national RIGHT TO LIFE committee, inc.

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February 6, 2019

Re: S. J. Res. 6, the "Equal Rights Amendment" and abortion

Dear Senator:

In March, 1972, Congress approved a joint resolution, H.J. Res. 208, which proposed that the so-called "Equal Rights Amendment" be added to the U.S. Constitution if three-quarters of the state legislatures ratified it within seven years – i.e., by March 22, 1979. Because only 35 states ratified by that deadline, the amendment died. In 1983, the leadership of the House of Representatives – then Democratic – attempted to again send identical language to the states – but the start-over resolution was defeated on the floor of the House (November 15, 1983).

Now, Senators Cardin and Murkowski have introduced a joint resolution (S.J. Res. 6) that purports to remove the deadline that was contained in 1972 H.J. Res. 208, based on the odd notion that passing such a resolution could somehow revive the long-expired ERA. Moreover, the sponsors propose that this may be accomplished by simple majority votes in Congress, not the two-thirds votes that were required for approval of H.J. Res. 208 in 1972.

National Right to Life is strongly opposed to adding the 1972 ERA language to the U.S. Constitution, because it would provide a powerful legal weapon with which to challenge virtually any limits on abortion, and to require unlimited government funding of abortion. Therefore, we intend to include any Senate roll call on S.J. Res. 6 in our scorecard of key pro-life votes of the 116th Congress.

Moreover, S.J. Res. 6 is insupportable on constitutional grounds. While Congress is under no obligation to include a deadline when it proposes a constitutional amendment to the states, Congress did so in 1972, and then approved the package by the required two-thirds votes. Of the 35 states that ratified the ERA before the 1979 deadline, 24 explicitly referred to the deadline in their instruments of ratification.

Both in Congress and in some of the early ratifying states, far too little consideration was given to some of the likely substantive legal effects of the 1972 ERA language, which have become better understood in the intervening years. State ERAs adopted by a number of states, containing language virtually identical to the proposed federal ERA, have been employed by pro-abortion advocacy groups in a manner that jeopardizes virtually all pro-life laws and policies.

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 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 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 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. 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. 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 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.)

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. 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.

When questioned about ERA-abortion lawsuits such as those in New Mexico, Connecticut, and now Pennsylvania, some ERA proponents observe 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*.** The cases in brought in the states mentioned above are among the evidences that leading ERA proponents – judges among them – believe that limits on abortion are facially invalid under an ERA.

ABORTION-NEUTRALIZATION OF ANY START-OVER ERA

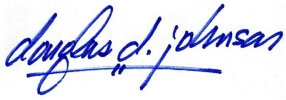
Beginning in 1983, pro-life members of Congress have insisted that a simple "abortion-neutralization" clause must be added to any new ERA before it is sent out to the states. The proposed revision – which *cannot* be added to the already-fixed language of the 1972 ERA, but which could be added by Congress 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 ERA since it was defeated on the House floor on November 15, 1983.

For the reasons described above, National Right to Life intends to score any roll call on S.J. Res. 6. 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 whatever on abortion, including late abortions, and to require government funding of abortion without limitation.

Respectfully submitted,



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For additional documentation on the ERA-abortion connection, or on the current status of the 1972 ERA, see the NRLC website at http://www.nrlc.org/federal/era, or contact the National Right to Life Federal Legislation Department at federallegislation@nrlc.org.