national RIGHT TO LIFE committee, inc.
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April 24, 2023 202-378-8863

Re: In opposition to S.J. Res. 4 (Cardin), purporting to retroactively "remove" the ratification deadline and pre-deadline rescissions for long-expired 1972 Equal Rights Amendment

Dear Senator:

The National Right to Life Committee (NRLC), the federation of state right-to-life organizations, urges you to vote against cloture on the motion to proceed to S.J. Res. 4 (Cardin), a measure purporting to retroactively revive the 1972 Equal Rights Amendment and insert it into the text of the U.S. Constitution – even though multiple federal court decisions have held that the ERA expired over 50 years ago. We understand the Senate may conduct a roll call on such a cloture motion on **Thursday, April 27**.

The language of the 1972 ERA would easily lend itself to use as a powerful pro-abortion legal weapon, potentially invalidating all laws or government policies that protect unborn members of the human family, at any stage of development, or that even indirectly impede access to abortion, including any limits on government funding of elective abortion. Leaders of prominent pro-abortion and pro-ERA advocacy groups now openly proclaim that they believe this is the only proper construction of the ERA. They now admit that decades of denial and deflection of pro-life concerns about the ERA were merely "a strategic decision" (i.e., a deception). The mask has now been discarded. All senators who support *any* limits on abortion or *any limits* on government funding of elective abortion should take the pro-abortion advocacy groups at their current word as to how they intend to employ the vague 1972 ERA language, if it ever becomes part of the Constitution.

Moreover, S.J. Res. 4 is an attack on the integrity of the constitutional amendment process itself. Every senator who respects the rule of law should oppose it.

The 92nd Congress included a seven-year ratification deadline in the ERA Resolution. 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."

On February 28, 2023, a unanimous panel of the U.S. Court of Appeals for the District of Columbia (Judges Wilkins, Childs, and Rao) rejected an appeal by Illinois and Nevada, urging the court to order the Archivist to certify the ERA as ratified. The unanimous panel demolished a key legal claim of the ERA revival scheme -- the pretense that the ERA's ratification deadline was not binding because it was placed in the Proposing Clause of the 1972 ERA Resolution. (The court observed (p. 25), "[I]f that were the case, then the specification of the mode of ratification in every amendment in our nation's history would also be inoperative.") Contrary to spin by the pro-ERA lobby, the D.C. Circuit ruling contained not a word suggesting that Congress has any power to retroactively alter the status of the 1972 ERA, which was not an issue before the court.

As the *Washington Post* pointed out in a February 9, 2022 fact check, over the past 41 years, "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." Since 1982, 29 federal judges have an opportunity to vote to validate or advance some element of the ERA-revivalists' legal claims, but the ERA-revival litigants have yet to win a single vote, from a single judge, on a single component in their hodge-podge array of novel legal claims. Of the federal judges involved, 15 were appointed by Republican presidents and 14 by Democratic Presidents.

Some of the constitutional violations embedded in S.J.Res. 4 are critiqued in Senate Resolution 107, sponsored by Senator Hyde-Smith; we urge you to co-sponsor Senator Hyde-Smith's helpful measure.

Article V does not allow Congress to engage in a "bait-and-switch." As Judge Contreras observed in his 2021 ruling upholding the deadline, "Inclusion of a deadline was a compromise that helped Congress successfully propose the ERA where previous attempts to pass a proposal had failed." The current Congress lacks power to retroactively edit that legislative compromise, while simultaneously claiming the congressional super-majorities and subsequent state ratifications that flowed from it.

Even if Congress somehow did hold power to execute a retroactive bait-and-switch on the deadline, the authors of S.J. Res. 4 have formally declared the resolution to be an exercise of Congress' Article V powers. That means *approval* would require a *two-thirds* vote. This is one of the two grounds on which the only federal court ever to review the purported 1978 "deadline extension" ruled that it was unconstitutional. (*Idaho v. Freeman*, 1981)

S.J. Res. 4 not only purports to retroactively remove the deadline, but also declares the ERA to be part of the Constitution, thereby implicitly disregarding pre-deadline *rescissions* by Nebraska, Tennessee, Idaho, and Kentucky. Yet the legislatures of the states represented by the prime sponsor, Senator Cardin, and by the Judiciary Committee Chairman, Senator Durbin, both notified the Archivist in recent years of formal actions rescinding their previous ratifications of the Corwin Amendment. Were those legislative actions (in 2014 and 2022, respectively) merely exercises in political theater, or did they have legal force?

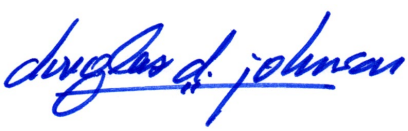
Finally, no Congress has power to act on any measure after it has *expired*. The Senate cannot today take up and pass the ERA "deadline removal" measure passed by the House on March 17, 2021, because it has expired. The current Congress cannot override a veto by President G.H.W. Bush; his veto messages have expired. Certainly, Congress has the power to again submit the same proposed amendment text to the states, with or without a ratification deadline, but it must do so by the procedures spelled out in Article V, including the requirement for two-thirds approval by each house, and all within a single Congress. As the late Justice Ginsburg said on February 10, 2020:

> *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"?*

National Right to Life will heavily weigh the vote on advancing S.J. Res. 4, a measure openly declared by its backers as intended in part to erect a constitutional barrier against any protections for unborn members of the human family.

The recent history of judicial, executive, and legislative actions on the Equal Rights Amendment is documented in detail, with links to primary sources, in the *NRLC Special Report on the Equal Rights Amendment* (January 23, 2023). For further information, please contact us at (202) 378-8863, or via e-mail at djohnson@nrlc.org. Thank you for your consideration of NRLC's position on this vital matter.

Respectfully submitted,



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