, in the first ERA case, *Idaho v. Freeman*. Judge Callister ruled that the March 1979 ratification deadline was valid and unchangeable by Congress once submitted to the states, and that state rescissions were valid. The U.S. Supreme Court in October 1982 dismissed the ensuing appeal as moot, without dissent. "To reach that conclusion, the [Supreme] Court must have assumed that the ERA's deadline barred further ratifications," Judge Contreras observed.

Some ERA advocates downplayed the significance of Judge Contreras' March 5 ruling, or even tried to give it a positive spin. For example, Prof. Julie Suk of CUNY, author of an advocacy book about the ERA, claimed, "The court's reasoning clearly affirms Congress's role as the director of the Article V amendment process." (In reality, Judge Contreras, while not deciding issues that were not immediately before him, made it quite clear that the federal courts would have the last word regarding ERA, and will enforce the requirements of Article V. "In addition, the effect of a ratification deadline is not the kind of question that ought to vary from political moment to political moment…Yet leaving the efficacy of ratification deadlines up to the political branches would do just that," Judge Contreras said.)

Kamala Lopez, president of the prominent ERA advocacy group *Equal Means Equal*, reacted quite differently to Judge Contreras' ruling. In a Facebook video posted the day after the ruling, she began, "Yesterday was a really bad day for the [ERA]," then launched an obscenity-laced 10-minute attack on Judge Contreras, the U.S. Supreme Court, and the "criminal" U.S. government.

"Although ERA-is-alive advocates and politicians will continue to repeat that '38 states have ratified ERA,' it is well past time for journalists to treat such claims with much more skepticism," commented NRLC's Johnson. "Before the deadline, 35 states ratified, but 5 rescinded. Since the deadline, as a matter of law there has been no ERA before any state to ratify. **The resolutions adopted in Nevada, Illinois, and Virginia were political props, based on legal fictions, and the same is true of the 'deadline removal' measures now pending in Congress**."

The late Justice Ruth Bader Ginsburg in Sept. 2019 and Feb. 2020 advised her fellow ERA advocates to "start over," but her advice has not been heeded. On the latter occasion, she observed that the Virginia legislature's January 2020 action on ERA occurred "long after the deadline passed," adding, "if you count a latecomer on the plus side, how can you disregard states that said, 'We've changed our minds'?"

Among the other implausible aspects of H.J. Res. 17, it is officially designated by its sponsors as an exercise of Congress's power under Article V of the Constitution -- yet, Article V clearly requires two-thirds votes in each house of Congress. As introduced on January 21, H.J.Res. 17 did in fact contain the two-thirds requirement, but that requirement was deleted through some manner of behind-closed-doors, stealth-edit procedure around March 6. The two-thirds requirement no longer appears in the stealth-edited version (same number, same introduction date) that will come to the House floor. The resolution is expected to pass the House by a narrow majority.

THE ERA-ABORTION CONNECTION

The 1972 ERA text, if inserted into the Constitution, would likely be construed to provide a long-lacking textual foundation for "abortion rights," with an even broader pro-abortion sweep than the privacy-based right created

in *Roe v. Wade* and *Casey v. Planned Parenthood*. As the Associated Press (David Crary) accurately reported on January 21, 2020, ".... Abortion-rights supporters are eager to nullify the [ERA ratification] deadline and get the amendment ratified so it could be used to overturn state laws restricting abortion." Likewise, on January 30, 2020, NBC News (Pete Williams) reported, "The ERA has been embraced by advocates of abortion rights. NARAL Pro-Choice America has said it would 'reinforce the constitutional right to abortion' and 'require judges to strike down anti-abortion laws.'"

Other statements by leaders of other pro-abortion groups, including Planned Parenthood, NOW, the Women's Law Project, the National Women's Law Center, the ACLU, and others, proclaiming the abortion-expansive effects they believe the ERA incorporates, may be reviewed in a footnoted "quotesheet" posted on the NRLC website's ERA page.

The latest "scorecard warning" letter issued by NRLC, sent today to members of the U.S. House of Representatives, said: "National Right to Life intends to include the roll call on passage in our scorecard of key pro-life votes of the 117th Congress. We place special importance on this vote. In our scorecard, a vote in favor of the 'deadline repeal' measure will be accurately characterized as a vote for a measure that both National Right to Life and an array of prominent pro-abortion organizations (including NARAL, NOW, and the National Women's Law center) say would be employed to launch new legal attacks on state and federal laws or policies that directly or indirectly limit abortion, and to remove all limits on government funding of abortion, with likely success."

The legal theories employed to justify the claim that the ERA is alive, and the likely legal effects of the ERA text were it to become part of the Constitution, are distinct issues. NRLC's Johnson explained. "The federal courts are unlikely to bend the Constitution to accommodate the implausible political construct of an immortal ERA. Still, were the ERA-revival effort somehow to succeed, the pro-abortion movement would gain a very powerful new legal weapon. Therefore, pro-life groups can do nothing other than hold lawmakers accountable for their votes in the light of the intended and likely pro-abortion legal effects of the ERA, were it to go into effect."

Douglas Johnson noted that the growing recognition of the ERA-abortion connection was responsible for the defeat of an ERA start-over attempt on the House floor on November 15, 1983. Moreover, the ERA-abortion link is the single greatest factor in a precipitous drop in overall support for the ERA in Congress. In 1971, 94% of House members voted for the ERA, including 92% of Republicans. In February 2020, an ERA "deadline removal" bill passed by a narrow and nearly party-line vote, supported by 56% of the House and only 3% of Republicans.

Douglas Johnson, director of NRLC's ERA Project whose involvement with the ERA goes back to 1983, is available for interviews by telephone or email, to discuss both the congressional and ratification history of the ERA, and the legal and political aspects of the current showdown.

Founded in 1968, the National Right to Life Committee (NRLC), the federation of 50 state right-to-life affiliates and more than 3,000 local chapters, is the nation's oldest and largest grassroots pro-life organization. Recognized as the flagship of the pro-life movement, NRLC works through legislation and education to protect innocent human life from abortion, infanticide, assisted suicide and euthanasia.

For daily updates on ERA-related events in Congress, the courts, the Executive Branch, and the states, from an "ERA-skeptical" perspective, we recommend following the non-NRL Twitter account @ERANoShortcuts.