



To: The Honorable Members of the North Dakota Legislative Assembly

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Re: Urging your support for Senate Concurrent Resolution No. 4010,
reaffirming that the Legislative Assembly's ratification of the 1972 version
of the Equal Rights Amendment (now recognized as
employable as a pro-abortion legal weapon) lapsed on March 22, 1979

Date: February 15, 2021

SUMMARY: In March, 1972, the 92nd Congress approved and submitted to the states H.J. Res. 208, which contained both a proposed amendment to the U.S. Constitution -- the "Equal Rights Amendment" (ERA) -- and a 7-year ratification deadline. The 44th North Dakota Legislative Assembly ratified H.J. Res. 208 on February 3, 1975. However, the ratification deadline arrived in March 1979 -- 42 years ago -- without the ERA having garnered the required 38 state ratifications. The 1972 ERA ceased to exist at that time, and the ratification instrument approved by the North Dakota Legislative Assembly likewise lost its vitality. However, in more recent years, there have been two important developments that now justify adoption of SCR No. 4010.

First, many leaders and attorneys associated with prominent pro-abortion organizations now openly proclaim that they intend to employ a federal ERA to reinforce and expand federal constitutional "abortion rights," and they believe the ultimate result will be the invalidation of hundreds of state and federal pro-life laws and policies. Indeed, they have already successfully employed state-constitution ERAs in that fashion in several states. Thus, the language of the 1972 ERA is now being construed in ways different from those presented to the North Dakota Legislative Assembly 46 years ago.

Secondly, a national scheme has emerged to evade the ratification requirements contained in Article V of the U.S. Constitution, and to "air drop" into the Constitution the 1972 ERA language. For example, Democratic attorneys general from Virginia and other states are currently urging a federal judge in Washington, D.C., to rule that the 1972 ERA has already been ratified -- and in so doing, they are counting North Dakota as a ratifying state. It is time for the Legislative Assembly to take note of this ongoing subterfuge and to formally say, "Count us out," through adoption of SCR No. 4010.

The proper course for advocates of an ERA is to start over in Congress-- to see if language can be crafted that would garner the required two-thirds support after honest debate, and if so, then to allow the current generation of state legislators to review and debate what Congress submits.

FURTHER DISCUSSION OF 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 as a legal weapon 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 are readily available for your examination in documents separate from this memo, including some collected in a “quotesheet” available at this URL: <https://www.nrlc.org/uploads/era/ERA-AbortionQuotesheet3-5-20.pdf>

Moreover, pro-abortion litigants 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 medical assistance program to fund abortions performed by medical professionals, since procedures sought by men (e.g., prostate surgery) were funded. In a ruling based *solely* on the ERA, Justice Pamela Minzner wrote that “there is no comparable restriction on medically necessary services relating to physical characteristics or conditions that are unique to men. Indeed, we can find no provision in the Department’s regulations that disfavor any comparable, medically necessary procedure unique to the male anatomy...[the restriction on funding abortions] undoubtedly singles out for less favorable treatment a gender-linked condition that is unique to women.” It is noteworthy that the ERA/abortion equation had been urged upon the court in briefs submitted by Planned Parenthood, NARAL, the ACLU, the Center for Reproductive Law and Policy, and the NOW Legal Defense and Education Fund. The doctrine that the ERA language invalidates limitations on tax-funded abortion was also supported in briefs filed by the state Women's Bar Association, Public Health Association, and League of Women Voters. You can read or download the ruling here: <http://nrlc.org/uploads/era/ERANewMexicoSupremeCourt.pdf>.

Further, 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” of an ERA 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 is by definition 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 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 additional documentation on the ERA-abortion connection, see the NRLC website at <http://www.nrlc.org/federal/era>.

THE "PRIVACY" DODGE

For decades, some ERA advocates have tried to deflect attention away from the ERA-abortion connection by observing that *past* Supreme Court rulings on abortion have relied on a purported due-process "privacy" or personal-autonomy right. Such observations are almost childish in their transparent evasiveness. Obviously, *past* U.S. Supreme Court rulings on abortion-related issues were interpretations of the *current* U.S. Constitution. Those precedents are essentially irrelevant to the outcome of future lawsuits based on the ERA's absolute prohibition on abridgement of "equality of rights...on account of sex," and the ERA's legislative history, which indicates that "the ERA could provide a basis for plaintiffs to challenge laws or policies that have a *disparate impact* on women" (U.S. House of Representatives Judiciary Committee report on H.J. Res. 79, purporting to remove ERA ratification deadline, no. 116-378, Jan. 16, 2020, emphasis added).

FURTHER DISCUSSION OF WHY THE 1979 DEADLINE WAS VALID AND FINAL

Each of the six constitutional amendment resolutions approved by Congress since 1960 – four of which were adopted -- has contained a seven-year ratification deadline in the Proposing Clause. (The Proposing Clause is not a mere "preamble," but a constitutionally required part of any submission to the states, instructing states regarding the mode of ratification.)

The U.S. Supreme Court has recognized that "Congress had the power to fix a reasonable time for ratification" for a proposed constitutional amendment (*Coleman v. Miller*, 1939). Such a deadline might appear, the Supreme Court indicated, "in the proposed amendment or in the resolution of submission." The Supreme Court earlier had held, "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 clearly conveys that the deadline must be fixed at the time a proposed amendment is submitted to the states. (*Dillon v. Gloss*, 1921, emphasis added).

At the true deadline on March 22, 1979, only 35 of the required 38 states had ratified the ERA, and five had rescinded. **North Dakota's SCR No. 4010 is not a rescission** (rescissions, if possible, are possible only with respect to live proposals). **Rather, SCR No. 4010 is an affirmation that the Legislative Assembly's 1975 consent was to a specific proposal that included a deadline, and that consent lapsed when the 1979 deadline was reached without the required consensus by 37 other states.**

In a highly controversial move, Congress in 1978 passed (by *majority* vote, not two-thirds) a resolution that purported to extend the ERA ratification deadline to June 1982. But no additional states ratified during the purported 39-month extension. A federal district court in Idaho ruled that the deadline extension was unconstitutional *and* that a state could rescind before the original deadline. (*Idaho v. Freeman*, 1981) When various parties sought review of those issues by the U.S. Supreme Court, the Acting Solicitor General of the U.S. submitted a memorandum explaining that the ERA was dead any way you cut it -- under either deadline, and whether or not rescissions were valid. The U.S. Supreme Court agreed, dismissing the pending cases and vacating the district court ruling on grounds of mootness. (See documents posted at <http://www.nrlc.org/uploads/era/ERASupremeCourtDeclaresDead1982sg.pdf>)

In subsequent years, ERA supporters in Congress repeatedly introduced proposals to begin the entire amendment process anew-- explicitly or implicitly recognizing that the 1972 ERA was dead. Indeed, such a start-over ERA (numbered as H.J. Res. 1) was brought to the floor of the U.S. House of Representatives on November 15, 1983, but it went down to defeat, failing to muster the required two-thirds vote.

Nevertheless, beginning in 1993, some ERA advocates have claimed that the 1972 ERA could still be ratified -- because the “Congressional Pay Amendment” (CPA) was deemed by many to have been ratified in 1992, 203 years after Congress proposed it. However, the U.S. Supreme Court in 1921 said that it was “quite untenable” to assert that the CPA was still a viable candidate for ratification – and to this day, no court has reviewed the CPA or ruled that it has been validly ratified. In any event, the question of whether or not the CPA was actually ratified has little relevance to the ERA, since the CPA had no deadline attached, nor did any state take action to rescind its ratification. **There is no plausible constitutional theory by which a later Congress can retroactively alter any component of what a previous Congress submitted to the states by the required two-thirds votes.**

In January, 2020, the federal Department of Justice Office of Legal Counsel (OLC) explained in [a well-reasoned opinion](#) that Congress may not retroactively modify a proposal, including any element of the Proposing Clause such as the ratification deadline, once it has been submitted to the states (an exercise that the OLC compared to the current Congress purporting to override a veto issued by a President who left office decades in the past). Thus, proposals that purport to “remove” the ratification deadline (and to do so by simple majority votes), such as S.J. Res. 1 and H.J. Res. 17 in the current 117th Congress, should be recognized as attempts to run roughshod over the Article V requirements for amending the Constitution.

On February 10, 2020, U.S. Supreme Court Justice Ruth Bader Ginsburg, long known for her attachment to the Equal Rights Amendment, at a forum at Georgetown University Law Center, was asked directly about the status of the ERA. She responded: *“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 ABORTION-NEUTRALIZATION AMENDMENT FOR ANY START-OVER ERA

If ERA supporters ever return to the proper Article V process -- starting over -- pro-life members of Congress will urge (as they have done since 1983) the addition of a simple “abortion-neutralization” clause. The proposed revision – which obviously *cannot* be added to the language of the lapsed 1972 ERA, but which could be added by Congress to any *new* ERA proposal – reads as follows:

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 not change the current legal status of abortion, nor would it permit the ERA itself to be employed for anti-abortion purposes. Rather, the proposed revision would simply make *any new ERA itself* neutral regarding abortion policy. Yet prominent pro-ERA advocacy groups have emphatically repudiated such a revision. It should be clear why that is.