

NRLC, Pro-Life Forces in Arkansas Deal Setback To Campaign to Revive 1972 Pro-Abortion ERA

WASHINGTON (February 26, 2007)—Arkansas Right to Life and National Right to Life (NRLC), joined by other pro-life forces, dealt a setback to a national campaign that is attempting to put a broadly worded “Equal Rights Amendment” (ERA) into the federal Constitution.

NRLC opposes a federal ERA unless it contains an “abortion neutral” clause to prevent courts from using it to strike down laws limiting abortion. The 1972 ERA contains no such abortion-neutral provision.

In some states that have added ERAs to their state constitutions, without an abortion-neutral clause, state courts have interpreted those ERAs to invalidate limits on abortion.

Ratification of a federal constitutional amendment requires agreement from 38 state legislatures. In 1972, Congress submitted to the state legislatures a proposed ERA that provides, “Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex,” coupled with a seven-year deadline for ratification.

At the end of the seven years, 35 legislatures had passed ratification resolutions, but five of those later withdrew (“rescinded”) their ratifications.

In 1978, Congress passed a bill that claimed to extend the deadline for another 39 months—a move that a federal court later declared unconstitutional. In 1982, the U.S. Supreme Court said that the entire issue was “moot” (no longer a live issue), because no additional states ratified during the 39-month extension period.

In 1983 the leadership of the U.S. House of Representatives (then Democratic) also recognized that the 1972 ERA was dead by proposing that the same ERA language be sent out to the states anew (again with a seven-year deadline)—but the House voted down this ERA because sponsors would not allow consideration of the abortion-neutral

amendment and a women-in-combat amendment. Fourteen co-sponsors voted “no” (Nov. 15, 1983).

Deadlines Don’t Matter?

Even though in 1982 all sides agreed that the 1972 ERA was dead, some pro-ERA activists later



Rose Mimms, Executive Director of Arkansas Right to Life.

changed their mind, adopting what came to be known as the “three-state strategy.”

The basis for the new theory was the 27th Amendment (“Madison Amendment”), which bars a congressional pay raise from taking effect until an intervening general election. This amendment was declared ratified in 1992, nearly 203 years after it was first submitted to the states by Congress.

The Madison Amendment differed from the ERA in that Congress had not attached any deadline when it proposed the Madison Amendment to the states. Nevertheless, some ERA supporters began to argue that the 1972 ERA could be resurrected if only three more state legislatures would pass ratification resolutions. The “candidates” for such resolutions were the 15 states that never ratified the ERA: Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Utah, and Virginia.

Basically, defenders of the “three-state strategy” rely on three claims—

each of which is hotly disputed:

* They claim that the 1972 ERA is still alive for consideration by state legislatures—even though the Supreme Court said in 1982 that the ratification period had expired with or without the 39-month attempted deadline extension.

* They claim that the seven-year deadline, which Congress approved by the constitutionally required two-thirds vote as part of the original 1972 resolution, can be ignored or can retroactively be changed by Congress by simple majority votes—even though 26 of the 35 ratifying states explicitly referred to the deadline in their original ratification resolutions.

* They claim that the resolutions passed by five state legislatures rescinding their original ratifications do not count—even though all five of the rescissions were approved before the original seven-year deadline expired, and even though the only federal court ever to rule on the issue said that the rescissions were effective. (If the rescissions were valid, then the ERA fell not just three states short of the required 38, but eight.)

“The ‘three-state’ theory is legally pretty shoddy,” explained NRLC Legislative Director Douglas Johnson. “But if three states pass resolutions that purport to ratify the 1972 ERA, the current Democratic leadership in Congress probably would try to ram through a resolution declaring the ERA to be ratified. There would then be years of legal confusion until the U.S. Supreme Court issued a definitive ruling on the validity of the ratification.”

Showdown in Arkansas

In the 13 or so years since the “three-state strategy” was cooked up, no state legislature has passed a ratification resolution. However, the ERA-revival movement entered 2007 with high hopes. ERA ratification

resolutions have been introduced this year in Arizona, Arkansas, Florida, Illinois, Missouri, and Mississippi. Nevertheless, the campaign has been virtually ignored by the national news media. A national organizer for the “three-state” campaign was quoted in the *Kansas City Star* (February 7) explaining, “This is very much under the radar.”

The pro-ERA groups began 2007 most hopeful about Arkansas. On January 24, Gov. Mike Beebe, Lt. Gov. Bill Halter, and Attorney General Dustin McDaniel (all Democrats) spoke to a pro-ERA rally at the state capitol in Little Rock. On the same day, supporters introduced a ratification resolution in the state House, HJR 1002, with 66 of 100 House members signed up as cosponsors—far more than the 50 votes needed to pass it in the House.

The pro-ERA advocates took approval by the Arkansas House as a foregone conclusion, and were hopeful about approval in the state Senate, where a ratification resolution had fallen just short of passage in 2005. On January 31, the national pro-ERA newsletter, *The ERA Campaigner*, reported, “The hopes of ERA supporters all over the country are now high that the Arkansas legislature will ratify the ERA within the next few weeks.”

It didn’t work out that way. As the *Baptist Press* reported (February 8), “The Arkansas House resolution appeared headed to an easy victory in that chamber until organizations such as the National Right to Life Committee, Arkansas Right to Life and Eagle Forum began explaining to legislators the reasons for their opposition.”

NRLC and Arkansas Right to Life contacted legislators with information about constitutional problems with the “three-state” theory, and with documentation of the way that state ERAs had been construed by some courts to invalidate limits on abortion.

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Parental Notice Bill Reintroduced

Pro-life Congresswoman Ileana Ros-Lehtinen (R-Fl.) has reintroduced the Child Interstate Abortion Notification Act (CIANA), a bill strongly supported by National Right to Life.

The same legislation was approved by the House of Representatives in 2005 and again in 2006, but Senate Democrats blocked it from receiving a final vote in September, shortly before the congressional elections.

The bill would require an

abortionist to notify a parent, in most cases, before performing an abortion on a minor who is a resident of a different state.

The new bill number is H.R. 1063. To see a current list of cosponsors of the bill, or to send an e-mail to your representative in support of the bill, go to the Legislative Action Center on the NRLC website (<http://www.capwiz.com/nrlc/home/>) and click on "Issues and Legislation."

ERA

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At a February 7 House committee hearing, Rose Mimms, the executive director of Arkansas Right to Life, testified that an array of pro-life laws in Arkansas might be declared invalid under the ERA. "Amendment 68 of the Arkansas State Constitution that prohibits public funding of abortion, parental consent for minor's abortion, the Woman's Right to Know Act, and the Unborn Child Pain Awareness and Prevention Act would all be at risk if the ERA is passed," Mimms said.

Marianne Linane, Respect Life director for the Catholic Diocese of Little Rock, said, "There's too much at risk here to let this go forward and allow the courts to sort it all out later." She noted that the U.S. Conference of Catholic Bishops also are opposed to adoption of the 1972 ERA language.

Phyllis Schlafly, the longtime anti-ERA activist who founded Eagle Forum, flew to Little Rock from Illinois to testify. "The country made a very good decision in voting it down. . . . I hope we can leave it decently buried," Schlafly told the panel, adding that the revival campaign seemed "so retro."

At the end of the hearing, legislators opposed to the ERA announced that 20 of the 66 House

cosponsors were withdrawing their names from the resolution, including two members of the committee—an announcement that drew gasps from the pro-ERA activists in the hearing room.

The resolution then failed on a 10–10 tie vote—a stunning and unexpected setback for the "three-state" movement.

"After listening carefully to the debate, I concluded that the advantages of passing a mostly symbolic measure were outweighed by the possibility that passage might create a wide range of unintended consequences," explained Rep. Lance Reynolds (D), one of the committee members who withdrew his cosponsorship and voted "no."

"Many ERA supporters are not being candid with legislators in the states that they have targeted—and in Arkansas, that dishonesty came back to bite the pro-ERA side," said NRLC's Douglas Johnson. "Some lawmakers changed their minds once they learned how state ERAs have been used to require tax funding of abortion in New Mexico and Connecticut. Some legislators also learned for the first time that the 1972 federal ERA con-

tained a seven-year deadline and cannot be revived by any number of states."

"I am delighted that this subterfuge, this abortion Trojan Horse, has been unmasked in Arkansas," commented Richard Land, president of the Southern Baptist Ethics & Religious Liberty Commission. "The effort to revive the supposedly dead and buried federal Equal Rights Amendment shows the lengths to which pro-abortion supporters will go to try to subvert the will of the American people."

ERA-Abortion Connection

The language of the proposed 1972 ERA is virtually identical to language that the major pro-abortion groups have used in other states (including New Mexico) for highly successful legal attacks on laws protecting unborn children and limiting tax funding of abortion.

New Mexico 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 1972 federal ERA. In a subsequent lawsuit, leading pro-abortion groups—including NARAL, the ACLU, and Planned Parenthood—urged the state supreme court to rule that the state policy against funding Medicaid abortions was invalid under the ERA.

In 1998, the New Mexico Supreme Court agreed. In a unanimous opinion, the justices said that since the state paid for

procedures sought by men, it could not deny funding for abortion. (*New Mexico Right to Choose/NARAL v. Johnson*, No. 1999-NMSC-005. The entire ruling can be viewed or downloaded here: <http://www.nrlc.org/Federal/era/Index.html>.)

Similar arguments regarding tax funding of abortion have been accepted by some courts in other states, including Connecticut.

Once a court adopts the legal doctrine that a law targeting abortion is by definition a form of discrimination based on sex, and therefore impermissible under an ERA, the same doctrine could be used to invalidate any federal or state limits on abortion—even on partial-birth abortions or third-trimester abortions (since these are sought "only by women"); the federal and state "conscience laws," which allow government-supported medical facilities and personnel to refuse to participate in abortions; and parental notification and consent laws. Indeed, the ACLU's "Reproductive Freedom Project" has published a booklet that encourages pro-abortion lawyers to use state ERAs as legal weapons against state parental notification and consent laws.

For additional documentation on both the ERA-abortion connection and the legal issues surrounding the "three-state strategy," see the documents posted on the NRLC website at <http://www.nrlc.org/Federal/era/Index.html>.

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