national RIGHT TO LIFE committee, inc.
1446 Duke Street | Alexandria, Virginia 22314
(202) 626-8800 (voice) | www.nrlc.org | nrlc@nrlc.org

March 16, 2022 202-378-8863

Re: Scorecard alert on H.J. Res. 17 / S.J. Res. 1, purporting to retroactively "remove" deadline on the long-expired, pro-abortion 1972 Equal Rights Amendment

Dear Senator:

The Senate may soon conduct a decisive procedural vote on a measure strongly opposed by the National Right to Life Committee (NRLC): H.J. Res. 17, which purports to retroactively "remove" the ratification deadline that the 92nd Congress included in the Equal Rights Amendment Resolution submitted to the states on March 22, 1972 – 50 years ago.

H.J. Res. 17 passed the House of Representatives on a near-party-line vote on March 17, 2021, and was held at the desk under Rule 14. The Senate companion, S.J. Res. 1, introduced by Senators Cardin and Murkowski, has been in the Judiciary Committee for 14 months without action; it currently has 52 co-sponsors (every Senate Democrat, plus Senators Murkowski and Collins).

These resolutions are part of a campaign to jam into the Constitution a long-expired amendment proposal, evading the requirements of Article V of the Constitution. Prominent ERA proponents now openly proclaim that if they somehow succeed in this unprecedented end-run, they intend to use the ERA as a potent legal weapon against all limitations on abortion, state and federal, and to obtain unrestricted funding of abortion in all government health programs—a scenario that NRLC has warned against for more than four decades. Therefore, National Right to Life intends to include the roll call(s) on cloture on either H.J. Res. 17 or S.J. Res. 1 in our scorecard of key pro-life votes of the 117th Congress, and to accurately characterize any vote to advance either measure in the terms just described.

ERA sponsors in Congress accepted a seven-year ratification deadline in the ERA Resolution (92nd Congress, H.J. Res. 208) in a successful effort to muster the required two-thirds level of support. On March 5, 2021, federal District Judge Rudolph Contreras (an appointee of President Obama) ruled that Congress had the constitutional power to impose such a deadline, that it would have been "absurd" for the Archivist to disregard the deadline, and that legislative actions that occurred in Nevada (2017), Illinois (2018), and Virginia (2020) "came too late to count." Judge Contreras also noted that of the 35 states that ratified the ERA in the 1970s, 30 quoted or referred to the deadline in their ratification instruments.

An appeal by Illinois and Nevada (but not Virginia) is currently pending before the U.S. Court of Appeals for the D.C. Circuit (*Illinois v. Ferriero*); we are confident that the Court of Appeals will reject the concocted claim that the ERA remained before the state legislatures as a candidate for ratification after it had expired. Five states (Alabama, Louisiana, Tennessee, Nebraska, and South Dakota) have been granted intervenor status in this case based on recognition that the ERA would jeopardize important laws in those states, including pro-life laws, and these states have laid before the court a cogent presentation of multiple constitutional defects in the ERA-cannot-fail construct.

Judge Contreras' ruling was only the latest episode in an unbroken 40-year losing streak in the federal courts for the ERA-revival movement. "Every time the issue has been litigated in federal court, most recently in 2021, the pro-ERA side has lost, no matter whether the judge was appointed by a Democrat or Republican," observed the *Washington Post* Fact Checker in a detailed critique, "The ERA and the U.S. archivist: Anatomy of a false claim," published February 9, 2022. Indeed, over four decades, 26 federal judges and justices (14 appointed by Republicans, 12 by Democrats) have declined to entertain

or have flatly rejected legal claims or requests for relief presented by litigants who argued that the ERA remains viable; not a single judge or justice has cast a vote in favor of the ERA-revival camp on any component of the ERA-cannot-fail political construct.

As to H.J. Res. 17 and S.J. Res. 1, their constitutional defects are multiple and manifest. Congress lacks power to retroactively amend and revive a proposal that has *expired* – an exercise that the Justice Department, in a January 2020 legal opinion by the Office of Legal Counsel, aptly compared to the current Congress attempting to override a veto by President Carter. Congress's powers are enumerated in Articles I and V of the Constitution; they do not include time travel.

Moreover, H.J. Res. 17 purports to be an exercise of Congress's constitutional amendment power under Article V of the Constitution, and yet its sponsors insist it requires only a *simple majority* vote; these are incompatible claims. Whenever Congress operates under Article V, a two-thirds vote in each house is required. (The Resolved clauses of both H.J. Res. 17 and S.J. Res. 1 actually contained a two-thirds requirement when introduced in January of 2021, but the two-thirds requirement was removed in early March 2021 by use of the stealth-amendment "Star Print" procedure.) Even the late Justice Ruth Bader Ginsburg, for decades known as a champion of the Equal Rights Amendment, highlighted the gross constitutional defects inherent in attempts to resurrect a long-expired amendment by legislative incantations. On February 10, 2020, at a forum at Georgetown University Law Center, Justice Ginsburg said:

> ***I would like to see a new beginning. I'd like it to start over. There's too much controversy about latecomers -- Virginia, long after the deadline passed. Plus, a number of states have withdrawn their ratification. So, if you count a latecomer on the plus side, how can you disregard states that said, "We've changed our minds"?***

THE ERA-ABORTION CONNECTION

There is now broad agreement among key pro-life and pro-abortion groups that the language of the 1972 ERA could be employed to reinforce and expand "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…" The general counsel of the National Women's Law Center told AP that the ERA would allow courts to rule that limits on abortion "perpetuate gender inequality." The ACLU, in a March 16, 2021 letter to the House, said that the ERA "could provide an additional layer of protection against restrictions on abortion…[it] could be an additional tool against further erosion of reproductive freedom…" Following the March 17, 2021 House vote on H.J. Res. 17, the CEO of the Planned Parenthood Federation of America issued a statement suggesting that "reproductive rights" and the ERA are "inextricably linked." Such utterances become more numerous by the month, and documented examples are readily available for your examination.

Moreover, pro-abortion activists already have aggressively employed state ERAs to challenge pro-life policies. For example, in New Mexico, state affiliates of Planned Parenthood and NARAL relied on the 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.

Likewise, in Pennsylvania, an ERA-based challenge to the state's version of the Hyde Amendment is currently pending before the Pennsylvania Supreme Court. If the pro-abortion litigants (which include Planned Parenthood and the Women's Law Project) prevail, the state will be forced to pay for elective

abortions. An amicus brief filed by the ERA Project at the Columbia Law School is a good primer for anyone who wishes to see the types of untrammeled abortion-expansive claims that would be presented to federal judges if the 1972 ERA language became part of the U.S. Constitution.

For decades, many ERA advocates tried to deflect attention from the ERA-abortion connection by observing that *past* Supreme Court rulings on abortion have relied on a purported due-process "privacy" right. This dodge is truly childish in its evasiveness – obviously, past U.S. Supreme Court rulings on abortion issues dealt only with the *current* U.S. Constitution, *without* the ERA's absolute prohibition on abridgement of "rights…on account of sex." ERA-based challenges to laws or policies that directly or indirectly ("disparate impact") affect access to abortion would be evaluated by the courts afresh under the ERA.

Once a court adopts the understanding that a law limiting abortion by definition is a form of discrimination *based on sex*, that doctrine could 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 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.

For the most part, the leading champions of the ERA have cast off the mask regarding their pro-abortion intentions -- nowadays, they openly proclaim them, as in a scripted exchange among Congresswoman Ayanna Pressley, law Prof. Victoria Nourse, and Virginia state Sen. Jennifer McClellan, presented during at a pro-ERA hearing chaired by Congresswoman Carolyn Maloney on October 21, 2021, in the House Committee on Oversight and Reform.

CONCLUSION

Because the intent of H.J. Res. 17 and S.J. Res. 1 is to place the text of the pro-abortion 1972 ERA into the Constitution, National Right to Life intends to score and weigh heavily any roll call on advancing either measure. In our communications with our members, supporters, and affiliates nationwide, any vote to advance either of these measures will be accurately characterized as intended to insert language into the U.S. Constitution that would jeopardize any limits whatsoever on abortion, including late abortions, and is intended to require government funding of elective abortion.

Should you have any questions, please contact us at (202) 378-8863, or via e-mail at jpopik@nrlc.org. Thank you for your consideration of NRLC's position on these measures.

Respectfully submitted,

Carol Tobias
President

Douglas D. Johnson
Senior Policy Advisor
Director, ERA Project

David N. O'Steen, Ph.D.
Executive Director

Jennifer Popik, J.D.
Legislative Director