

February 25, 2021

202-626-8863

Re: Pro-life scorecard alert on S.J. Res. 1, purporting to remove ratification deadline in 1972 Equal Rights Amendment

Dear Senator:

The National Right to Life Committee (NRLC) strongly opposes Senate Joint Resolution 1, introduced on January 22 by Senators Cardin and Murkowski, which purports to “remove” the ratification deadline that the 92nd Congress included in the resolution proposing an Equal Rights Amendment to the U.S. Constitution, 49 years ago.

National Right to Life intends to include any roll calls on this measure, including cloture votes, in our scorecard of key pro-life votes of the 117th Congress. In our scorecard, a vote in favor of advancing this “deadline removal” measure will be accurately characterized as a vote intended to add language to the U.S. Constitution that both NARAL Pro-Choice America and National Right to Life say would likely be employed to invalidate laws protecting unborn children.

S.J. Res. 1 is blatantly unconstitutional. Congress lacks power to retroactively amend and revive a proposal that has expired – an exercise that the Justice Department in January 2020 rightly 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, the joint resolution purports to be an exercise of Congress’s constitutional amendment power under Article V of the Constitution, and yet is claimed to require only a simple majority vote – incompatible claims. Whenever Congress operates under Article V, a two-thirds vote in each house is required.

Even the late Justice Ruth Bader Ginsburg, long known as a champion for the Equal Rights Amendment, recognized the gross constitutional defects inherent in such attempts to resurrect a long-expired amendment proposal 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 Plus, a number of states have withdrawn their ratification.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"?

All six constitutional amendment resolutions approved by Congress since 1960 – four of which were adopted -- have contained seven-year deadlines in the Proposing Clause. (The Proposing Clause is not merely a “preamble,” but a constitutionally required part of any submission to the states, instructing states regarding the mode of ratification.) There is no plausible constitutional theory by which a later Congress can retroactively alter what a previous Congress submitted to the states by the required two-thirds votes. Even under President Carter, who endorsed a *pre-expiration* 39-month “deadline

extension” in 1977-78, the Justice Department conceded that its rationale would not be applicable if the deadline had *already expired*. (The only federal court to consider the “deadline extension” held it to be unconstitutional.) The liberal Brennan Center acknowledged in January 2020, “there is no precedent for waiving the deadline after its expiration.”

The U.S. House Democratic leadership of 1983 also recognized that the 1972 ERA was dead, which is why they brought a start-over ERA (same language) to the House floor on November 15, 1983 – only to see it defeated. Recognizing that they lack the level of support required to amend the Constitution by the methods spelled out in Article V, ERA advocates now attempt to archive their goals through a brazenly political exercise that runs roughshod over the requirements of Article V.

THE ERA-ABORTION CONNECTION

There is now broad agreement between 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.” Many other such examples have been collected and are readily available for your examination. We encourage you to keep these statements in mind if you hear anyone offer assurance, as House Speaker Nancy Pelosi did on the House floor on February 13, 2020, “This [the ERA] has nothing to do with the abortion issue.”

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. Moreover, the Women’s Law Project, in concert with Planned Parenthood, is currently pursuing a very similar lawsuit in Pennsylvania (*Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services*), arguing that it is “contrary to a modern understanding” to argue that an ERA is consistent with limitations on government funding of abortion.

Once a court adopts the understanding that a law limiting abortion by definition is a form of discrimination based on sex, and therefore impermissible under an ERA, 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 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 almost 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.”

**NATIONAL RIGHT TO LIFE ALSO OPPOSES
ANY START-OVER ERA, UNLESS AMENDED**

Even though the main focus of pro-ERA activists is on the unconstitutional "deadline repeal" campaign, "start-over" ERAs have also been introduced in recent Congresses. These measures at least have the virtue of respecting the requirements of Article V. However, because of the ERA-abortion link summarized above, we urge you to withhold support from any "start over" ERA, unless at a minimum it contains a simple "abortion-neutralization" clause, first proposed by National Right to Life in 1983. 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 start-over ERA proposal – would read:

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, since 1983 most ERA proponents have rejected out of hand the concept of an abortion-neutralization amendment.

CONCLUSION

Because the intent of 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 any roll calls on advancing this measure, including cloture votes. In our communications with our members, supporters, and affiliates nationwide, a vote in favor of advancing the measure will be accurately characterized as a vote intended to insert language into the U.S. Constitution that could invalidate any limits whatsoever on abortion, including late abortions, and require government funding of abortion.

Thank you for your consideration of National Right to Life's strong opposition to this measure.

Respectfully submitted,



Carol Tobias
President



Douglas D. Johnson
Senior Policy Advisor



Jennifer Popik, J.D.
Legislative Director



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.