national RIGHT TO LIFE committee, inc.
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March 6, 2020

Re: In opposition to unconstitutional attempts to revive the pro-abortion 1972 Equal Rights Amendment (H.J. Res. 79 / S.J. Res. 6)

Dear Senator:

Leaders of leading pro-abortion groups, including NARAL, NOW, Planned Parenthood, and the ACLU, have made it explicitly clear that if the language of the 1972 Equal Rights Amendment ever becomes part of the U.S. Constitution, they will employ it in litigation attacking limits on abortion. They have already successfully employed virtually identical state ERAs to require state funding of elective abortions in some states. Therefore, National Right to Life urges you to oppose all legislative measures that purport to advance the language of the 1972 ERA, such as H.J. Res. 79 (approved by the House of Representatives on Feb. 13, 2020) and S.J. Res. 6. NRL will include any roll call that might ensue on any such measure in our scorecard of key pro-life votes of the 116th Congress.

As the Justice Department Office of Legal Counsel (OLC) explained in a 38-page legal opinion issued January 6, 2020, the 92nd Congress included a seven-year deadline in the proposing clause of the original ERA resolution (92nd Congress H.J. Res. 208), which was then approved by the required two-thirds margins and sent by certified delivery to the states in March 1972. Thus, the 1972 ERA died in March 1979, and cannot be revived. The only constitutionally legitimate way for an ERA to become part of the Constitution is for Congress to submit a new ERA to the states, and for 38 states to ratify it. The current resolutions that purport to revive the 1972 ERA are clearly unconstitutional on multiple grounds.

Even Justice Ruth Bader Ginsburg, although a strong supporter of the text of the ERA, has publicly pushed back against suggestions that the 1972 ERA can still be ratified, stating on February 10: "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 Plus, a number of states have withdrawn their ratification.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'?" Those last two sentences were referring to the five states that rescinded their ratifications, prior to the 1979 deadline.

Nevertheless, on February 13, 2020, the House of Representatives approved H.J. Res. 79, a measure that purports to retroactively nullify the seven-year deadline in the ERA Resolution of 1972. The measure garnered a simple majority (nearly party line) of 232-183 – 45 votes short of a two-thirds majority. On the same day, Senate Judiciary Committee Chairman Lindsey Graham said, "It is clear the statutory period to have passed the ERA expired decades ago and it would be necessary for it to be reintroduced to have constitutional viability. Also it is not lost upon me and others that this latest effort to revive the amendment has much to do about abortion…"

THE ERA-ABORTION CONNECTION

Senator Graham is right. Indeed, there is now broad agreement between key pro-life and pro-abortion groups that the language of the 1972 ERA could be employed by liberal federal judges 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 and contraception.” The general counsel of the National Women’s Law Center told the Associated Press that the ERA would allow courts to rule that limits on abortion “perpetuate gender inequality.” Many other such examples are available on request.

Already, pro-abortion activists 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. Moreover, in 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 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…” of an ERA.

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.

For decades, many ERA advocates have tried to evade this issue by observing that *past* Supreme Court rulings on abortion have relied on a purported due-process “privacy” right. This is childish in its transparent 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.” Thus, beginning in 1983, NRL and 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 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 was the primary reason that a “start-over” ERA was defeated on the floor of the House of Representatives on November 15, 1983.

HOW H. J. RES. 79 AND S.J. RES. 6 VIOLATE CONSTITUTIONAL REQUIREMENTS

The U.S. Supreme Court has 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

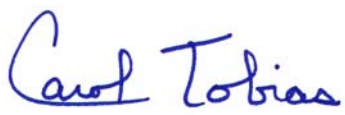
deadline might appear, the Court indicated, "in the proposed amendment or in the resolution of submission." The Supreme Court had previously said, "Whether a definite period for ratification shall be fixed, ***so that all may know what it is and speculation on what is a reasonable time may be avoided***, 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, any deadline must be fixed at the time a proposed amendment is submitted to the states. (*Dillon v. Gloss*, 1921, emphasis added).

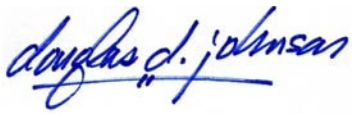
H.J. Res. 79 and S.J. Res. 6 purport to make the ERA part of the Constitution notwithstanding the binding deadline that the 92nd Congress submitted to the states in 1972. The OLC opinion rightly compares this to an attempt by the current Congress to override a veto by President Carter. As even the liberal Brennan Center for Justice commented on January 23, 2020, "there is no precedent for waiving the deadline after its expiration." Congress's powers as enumerated in Articles I and V of the Constitution are formidable, but they do not include time travel. Moreover, the authors of the deadline-nullification measures assert that they can accomplish this magic by *simple majority* votes, even though they purport to act based on Article V, which speaks only of *two-thirds* votes. **Nowhere does the Constitution empower Congress to make externally binding law on *any* matter without encountering a certain or potential *two-thirds* requirement** -- two-thirds being always required for proposals passed under Article V, and also required to enact ordinary legislation under Article I whenever a president vetoes a measure. Yet, the sponsors of H.J. Res. 79 and S.J. Res. 6 assert that these resolutions are subject to *neither* of these constitutional safeguards.

The proponents' feeble defense is that something similar was done once before -- when the 95th Congress gave approval, by simple majorities, to a measure that purported to extend the ERA ratification deadline by 39 months, to June 30, 1982. This is "precedent" only in the sense that a first attempted bank robbery is precedent for a second; yet, in our view, the second attempt does not legitimize the first. The purported "deadline extension" was declared unconstitutional by the only federal court to review the matter (*Idaho v. Freeman*, 1981). The U.S. Supreme Court declined to review the case only because it accepted the position of the U.S. Solicitor General that the ERA had "failed of adoption" either way, since no additional states ratified the ERA during the 39-month pseudo-extension. As Prof. Michael S. Paulsen, a leading expert on the constitutional amendment process, explained in a letter to the House Judiciary Committee, "The Supreme Court's disposition of the case on mootness grounds logically entails the predicate conclusion that the proposed Equal Rights Amendment had failed of ratification and was no longer legally capable of being ratified."

Because the intent of H.J. Res. 79 and S.J. Res. 6 is to place the text of the 1972 ERA into the Constitution, in our communications with our members, supporters, and affiliates nationwide, a vote in favor of advancing either resolution will be accurately characterized as a vote to insert into the U.S. Constitution new text that could invalidate any limits on abortion, including late abortions, and require government funding of abortion. Co-sponsorship of S.J. Res. 6 will be regarded and described in the same fashion. Thank you for your consideration of National Right to Life's strong opposition to these ill-advised and unconstitutional measures.

Respectfully submitted,





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NARAL PRO-CHOICE AMERICA

When the Equal Rights Amendment (ERA) was first introduced, it wasn't ratified, making protections against sexual discrimination under the Constitution incomplete for more than forty years.[1] Since then we've also seen federal courts shift into right-wing anti-choice hands and attacks on our right to legal abortion guaranteed under *Roe v. Wade* multiply.[2,3]

In order to protect our reproductive freedom today it's essential we pass the newly re-introduced bill to ratify the ERA. With its ratification, the ERA would reinforce the constitutional right to abortion by clarifying that the sexes have equal rights, which would require judges to strike down anti-abortion laws because they violate both the constitutional right to privacy and sexual equality.[4,5]

Without reproductive freedom, we are not truly free. Add your name in support of the ERA now!

It's past time that all Americans have the right, enshrined in our Constitution, to pursue our destinies free from discrimination based on sex. Now, the ERA has been re-introduced by Rep. Carolyn Maloney, and we have a new opportunity to ensure women will be treated equally under the law.[6]

Without bodily autonomy, we are not fully free to participate in the workforce, fulfill our educational aspirations; or determine if, when, and how to begin or grow a family. **And there's no plainer truth than this: We deserve to be fully equal citizens under the Constitution.**

Join us in advocating for the passage of the ERA to help protect our rights and the rights of generations to come. Add your name!

Thank you for all you do for reproductive freedom,
Jennifer Warburton,
Director of Government Relations, NARAL Pro-Choice America

Sources:

1. Ratification Info State by State, *Alice Paul Institute*, 2018.
2. Trump's Anti-Choice Judicial Nominees, *NARAL Pro-Choice America*, accessed March 13, 2019.
3. Wanna Save Roe v. Wade? Don't Look To The Courts, *The Daily Beast*, Jul. 27,2018.
4. Ibid.
5. The Equal Rights Amendment Strikes Again, *The Atlantic*, Jan. 20, 2019.
6. Equal Rights Amendment, *The Office of Rep. Carolyn Maloney*, Jan. 29, 2019.