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April 8, 2019

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

Dear Member of Congress:

At some point during the current Congress, the House of Representatives may vote one or more measures that are intended to amend the U.S. Constitution with the language of the “Equal Rights Amendment” that was submitted to the states by Congress in 1972, but never ratified.

Three measures have been introduced that seek to advance this goal, by various means:

- H. Res. 272 (Lawrence), a House resolution that “reaffirms its [House] support of legislative initiatives to put the Equal Rights Amendment in the Constitution . . .,” and that refers explicitly to the ERA language submitted to the states by Congress in 1972.
- H. J. Res. 38 (Speier), a joint resolution that purports to erase, *ex post facto*, the seven-year ratification deadline that Congress included in the ERA resolution submitted in 1972.
- H.J. Res. 35 (Maloney), a joint resolution that would resubmit the same ERA language to the states to begin a new ratification process (but this time without a deadline).

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.” 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 . . .” (see attachment)

For this reason, National Right to Life would include a House roll call on any of these three measures in our scorecard of key pro-life votes of the 116th Congress. In our scorecard, a vote in favor of H. Res. 272, H.J. Res. 35, or H.J. Res 38 would 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 have said would likely be employed to invalidate laws protecting unborn children. *Cosponsorship* of any of these measures will be described in a similar manner.

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

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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 . . .”

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.

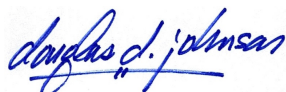
When questioned about ERA-abortion lawsuits such as those in New Mexico, Connecticut, and now Pennsylvania, some ERA proponents have observed that the U.S. Supreme Court has previously reviewed abortion-related restrictions under a due-process “privacy right” doctrine, and they remark that the federal 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 Supreme Court’s “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.***

Thank you for your consideration of National Right to Life’s strong opposition to adding the language of the 1972 ERA to the U.S. Constitution.

Respectfully submitted,



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President



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