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 South Carolina General Assembly

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

Re: why you should oppose H. 3340, H. 3391, and any other resolution purporting to ratify the 1972 federal "Equal Rights Amendment"

Date: February 1, 2019

SUMMARY: H. 3340 and H. 3391 purport to ratify the "Equal Rights Amendment" (ERA), which Congress submitted to the states in 1972. The National Right to Life Committee (NRLC) and our state affiliate, South Carolina Citizens for Life (SCCL), strongly urge members of the General Assembly to oppose these resolutions and any others of like purpose, for two reasons:

- The language of the ERA that was approved by Congress in 1972, which is locked-in and cannot now be revised, is virtually identical to language that the major pro-abortion groups have used in other states (e.g., New Mexico, Pennsylvania) for legal attacks on laws protecting unborn children (e.g., to mandate tax funding of abortion).

- The South Carolina resolutions are constitutionally illegitimate, part of an effort to manipulate the ratification process to achieve a political goal. 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. It is noteworthy that 24 of the ratifying states *explicitly referred to* that deadline in their ratification resolutions.

On October 4, 1982, the U.S. Supreme Court explicitly declared that the key legal issues surrounding ratification of the 1972 ERA (including the validity of rescissions passed by five ratifying state legislatures prior to the deadline, and a 1978 action by Congress that purported to extend the deadline by 39 months) were "moot" (moot because, as the Acting Solicitor General of the U.S. explained, the ERA "has failed of adoption no matter what the resolution of the legal issues presented here."). In subsequent years, ERA supporters in Congress have repeatedly introduced proposals to begin the entire amendment process anew, implicitly recognizing that the 1972 ERA is long dead. (For example, such new ERAs were introduced in the 115th Congress as S.J. Res. 6 and H.J. Res. 33.) Such a start-over ERA

was brought to the floor of the U.S. House of Representatives on November 15, 1983, but defeated; there have been no subsequent votes on an ERA in Congress.

HOW THE RESOLUTIONS IGNORE CONSTITUTIONAL REQUIREMENTS

When Congress submitted the ERA to the states in 1972, it included a seven-year deadline which expired in 1979, with only 35 state legislatures having ever acted to ratify. Of the 35, 24 *explicitly referred to the deadline* in their ratification resolutions; moreover, five *rescinded* their ratifications prior to the deadline.

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 on grounds of mootness. (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 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 any other revisions. Fourteen co-sponsors voted "no." (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.

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 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, what occurred 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 federal language that the South Carolina resolutions now propose to insert into the U.S. Constitution. 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. The case was *NM Right to Choose / NARAL v. Johnson*, No. 1999-NMSC-005. In its 1998 ruling, every justice on the New Mexico Supreme Court 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.

Writing for the *unanimous* New Mexico Supreme 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 noted that the New Mexico Supreme Court based its ruling *solely* on the state ERA, and that the ERA/abortion equation had been 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. 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.
You can read or download the ruling here:
http://nrlc.org/uploads/era/ERANewMexicoSupremeCourt.pdf.

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 contrary holdings are themselves "contrary to a modern understanding of the ways in which the denial of women's reproductive autonomy is a form of sex discrimination . . ." (For further details, see the complaint and this memo.)

It should be obvious that this analysis – that limits specific to abortion are in principle a form of sex discrimination and therefore impermissible under ERA – could 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"); 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 due-process "privacy right" doctrine, and also 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, 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 Supreme Court's "privacy" doctrine, the privacy 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 purely *ERA-based* challenges are presented to the courts.**

THE ABORTION-NEUTRALIZATION AMENDMENT

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 already-fixed language of the 1972 ERA, but which could be added by Congress to any *new* ERA proposal – reads as follows:

> *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 proposed revision would simply make *any new ERA itself* neutral regarding abortion policy. However, leading 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 any ERA since it was defeated on the U.S. House floor on November 15, 1983.

- -

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.

For more information on the abortion-neutralization revision proposed by National Right to Life, which must be added to any new ERA that may be proposed in Congress, 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/