North Dakota Catholic Conference

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To: House Government and Veteran's Affairs Committee
From: Christopher Dodson, Executive Director
Subject: SCR 4010 - Equal Rights Amendment
Date: March 18, 2021

The North Dakota Catholic Conference supports House Concurrent Resolution 4010.

This resolution is not about whether women and men should be treated with equal dignity. The call for equal respect is rooted in who we are as human persons. It is not about ensuring just wages and fair treatment for women. The Catholic bishops of the United States have advocated for that for over a hundred years. This resolution is solely about whether the time for ratification of the Equal Rights Amendment has passed and about whether Congress and others should attempt to resurrect a dead amendment in light of what we now know about how the amendment, if revived, would be interpreted.

When introduced, the nation's Catholic bishops opposed the Equal Rights Amendment because of concerns that the word "sex" could be interpreted to mean a "right" to abortion and more. Their concerns proved accurate. "Sex" has since been interpreted by some courts and government agencies to require payment for, and performance of, elective abortions and transgender surgery.[1]

To demonstrate that this is not a far-fetched claim, we can look to a case close to home.

Passed in 2010, the Affordable Care Act prohibits any federally funded or administered health program or activity — broadly defined — from engaging in discrimination. Rather than listing the types of discrimination prohibited, the act incorporated several nondiscrimination provisions already in federal law, including Title IX, which prohibits discrimination "on the basis of sex."

Using that provision, Health and Human Services defined "sex" to include "discrimination on the basis of . . . termination of pregnancy, . . . sex stereotyping, and gender identity."[2] It then defined discrimination based on "gender identity" to prohibit a healthcare provider from refusing to offer medical services for gender transitions if that provider offered comparable services, such as gynecological services, to others.[3] In short, prohibition on the basis of sex became a mandate to cover and perform elective abortions and transgender surgeries.

Why is this close to home? It is close to home because it impacted health care providers and employers here in North Dakota, including our own state government. In 2016, several Catholic entities, including the Diocese of Fargo, Catholic Charities of North Dakota, the University of Mary, and SMP Healthcare from Fargo, challenged the rules in federal court in North Dakota. Joining them was the State of North Dakota.

The state of North Dakota joined the suit for four reasons. First, the state operates a State Hospital that could have been required to provide elective abortions and transgender surgery. Second, it has a Medicaid program that excludes coverage for elective abortions and gender reassignment surgeries. Third, the state PERS plan excludes coverage for those procedures. Fourth, the state employs healthcare providers who, as state employees, would have had to perform elected abortions and gender reassignment surgery.

Eventually, in January of this year, U.S. District Court Judge Peter Welte in Fargo granted victory to the state and the Catholic plaintiffs, at least for now.[4] Appeals might be pending. The judgment is based on procedural matters and that, as applied to the religious plaintiffs, the rules violate the Religious Freedom Restoration Act. What is important for this committee to understand is that it was never disputed, even during the Trump Administration, that the rules, required coverage and performance of elective abortions and gender reassignment surgery and that this requirement stemmed solely from the word "sex."

The case illustrates the problem with the Equal Rights Amendment. It is not limited to "sex discrimination" as commonly understood. Unjust discrimination can be addressed without the far-reaching Equal Rights Amendment.

Considering the amendment's threats to human life, state laws, and religious freedom, North Dakota should pass SCR 4010 send a message that its prior ratification no longer stands and that Congress should not attempt to revive a long dead and seriously flawed amendment.

We urge a **Do Pass** recommendation on SCR 4010.

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[1] The attached Fact Sheet on the ERA released just last week from the United States Conference of Catholic Bishops summarizes the history and problems with the amendment.

[2] *Nondiscrimination in Health Programs and Activities*, 81 Fed. Reg. 31,467 (formerly codified at 45 C.F.R. § 92.4)

[3] "A provider specializing in gynecological services that previously declined to provide a medically necessary hysterectomy for a transgender man would have to revise its policy to provide the procedure for transgender individuals in the same manner it provides the procedure for other individuals." Id. at 31,455.

[4] *North Dakota, State of et al v. Burwell et al; The Religious Sisters of Mercy v. Azar; Catholic Benefits Association v. Azar*; consolidated in Case 3:16-cv-00386; January 16, 2021. https://www.govinfo.gov/app/details/USCOURTS-ndd-3_16-cv-00386/USCOURTS-ndd-3_16-cv-00386-0/summary

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The Equal Rights Amendment (ERA)

Catholic teaching speaks very clearly and strongly about the equality of men and women. "In creating [humans] 'male and female,' God gives man and woman an equal personal dignity." *Catechism of the Catholic Church,* no. 2334. The bishops' explicit concern for just wages and the fair treatment of women goes back at least 100 years. In a February 12, 1919, statement entitled *Programs of Social Construction*, the bishops said that "women who are engaged at the same tasks of men should receive equal pay for equal amounts and qualities of work." Moreover, recent popes like St. John Paul II and Francis have spoken powerfully about the need to do more to address unjust inequities between women and men[1]. That being said, the USCCB has concern about a number of consequences that will arise from the proposed Equal Rights Amendment (ERA).

Legal controversy: The Equal Rights Amendment (ERA) to the Constitution was passed by Congress in 1972 when two-thirds of each chamber voted for the amendment. However, it failed to achieve ratification by 38 states (three-fourths) within the 7-year time limit established by Congress. While Congress did purport to pass, before the deadline, a 39-month extension, it is legally questionable whether the extension was valid and, in any event, no further states ratified during the "extension." It is extremely doubtful that "ratifications" after the deadline have any legal effect, with or without the retroactive blessing of Congress. Also disputed is the effect of rescissions that were passed by five states before the deadline.

Only if the five rescissions are disregarded, and the deadline is disregarded, was Virginia's January 2020 legislative action the "38th ratification." However, the legal ruling of the Department of Justice's Office of Legal Counsel (Jan 6, 2020) prevents the Archivist from certifying the ERA of 1972 (and thereby making it part of the Constitution) due to OLC's determination that ratifications after the congressionally-mandated time limit are not valid. (Because they determined the 1972 ERA is no longer pending, it was unnecessary to also rule on whether states could rescind their ratifications).

The present congressional effort is notably not to reintroduce the ERA and begin the process again as many legal experts have recommended, including most famously Ruth Bader Ginsburg[2], as the only constitutional path forward. Instead, Congress is considering a resolution to retroactively remove the deadline imposed by the original 1972 ERA. If passed by a simple majority, the resolution would be challenged as surpassing congressional authority, likely both because it would be passed with only simple majorities (instead of the 2/3 required for a constitutional amendment) and because the previous congressionally-enacted date change was struck down. It should also be noted that this

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[1] *See, e.g.*, Pope St. John Paul, II, *Letter to Women* (June 29, 1995) (insisting on "real equality" between men and women in terms of "equal pay for equal work," fairness for working mothers, equality between spouses and parents, and the "recognition of everything that is part of the rights and duties of citizens in a democratic State") http://www.vatican.va/content/john-paul-ii/en/letters/1995/documents/hf_jp-ii_let_29061995_women.html; Pope Francis, General Audience (Apr. 29, 2015) (calling for Christians to demand equal pay for women because the "disparity is an absolute disgrace!"), http://www.vatican.va/content/francesco/en/audiences/2015/documents/papa-francesco_20150429_udienza-generale.html.

[2] https://apnews.com/article/3510fbca261198d9ea63c30db2aa2033.

resolution does not attempt to resolve the legal controversy over the states that have attempted to rescind their ratification.

Language: The operating language of the 1972 ERA is extremely short: "*Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex*." However, in the almost 50 years since its initial passage by Congress, debate remains over the meaning of this provision. Supporters claim the ERA would prevent discrimination, promote equal pay, and so on. But discrimination against women is already prohibited by a multitude of federal and state laws, and is covered by the Constitution's Equal Protection Clause under precedent that was developed after the ERA was submitted to the states. Supporters also assert that adding the ERA would become, among other things, a powerful tool against pro-life abortion laws.

Abortion controversy: In the early years of the ERA, proponents commonly denied concerns that the amendment would entrench and expand the legality and practice of abortion. However, in recent years, some promoters of the ERA have boldly celebrated and advocated for the ERA precisely *because* of its ability to overturn abortion laws throughout the country. In fact, some state ERAs have already been used in this way. New Mexico's Supreme Court, for example, overturned a state "Hyde amendment" in 1998 saying, "*We conclude from this inquiry that the Department's rule violates New Mexico's Equal Rights Amendment because it results in a program that does not apply the same standard of medical necessity to both men and women, and there is no compelling justification for treating men and women differently with respect to their medical needs in this instance*."[3]

The general argument is that since abortion is a procedure that only women undergo, the government's decision to prohibit it, to decline to fund it, or to condition its availability on compliance with such requirements as parental notice and informed consent, is inherently discriminatory if the government does not impose those same conditions or requirements upon medical procedures that are unique to men or applicable to both men and women. It is also believed that sexual equality, as embodied in the ERA, would provide an additional argument for a constitutional right to abortion. Particularly at a time when *Roe v. Wade* is seen as vulnerable to being overturned (precisely because it is not grounded in the Constitution), proponents have been very clear that the ERA is *needed* to ensure abortion access and knock down current pro-life laws. For example:

- NARAL Pro-Choice America, claims: "*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]
- National Women's Law Center: "*[Emily] Martin [general counsel for NWLC] affirmed that abortion access is a key issue for many ERA supporters: she said adding the amendment to the constitution would enable courts to rule that restrictions on abortion 'perpetuate gender inequality*.'"[5]
- NOW: "*...an ERA –properly interpreted – could negate the hundreds of laws that have been passed restricting access to abortion care . . . a powerful ERA should recognize and prohibit that most harmful of discriminatory actions*."[6]

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[3]*Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 844 (N.M. 1998), available at https://nrlc.org/uploads/era/ERANewMexicoSupremeCourt.pdf.

[4]NARAL email, March 13, 2019.

[5]Rankin, Sarah and David Crary, "Lawmakers Pledge ERA will pass in Virginia. Then what?", Associated Press, January 1, 2020.

[6]Grabenhofer, Bonnie and Jan Erickson, "Is the Equal Rights Amendment relevant in the 21st Century?", National Organization for Women, available at https://now.org/resource/is-the-equal-rights-amendment-relevant-in-the-21st-century/.

- ERA activist-attorney Kate Kelly (in response to the question, "Would the ERA as it is written codify Roe v. Wade?"): "My hope is that what we could get with the ERA is FAR BETTER than Roe."[7]

Gender and Related Concerns: In the last several years, many courts and agencies at both the state and federal levels have reinterpreted discrimination on the basis of "sex" in law to include "sexual orientation" and "gender identity" or "transgender status." Last summer, the Supreme Court construed sex as used in Title VII to forbid workplace discrimination on the basis of sexual orientation and transgender status. If the ERA were to be ratified, many would argue that its prohibition of discrimination on the "basis of sex" extends constitutional-level protections to sexual conduct and "transgender" identities. For example:

- NOW: "*The ERA would require strict scrutiny in challenges to the many state laws that deny LGBTQIA persons equal access to public accommodations, permit discrimination in housing, employment discrimination, credit and retail services, jury service and educational programs, among others.*"[8]

If this is correct, the result could be a radical restructuring of settled societal expectations with respect to sexual difference and privacy. For example, the ERA could be asserted as a basis for arguing that locker rooms and bathrooms in public facilities can no longer be reserved for members of a single sex. This would apply to a broad range of public institutions, including K-12 schools, colleges, universities, libraries, parks, hospitals, courthouses, townhalls, social welfare agencies, and government workplaces – and could also be asserted as a basis for compelling speech to conform to "preferred pronouns." The ERA could bolster the claim that public social services devoted to the most vulnerable of women, including homeless and domestic abuse shelters, must admit men.

Healthcare workers in public facilities could be forced to provide, and taxpayers made to pay for, "gender transition" procedures. School athletics and dormitories, and sleeping quarters in many prisons, could be forced to abandon current single-sex participation and residency criteria regardless of the privacy interests of other participants and residents. Finally, private charities that offer a broad range of services to their communities might be forced to change their facilities, speech, and practices to affirm "gender identities" or living situations contrary to their sincerely-held religious and moral beliefs.

Religious Liberty and Conscience Protection: The ERA could also have an impact on the ability of churches and other faith-based organizations to obtain and utilize conscience protections anytime there is a perceived conflict with the sexual nondiscrimination norms that the ERA would adopt. The ERA could likewise make it more difficult for faith-based organizations to compete on a level playing field with secular organizations in applying for and obtaining government resources to provide needed social services. For example, the government could argue that a decision not to perform an abortion or transgender surgery is sex discrimination, so that a health care provider is ineligible to receive federal funds if it declines to perform such a procedure.

Possible Setbacks for Women in the Workplace and Education: Because the ERA only applies to sex discrimination by the government and not to the private sector, it may not be helpful on issues like unequal pay or sexual harassment in the workplace, or other important issues like violence

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[7] Kelly, Esq., Kate. Twitter Post. January 24, 2021, 5:57 PM. https://twitter.com/Kate_Kelly_Esq/status/1353477069959790594.

[8] Grabenhofer, Bonnie and Jan Erickson, "Is the Equal Rights Amendment relevant in the 21st Century?", National Organization for Women, available at https://now.org/resource/is-the-equal-rights-amendment-relevant-in-the-21st-century/; *see also* Kelly, Kate, "The ERA Is Queer and We're Here For It!", Advocate, February 23, 2019, available at https://www.advocate.com/commentary/2019/2/23/era-queer-and-were-here-it.

against women. In fact, the ERA could be deemed to prohibit government policies designed to benefit women.

There are several federal and state programs designed to promote women's advancement in the workplace and in education that might be deemed to be unconstitutional if the ERA were adopted. These include government efforts to increase women's participation in STEM fields, corporate management, and business ownership. Other government distinctions that are designed to promote the interests of women—such as single-sex educational settings, dormitories, locker rooms, or even prisons—may be deemed to conflict with the ERA as presently drafted.

March 12, 2021