national RIGHT TO LIFE committee, inc.

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Re: Pro-life scorecard alert on the abortion-expansive 1972 "Equal Rights Amendment"

Dear Member of Congress:

On November 13, the Judiciary Committee of the U.S. House of Representatives will vote on H. J. Res. 79, a measure that purports to erase, *ex post facto*, the seven-year ratification deadline that Congress included in the ERA resolution submitted in 1972. The full House is expected to vote on this measure in the not-distant future. National Right to Life is strongly opposed to H. J. Res. 79, and intends to include the roll call in our scorecard of key pro-life votes of the 116th Congress.

In our scorecard, a vote in favor of H.J. Res. 79 will be accurately characterized as a vote for adding language to the U.S. Constitution that both NARAL Pro-Choice America and National Right to Life say would likely be employed to invalidate laws protecting unborn children.

Moreover, H. J. Res. 79 is constitutionally illegitimate, an attempt to execute an end-run around the ratification process provided in Article V of the U.S. Constitution. When Congress sent the ERA proposal to the states in 1972, the submitted resolution (H. J. Res. 208) included a seven-year deadline, which expired in 1979 – 40 years ago. The only constitutionally legitimate way for an ERA to become part of the Constitution is for Congress to propose a new amendment to the states.

THE ERA-ABORTION CONNECTION

There is now essential agreement between key pro-life and pro-abortion groups that the language of the 1972 ERA is likely to result in powerful reinforcement and expansion of "abortion rights." For example, NARAL Pro-Choice America, in a March 13, 2019 national alert, asserted that "the ERA would reinforce the constitutional right to abortion . . . [it] would require judges to strike down anti-abortion laws . . ." A National Organization for Women factsheet on the ERA states that "...an ERA -- properly interpreted -- could negate the hundreds of laws that have been passed restricting access to abortion care…"

ERAs have already been employed as pro-abortion legal weapons in some states that have added similar ERA provisions to their state constitutions – for example, in 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 proposed federal language. Subsequently, the state affiliates of Planned Parenthood and NARAL relied on this state ERA in a legal attack on the state version of the "Hyde Amendment," prohibiting Medicaid funding of elective abortions.

In its 1998 ruling in *NM Right to Choose / NARAL v. Johnson*, No. 1999-NMSC-005, the New Mexico Supreme Court *unanimously* agreed that the state ERA required the state to fund abortions performed by medical professionals, since procedures sought by men (e.g., prostate surgery) are funded. The New Mexico Supreme Court based its ruling *solely* on the state ERA, and that the ERA/abortion equation was urged upon the court in briefs submitted by Planned

Parenthood, NARAL, the ACLU, the Center for Reproductive Law and Policy, and the NOW Legal Defense and Education Fund. A lawsuit in Connecticut used similar arguments and achieved the same result – tax-funded abortion.

Moreover, on January 16, 2019, the Women's Law Project and the Planned Parenthood Federation of America (PPFA) filed a lawsuit (*Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services)* arguing that the Pennsylvania ERA (which contains language functionally the same as the federal proposal) must be construed to invalidate the state's limitations on Medicaid funding of abortion – using arguments that, by extension, would apply also to other limits on abortion. The complaint argues that any previous judgment that the ERA did not apply to abortion is "contrary to a modern understanding . . ." The Pennsylvania courts have not yet ruled on this petition.

Once a court adopts the understanding that a law limiting 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 too 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.

When questioned about ERA-abortion lawsuits such as those in New Mexico, Connecticut, and now Pennsylvania, some ERA proponents have observed that the U.S. Supreme Court has previously reviewed abortion-related restrictions under a due-process "privacy right" doctrine, and they remark that the federal ERA would not "change" these past "privacy" rulings. **But this argument is transparently evasive, entirely 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 account of sex." **Whatever one thinks of the "privacy" doctrine, that doctrine is *entirely irrelevant* to the question of how limits on abortion will be analyzed by judges who are presented with *new legal challenges that are based entirely on the new constitutional provision – the ERA*.**

Beginning in 1983, pro-life members of Congress have insisted that a simple "abortion-neutralization" clause must be added to any *new* ERA before it is sent out to the states. The proposed revision – which cannot be added to the fixed and expired language of the 1972 ERA, but which could be added by Congress to any new ("start over") ERA proposal – reads:

> 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 simply make any new ERA itself neutral regarding abortion policy; it would not change the current legal status of abortion, nor would it permit the ERA itself to be employed for anti-abortion purposes. Tellingly, ERA proponents have adamantly refused to accept such an abortion-neutral revision. That refusal is one major reason why neither house of Congress has voted on an ERA since the ERA was defeated on the House floor on November 15, 1983.

HOW H. J. RES. 79 IGNORES CONSTITUTIONAL REQUIREMENTS

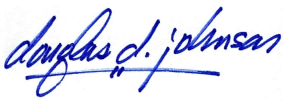
When Congress sent the ERA proposal to the states in 1972, the submitted resolution (H.J. Res. 208) included a seven-year deadline, which expired in 1979 – 40 years ago. The U.S. Supreme Court had previously recognized that "Congress had the power to fix a reasonable time for ratification," and indicated that such a deadline would be effective (*Coleman v. Miller*, 1939). Such a deadline might appear, the Court indicated, "in the proposed amendment or in the resolution of submission." The Supreme Court had also said, "Whether a definite period for ratification shall be fixed, ***so that all may know what it is and speculation on what is a reasonable time may be avoided***, is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification," which is to say, the deadline must be fixed at the time a proposed amendment is submitted to the states. (*Dillon v. Gloss*, 1921, emphasis added).

In a highly controversial move, Congress in 1978 passed (by majority vote, not two-thirds) a resolution that purported to extend the deadline to June 1982, but when this disputed second "deadline" arrived, no additional states had ratified. A federal district court ruled that the deadline extension was *unconstitutional* and that the five rescissions were valid. (*Idaho v. Freedman*, 1981) When various parties sought review of those issues by the U.S. Supreme Court, the Acting Solicitor General of the U.S. submitted 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 pending cases and vacating the district court ruling as moot. (See http://www.nrlc.org/uploads/era/ERASupremeCourtDeclaresDead1982sg.pdf.)

In 1983 the majority leadership of the U.S. House of Representatives (then Democrat-controlled), also recognizing that the 1972 ERA was dead, attempted to send that the same ERA language out to the states again – but the House voted down this do-over ERA, because the House leadership would not allow consideration of a proposed abortion-neutral revision or other revisions. (Nov. 15, 1983)
Nevertheless, beginning in 1994, some ERA advocates have claimed that the 1972 ERA could still be ratified -- because the "Congressional Pay Amendment" (also known as the "Madison Amendment") was deemed ratified in 1992, 203 years after Congress proposed it. However, Congress did not attach any deadline when it submitted the Congressional Pay Amendment to the states, nor did any state take action to rescind its ratification of that amendment.

For the reasons described above, National Right to Life intends to score any roll call on H.J. Res. 79. In our communications with our members, supporters, and affiliates nationwide, a vote in favor of this resolution will be accurately characterized as a vote in favor of inserting language into the U.S. Constitution that could invalidate any limits whatsoever on abortion, including late abortions, and to require government funding of abortion. Thank you for your consideration of National Right to Life's strong opposition to any effort to add the language of the 1972 ERA to the U.S. Constitution.

Respectfully submitted,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