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Before the House Government and Veterans Affairs Committee

North Dakota Legislative Assembly

In Support of Senate Concurrent Resolution No. 4010 – "Count Us Out"

March 18, 2021

Chairman Kasper and distinguished members of the Committee:

I am Douglas Johnson. I serve as Senior Policy Advisor to the National Right to Life Committee (NRLC), which is a federation of right-to-life organizations, including North Dakota Right to Life, on behalf of which I also testify today. For about a half century now, our organizations have worked in support of public policies that recognize the right to life of all members of the human family, including unborn children.

I previously served as the congressional affairs director for National Right to Life for a period of 36 years, from 1981 through 2016. I have been dealing with issues pertaining to the proposed 1972 Equal Rights Amendment since about 1982.

I testify today in strong support of Senate Concurrent Resolution No. 4010. We implore you to approve this resolution at the earliest

possible date. It sends a message that urgently needs to be heard in certain quarters.

I understand that the House already passed such a resolution (HCR 3037) on March 5, 2019, by a vote of 67-21, but that measure expired at the end of the previous legislative session. That is the way it is with respect to matters of legislation—things that are not enacted, expire. Yet this is a principle that some people are confused about, or are pretending to be confused about, with respect to the Equal Rights Amendment.

Mr. Chairman, I speak to you today because there are some powerful players, in Washington, D.C. and elsewhere, who have been working for years now on a plan – I might even be so bold as to call it a scheme. It is an intricate scheme, and North Dakota plays an essential part in it. Indeed, they cannot pull it off without North Dakota. The persons pushing this plan have appropriated a legislative action taken by the North Dakota Legislative Assembly in 1975 – 46 years ago – and are claiming that it constitutes rock-solid evidence that North Dakota is on board with their current project.

Their goal is to drop three new paragraphs of text into the U.S Constitution – the text of the so-called Equal Rights Amendment, as proposed by the 92nd Congress in 1972 – 49 years ago.

If they are able to accomplish this bold scheme, there are many people who have big plans for what they are going to do with that new constitutional text. Among other things, they intend to employ that language to create a new, firm, and permanent foundation for a federal constitutional right to unimpeded abortion on demand. Then intend to employ it to send judicial and federal regulatory bulldozers through your state codes, and every other law or policy at any level of government, that treats abortion any differently from, say, vasectomies.

Based on what I have been told by our associates at North Dakota Right to Life, based on what I have observed as to the actions of this legislature over a period of many years in seeking to protect unborn children and others whose intrinsic right to life may be in jeopardy, I do

not believe that anything like a majority of members of this legislature would favor those goals. In the end, that is for you to say, not me. But if my surmise is correct, then I respectfully submit that it is time for you to send a clear message to those are appropriating North Dakota's good name in their extra-constitutional scheme.

That message should be, "Count us out!" This is the message embodied in Senate Concurrent Resolution No. 4010.

WHY DO NATIONAL RIGHT TO LIFE AND NORTH DAKOTA RIGHT TO LIFE SO STRONGLY OPPOSE THE 1972 ERA?

I will say a bit more about what is afoot in a minute – but first I would like to say a little more about how it came to be that National Right to Life and our affiliates, including as North Dakota Right to Life, came to be so strongly opposed to placing the language of the 1972 ERA into the federal Constitution, and to very briefly summarize the evidence for what we call, by way of shorthand, the "ERA-abortion connection."

The federal ERA Resolution, House Joint Resolution 208 of the 92nd Congress, was approved by the U.S. House of Representatives overwhelmingly in 1971 – 50 years ago – and by the U.S. Senate on March 22, 1972. Unborn children were protected by law in North Dakota at that time; abortion was unlawful, except to save the life of the mother.

This state, like every state, contained the entire resolution. Like every constitutional amendment including the Bill of Rights, it contained not only text proposed to be inserted into the Constitution, but also a Proposing Clause -- which is not just a "preamble," but a component that is required by Article V itself, which says that Congress shall specify the "Mode of Ratification" of each proposed amendment. In the Proposing Clause of the ERA Resolution, there appeared a seven-year deadline for ratification. This was in no way unusual – such a deadline has appeared

in the Proposing Clause of every constitutional amendment proposed by Congress since 1960.

Abortion was not really as issue with respect to the ERA in those early days. Indeed, 22 states ratified the even ERA before the U.S. Supreme Court knocked flat the pro-life laws of North Dakota and every other state, in its January 1973 ruling in *Roe v. Wade*.

The Supreme Court decision created much turmoil and debate, but as near as I can tell, that debate did not impinge to any great degree on the debates on ratification of the ERA until around 1976, when the issue of government funding of abortion erupted into a high-profile issue nationwide.

How did that happen? Well, it came to light that one of the many side effects of the Supreme Court willy-nilly decreeing that elective abortion was a federal constitutional right, was that the federal Medicaid program began paying for all abortions sought by Medicaid-eligible women. It is the general rule with Medicaid that the program pays only for services that are deemed "medically necessary." However, it is well established, and well understood by anyone who has spent any time seriously studying the matter, that there are certain types of services provided by such health programs which the term "medically necessary" is a term of art-- a term that does not connote any form of illness or disorder.

For example, if a Medicaid-eligible woman is of reproductive age and wishes to obtain a prescription for contraceptive pills, they are provided without question—the medical necessity is simply her capacity to become pregnant, and her desire not to become pregnant. The result of *Roe v. Wade* was that abortion now fell into the same category. If a woman was Medicaid eligible, was pregnant, and did not wish to be, then the program automatically paid for an abortion. There was never any requirement that some health risk or health difficulty be involved – the medical necessity was the desire for an abortion, which required a licensed medical professional.

This is well established, it has been explicitly acknowledged by prominent champions of abortion, and I will submit some such statements for the hearing record. To cite just two of many examples, Judith Feder, principle deputy assistant secretary of the federal Department of Health and Human Services under the Clinton Administration, said on Jan. 26, 1994, "When we're talking about medically necessary or appropriate [abortion] services, we are also talking about all legal services." In 1993, William Hamilton, vice president of the Planned Parenthood Federation of America, said "medically necessary" abortions include "anything a doctor and a woman construe to be in her best interest, whether prenatal care or abortion."

So, it came to light in 1976 or so that the federal Medicaid program was paying for about 300,000 abortions a year, and the number was climbing rapidly. Congress had never voted to fund abortions, but they had created a program to fund "medically necessary" services, and now that included all abortions. This is why Congressman Henry Hyde first offered his famous Hyde Amendment, first enacted in 1976, which barred Medicaid funding of abortion, except to save the life of the mother.

There were years of court challenges, but ultimately the Hyde Amendment was upheld the U.S. Supreme Court in 1980. The effect, in that era, was to reduce that 300,000 annual number to roughly 300 per year, which were the abortions still allowed to be funded under the Hyde Amendment, to prevent the death of the mother. So when you hear the term "medically necessary" in the abortion context, keep that mind: the ratio of life-of-mother cases to so-called "medically necessary" abortions was found to be roughly 1 to 1,000.

In 1984, four years after the Supreme Court upheld the Hyde Amendment, Ruth Bader Ginsburg, then a judge on the U.S. Court of Appeals for the District of Columbia, published a law journal article titled, "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*." She suggested that it would have been better if the Supreme

Court had crafted the right to abortion in terms of sexual equality, rather than "a patient-physician autonomy" doctrine. She suggested that if the court had approached abortion in sex equality terms, the Hyde Amendment case might have been struck down. She noted, however, near the end, "I understand the view that for political reasons the reproductive autonomy controversy should be isolated from the general debate on equal rights, responsibilities, and opportunities for women and men."

And this is the nub of the problem with the 1972 ERA. It would subject all government law and policies to the strictest judicial scrutiny to determine whether they deny some right or benefit "on the basis of sex." Many ERA advocates, and even the U.S. House Judiciary Committee, have suggested this would apply not just to laws that explicitly treat men and women differently, but also to laws that treat people differently on the basis of their unique physical or biological attributes (such as pregnancy), and even to policies that are deemed to have different net effects on the sexes – the term of art here is "disparate impact."

Certainly, laws that deal with pregnancy in any manner, or with the welfare of human beings in utero, do affect women differently from men. This "disparate impact" flows from biological realities – that only one sex directly nurtures the life of an member of the human family during the pre-natal period. But under the ERA, that biological distinction would not justify regulation of abortion – regulations based explicitly or implicitly on physical distinctions between the sexes would be subjected to strict judicial scrutiny. This "strict scrutiny" is another term of art – but as they say in the legal textbooks, it is "strict in theory – but fatal in fact."

THE ERA-ABORTION DEFLECTION GAME

When I first got directly involved in the ERA debate in the early 1980s, it was still routine for most ERA supporters to deny that there was any ERA-abortion connection. When the concern was raised, they would typically engage a rather transparent form of misdirection. They

would say something like, “The Supreme Court has dealt with abortion as a privacy matter, not as a sex discrimination matter, and ERA would not change that.”

Well, this is almost childish in its evasiveness. Of course, abortion laws were being reviewed under the “fundamental right” that the Supreme Court had fabricated in *Roe v. Wade*, because that was the most powerful weapon in the pro-abortion litigation arsenal, and the Supreme Court was not yet interpreting the 14th Amendment to apply a very heightened standard of review to sex-based distinctions. But the ERA was designed precisely to require strict scrutiny, and even more than strict scrutiny according to some authoritative advocates, to any policies deemed to deny or abridge rights “on account of sex.”

All those past Supreme Court opinions on abortion matters, decided without the ERA in the Constitution, tell you nothing about how pro-life laws and policies would fare when attacked by new lawsuits based on the ERA. The “privacy” 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,” So this was basically a dodge, a method of deflection.

At about that same time, the late 1970s, early to mid-1980s, we noticed that pro-abortion groups were filing lawsuits in which they employed state ERAs – many of which were very close in wording to the proposed federal ERA – in attacks on state laws limiting government funding of elective abortions. In those early days, the ERA claims were often mixed with other claims, such as due process or equal protection, and the courts sometimes sidestepped the ERA part, but the pattern was disturbing. Then in Connecticut such an attack succeeded – the state “Hyde Amendment” analog was struck down solely on the basis of the state ERA.

I’d like to add here that there was one pro-abortion group in that era that did not go along with the party line, among ERA advocates, to deflect or deny the ERA-abortion connection. That organization was the

American Civil Liberties Union. From an early date, the ACLU took a more candid, unapologetic approach to the ERA-abortion connection.

For example, in a speech given on October 24, 1986, Lynn Paltrow, staff attorney with the ACLU Reproductive Freedom Project, said, "They say the ERA will lead to funding for abortion. I say, I hope so."

The ACLU also published a manual on how to file legal challenges to state parental notification and consent laws, and they recommended using state ERAs when they were available.

So abortion did become an issue, I believe, during the last years of legislative debates over the ERA, leading up to the deadline in March 1979. This played some role, I believe, in the fact that state ratified the ERA after Indiana did so in January, 1977.

As the deadline approached, 35 states had ratified ERA, but four (at that time) had rescinded their ratifications. ERA advocates demanded that the deadline be extended. In 1978, Congress adopted, by simple majority votes (not two-thirds votes), a resolution that purported to extend the deadline for 39 months, through June 1982. The only federal court to consider the matter ruled that was unconstitutional in two different ways--but it became a moot case, because no more states ratified during the additional 39 months. At the end of the second, pseudo-deadline, the total remained at 35 states, and that was without taking into account the recissions.

1983—ERA ADVOCATES REJECT OPPORTUNITY TO RENDER THE EQUAL RIGHTS AMENDMENT NEUTRAL ON ABORTION

Everyone on all sides agreed that the 1972 ERA was dead. The U.S. Supreme Court even implicitly recognized this, by declaring moot the lawsuits that had arisen about the constitutionality of the deadline extension and the rescissions. It didn't matter, because the ERA was

dead any way you resolved those questions. It did not receive the required 38 state ratifications.

In January, 1983, the top priority of the majority party leadership in the U.S. House of Representatives was to start the process all over again. A new ERA, with the exact same language, was designated as H.J. Res. 1.

National Right to Life and other pro-life groups, including pro-life religious bodies such as the U.S. Conference of Catholic Bishops, were by this point felt there was more than ample evidence that the traditional ERA language could be and would be employed as a pro-abortion legal weapon, and so we all opposed this attempt to send the exact same language out again to the states for ratification.

There were five hearings held in the House Judiciary Committee. I attended them. The likely impact of the ERA on abortion law was a major issue. It was at that time that we formulated, in concert with pro-life lawmakers, what became known as the *abortion-neutralization amendment*, a one-sentence rule of construction that we proposed to be added to the start-over ERA, in 1983. This is what it said:

> Nothing in this Article [the ERA] shall be construed to grant, secure, or deny any right relating to abortion or the funding thereof.

We said then to the ERA supporters in Congress (and we say it still): National Right to Life would no longer oppose your ERA language; National Right to Life would be *neutral* on your ERA language; if you will add this single sentence, a rule of construction that would bar the courts from applying the ERA to change abortion law *in either direction.*

The sponsors refused. They realized, however, that on the floor of the House of Representatives, that abortion-neutralization amendment would command a majority. So they did a remarkable thing, on November 15, 1983 – they brought the ERA, a proposed constitutional

amendment, to the House floor under a shortcut procedure called "suspension of the rules," usually used only for non-controversial bills, which permits only brief debate and, most importantly, no consideration of amendments. To their shocked astonishment, the ERA went down to defeat on the floor of the House of Representatives. It fell short of two-thirds, as 14 co-sponsors voted against it -- and that almost entirely due to the abortion issue.

In 1971, 94 percent of the House had voted for the ERA. Now, in 1983, it had dropped to 65 percent – and the single greatest factor was the ERA-abortion connection. It was to drop much further still, in the ensuing years. On a U.S. House roll call that occurred just yesterday, the level of support for the 1972 ERA language was only 52%, and the tally was 62 votes short of the two-thirds majority that would be required to approve a new constitutional amendment.

Mr. Chairman, that remains the position of National Right to Life today. If Congress wants to send a new ERA proposal to the states, and they include that one-sentence, then we would be neutral on it.

But what we saw then, and what we saw now, is an ideological determination to preserve the capacity to use the ERA as a pro-abortion legal weapon. And as time went on, the mask slipped more and more, and eventually, it was tossed aside.

THE ERA-ABORTION EVIDENCE GROWS

In the years following that vote, some pro-abortion litigants became even more open and aggressive in their use of *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

THE ERA-ABORTION CONNECTION: THE NEW CANDOR

On this question of the ERA-abortion connection, there has been a very significant development just in the past few years. Increasingly, the younger generation of leaders of major abortion-rights organizations seemingly came to find it intolerable to continue to deny that a constitutional amendment that prohibits any level of government from denying any right or benefit "on account of sex," would not strike down limitations on abortion. In their world view, what stronger example of invidious discrimination "on account of sex" could there be, than a law that restricts access to a "medical procedure" that only women seek? They found it ideologically unacceptable to continue that pretext.

And so, over the last several years, we have seen, and we have collected, many very explicit statements from leaders and attorneys associated with prominent abortion-rights organizations and causes,

quite explicitly stating that they believe the ERA, if inserted into the U.S. Constitution, would protect "abortion rights." Some say that they believe it would be a far more secure constitutional platform that the judicially constructed "privacy" right. I have submitted a document that we refer to as the "ERA-abortion quotesheet," that contains four pages of such citations in small print, all footnoted. Let me read you just a couple.

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 and contraception."

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."

This week, the U.S. House of Representatives considered, and passed, a resolution (H.J. Res. 17) purporting to "remove the deadline" on the long-expired 1972 ERA. Into my inbox I find a new crop of statements by pro-abortion groups, explicitly affirming the ERA-abortion connection.

Here is part of what Alexis McGill Johnson, president and CEO of the Planned Parenthood Federation of America, the nation's largest abortion provider, said in a release yesterday, March 17, 2021, celebrating the House vote on the ERA "deadline removal" resolution:

> "The Equal Rights Amendment is an important tool for strengthening the existing legal foundation created by the courts. We know an equal society cannot exist unless all people have the right to make their own decisions, plan their own futures, and

control their own bodies. And we know the fight for reproductive rights – including access to abortion – is inextricably linked to the fight for women's equality."

The ACLU, in a letter sent to the House on March 16, 2021 in support of the ERA "deadline removal" measure, stated that the ERA "could provide an additional layer of protect against restrictions on abortion, contraception, and other forms of reproductive healthcare….The Equal Rights Amendment could be an additional tool against further erosion of reproductive freedom…"

WHAT S.C.R. NO. 4010 SAYS, AND WHAT IT DOES NOT SAY

Mr. Chairman, while I have had no opportunity to review the records of the debate over the ERA that occurred in the North Dakota Legislative Assembly in early 1975, I will hazard that few if any of the legislators who voted to ratify the ERA, had any intention of placing into the U.S. Constitution the pro-abortion bulldozer that these modern abortion-rights attorneys and activists are describing. Those legislators voted on what they knew at the time. I do not fault them.

But now we *know*. They have *told* us. They have *shown* us – for example, in the unanimous ruling of the New Mexico Supreme Court. Whatever else it may also be, the 1972 Equal Rights Amendment was also a pro-abortion Trojan Horse. It was a stealth strategy. It was understood by some smart, sophisticated ERA champions such as Ruth Bader Ginsburg, but it was not understood by state legislators of that era, and in most cases, probably not understood either by local pro-ERA activists, who innocently believed what they were told – that there was no connection.

Your predecessors in 1975 voted on the ERA based on what they understood about it at the time. I do not fault them. There is nothing in the text of Senate Concurrent Resolution No. 4010 that imputes any

blame or fault to the legislators of 1975, who voted on the basis of what they perceived at the time that the ERA meant, and what they were told it meant.

But now we sit here 46 years later. The world has changed. If by some magic this exact same language was submitted by Congress to this legislature today, I am sure that you would give it much more exactly scrutiny with respect to the implications for laws protecting the unborn, limitations on government funding of abortion, and quite likely, some other things as well. I would go so far as to predict that this legislature, like many of the others that ratified back in the period of 1972 through 1975, would not again ratify that same language.

So what do they do? The activists on the Left badly want their pro-abortion nuke in the Constitution, but pro-life state legislators, and pro-life members of Congress too, have seen what is inside the Trojan Horse. They are wise to the con. What to do?

THE THREE-STATE SCHEME, AND NORTH DAKOTA'S UNWITTING ROLE IN THAT SCHEME

What they did was some up with a scheme under which they thought the dead 1972 ERA could be resuscitated. It was cooked up in 1993, and given the name the "three-state theory." Basically, the premise was that ratification deadlines didn't matter. Either they were unconstitutional if done in the usual way, or that Congress could change them retroactively at any time. The other key element of the theory was that rescissions were never permissible at any time, whether before or after a deadline.

Under either variation of this theory, resolution for a proposed constitutional amendment, structured in the usual way, can never die. And a state that once consents to that proposal is forever committed to that position, no matter how much time passes, or much the meaning of certain terms in law may change. It is what one law professor, Grover

Joseph Rees, once aptly referred to as the "gotcha!" theory of amending the Constitution.

So starting in 1994, they went forth with this three-state theory, and tried to get any of the 15 states that had never ratified the ERA to embrace it. They were opposed by National Right to Life and its affiliates, among others. For 23 years, they completely failed. But then finally they were able to get such a resolution approved in Nevada in 2017, and then in Illinois in 2018, and then finally in Virginia in January, 2020. When it passed in Nevada, the advocates proclaimed, "We are number 36." When it passed in Illinois, "We are no. 37." And when it passed in Virginia in January 2020, the national news media proclaimed that the half-century struggle had crossed the finish line – the 38th state had ratified, millions of Americans were informed by the mainstream news media.

But on what basis did those three states claim to be numbers 36, 37, and 38? Well, they did it by counting you.

That's right. As far as the current generation of Democrats in Congress, and left-leaning advocacy groups are concerned, you all are in the bag. The legislatures of Indiana, Kansas, Ohio, Michigan, Montana Texas, Wisconsin, Wyoming, and other states, that would never ratify this 1972 ERA language again, knowing what we know now – you're all in their bag, under their theory.

I am not just talking about what these people say in press releases or the newspapers. It is much more serious than that. In January 2020 the Justice Department issued a very thorough legal opinion that explained that the ERA had expired on March 22, 1979, therefore, the Archivist of the U.S. must not certify it as part of the Constitution. So the attorneys general of Virginia, Nevada, and Illinois sued the Archivist, in federal court in the District of Columbia, in case called *Virginia v. Ferriero*. Their claim was that ERA was already part of the Constitution, because the deadline was unconstitutional, and that 38 states had ratified. In their original complaint dated January 30, 2020, on page 7, they submitted a list of the states they were counting, and

North Dakota was on the list. Immediately under that, they stated in bold face, "Recent ratifications by Nevada, Illinois, and Virginia bring the total number of ratifying states to 38."

They told the federal court that North Dakota is their constitutional pocket, so to speak. Moreover, Democratic attorneys general for 18 other states supported this position in a friend-of-the-court brief submitted June 29, 2020. They too, counted North Dakota as in the bag, helping make up the claimed 38-state bundle.

Arguments went back and forth in that case for a year. In the meantime, a presidential candidate named Joe Biden issued a position paper state stated, "Now that Virginia has become the 38th state to ratify the ERA, Biden will proudly advocate for Congress to recognize that three-quarters of states have ratified the amendment and take action so that our Constitution makes clear that any government-related discrimination against women is unconstitutional." So the new President, as a candidate at least, also took the position that Virginia was the 38th cumulatively ratifying state -- so he, too, was counting you as being in the bag.

Just yesterday, Mr. Chairman, the Democratic leadership of the House of Representatives brought to the floor of that body a resolution that purports to retroactively remove the deadline from the 1972 ERA. The backers of that resolution say that if both houses of Congress adopt it, it will have the effect of completing the ratification of the ERA, because (they repeated over and over), "38 states have ratified the ERA." They are counting North Dakota. North Dakota being in the bag is essential to their scheme.

The U.S. House of Representatives yesterday passed that resolution, which is premised on the 38-state claim, albeit by the smallest pro-ERA margin in 50 years 222-204. A majority of U.S. senators are on record in favor of it – but, more than a majority will be required to surmount procedural obstacles. Mr. Chairman, we think this is all unconstitutional.

On March 5, 2021, the judge hearing the Virginia case, Judge Rudolph Contreras, a well-respected jurist who was appointed by President Obama, handed down a 37-page ruling in which he said that the deadline was unconstitutional and real, and that the actions of the Nevada, Illinois, and Virginia legislatures came too late. They didn't really ratify anything, in the judge's view.

But that ruling can be appealed. The resolution adopted yesterday by the House of Representatives is premised on the continued claim that North Dakota and the other 34 states that ratified prior to the deadline, are still on board—even those that explicitly rescinded prior to the deadline.

The pro-ERA people have a plan. If they could get the U.S. Senate to go along, they would go into federal court and argue that the federal legislative branch and the federal Executive Branch have come to agreement that the ERA is now part of the Constitution -- but they can only do that by counting North Dakota and every other state that ratified before the deadline.

Our view is different. We believe that the ERA ceased to exist on March 22, 1979, in the same manner that a bill not enacted ceases to exist at the end of a session of this legislative body. We believe that all of the ratifications expired on that date as well, which is the position that is stated in SCR 4010.

But there seem to be a great many important people who are confused about that, or at least pretending to me. The Democrat attorneys general. Nearly every Democratic member of Congress. The President of the United States, and the Vice President. They all consider North Dakota to be in the bag for their continuing efforts to air drop the ERA into the text of the U.S. Constitution.

We think it is past time that you helped clear the air.

S.C.R. NO. 4010 IS NOT PROPERLY DESCRIBED AS A "RECISSION"

I do not know who drafted Senate Concurrent Resolution No. 4010, but I think it is very well worded. Sometimes in the press I see it described as *rescinding* North Dakota's ratification. I do not mean to split hairs, but that is not accurate. Your resolution is not a rescission. That word *rescind* does not appear anywhere in the resolution, nor any synonym such as "nullify" or "render null and voice," or any other language of that kind. Rather, the resolution quite properly states that "the vitality of" the 1975 ratification "officially lapsed" at the expiration of the ERA, on March 22, 1979.

Whether a state can rescind a ratification, prior to a deadline and prior to a proposed amendment achieving the required three-fourths margin, is a disputed legal issue--mostly because there has never been a case in which it made the difference in determining whether a constitutional amendment had been ratified or not. But rescissions, if possible, can occur only while a constitutional amendment proposal is still a live entity. An expired proposal no longer exists, and cannot longer be the subject either of a valid ratification or a valid rescission. The 1972 ERA expired and ceased to exist on March 22, 1979.

So, SCR No. 4010 is not a rescission, but it is an affirmation that the North Dakota legislature's 1975 consent was to a specific congressional proposal that included a deadline, and that consent lapsed when the 1979 deadline was reached without the required consensus by 37 other states. The resolution mere explains what happened back in 1975 and in 1979. The Legislative Assembly in 1975 ratified the ERA Resolution just as it was submitted by Congress, which had a deadline in its Proposing Clause, and when that deadline arrived without the ERA having become part of the Constitution, the ERA ceased to exist. The consent to that specific proposal also expired, ceased to exist.

So, you are not undoing anything, which is what rescind means. Rather, in this resolution you are *explaining* what you already did. Some

might say, "This should not be necessary," bur regrettably it is necessary, because a great many people in high places are apparently confused about it, or pretending to be confused.

As we speak, those confused people are trying to convince U.S. senators to adopt their view that North Dakota and of the other 34 pre-1979 ratifying states are on board. Before too long, quite likely, they will be trying to convince additional judges higher federal courts that the ERA should be deemed part of the Constitution because 38 states have consented to it.

On behalf of National Right to Life and North Dakota Right to Life, I strongly urge that you give speedy approval to SCR 4010. Let those notices be sent to the Archivist of the United States. Let the notice be sent to your congressional delegation, who perhaps can discuss it with their colleagues and help them come to better understand the dynamics and dangers of the "gotcha" approach to amending the Constitution.

SCR 4010 states that North Dakota "should not be counted by Congress, the Archivist of the United States…any court of law" as a state "still having on record a live ratification" of the ERA.

The subtext of SCR 4010, as I read it, is something like this – polite, but crisp and clear: "It has come to our attention what you are up to. We are not in your bag. We are not on board for your extra-constitutional end run. The ERA expired on March 22, 1979, and so did our consent to it. We tell you this now in this formal way, to remove any ambiguity, to correct the confusion. Count us out. Count us out!

I believe that if your body takes this step, other state legislatures which are similarly situation may well follow in your footsteps, adopting these helpful explanatory resolutions. This will be helpful in clearing the air in the U.S. Senate, perhaps. Down the road a bit, it may even help some judges see the absurdity of these theories that proposed amendments and ratification actions live forever, even when they are stamped with explicit expiration dates.

I thank you, and would be happy to address any questions.

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Addendum:

There was no one who wanted an ERA in the Constitution more than Ruth Bader Ginsburg. She said more than once that if there was one amendment she could add to the Constitution, it would be the ERA. And yet during 2019 and 2020, she was twice asked about this matter, and on both occasions she indicated quite clearly that she believed the proper course was to *start over*.

On February 10, 2020, Justice Ginsburg, at a forum at Georgetown University Law Center, 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'?"**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMONWEALTH OF VIRGINIA, STATE OF ILLINOIS, and STATE OF NEVADA, Plaintiffs, v. DAVID S. FERRIERO, in his official capacity as Archivist of the United States, Defendant.	)	**COMPLAINT** Case No. _____

The United States Constitution now declares, once and for all, that equality of rights under the law shall not be denied or abridged on account of sex. For nearly 150 years, our Nation's foundational document did not acknowledge the existence of women. In 1920, the concept of equality among the sexes appeared in the Constitution for the first time, but was limited to the right to vote. Now—after 231 years and on the centennial of the 19th Amendment—the American people have committed to equality regardless of sex by adopting the Equal Rights Amendment as the 28th Amendment to the U.S. Constitution.

On January 27, 2020, the Commonwealth of Virginia became the 38th State to ratify the Equal Rights Amendment. At that moment, the process set forth in Article V of the U.S. Constitution was complete. Plaintiff States Nevada, Illinois, and Virginia—the three States to most recently ratify—ask this Court for an order: (1) directing the Archivist of the United States to perform his purely ministerial duty under 1 U.S.C. § 106b to "cause the amendment to be published, with his certificate, specifying . . . that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States," and (2) declaring that the Equal Rights Amendment has become the 28th Amendment to the U.S. Constitution.

> "ARTICLE —
>
> "SECTION 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> "SECTION 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> "SECTION 3. This amendment shall take effect two years after the date of ratification."

28. Both the House and the Senate approved H.J. Res. 208 by far more than the required two-thirds majority. The House adopted the resolution in October 1971 by a vote of 354-24, and the Senate adopted the resolution in March 1972 by a vote of 84-8. In both chambers, the Equal Rights Amendment passed with strong bipartisan support.

29. While Congress was considering the Equal Rights Amendment, President Richard Nixon endorsed it, noting in a letter to Senate Republican leadership that he had co-sponsored the equal rights amendment as a Senator in 1951 and remained committed to its adoption.

30. Once approved by two-thirds of each chamber, the Equal Rights Amendment was formally proposed to the States as provided in Article V.

31. By the end of 1972, 22 States had ratified the Equal Rights Amendment: Hawaii, New Hampshire, Delaware, Iowa, Kansas, Idaho, Nebraska, Texas, Tennessee, Alaska, Rhode Island, New Jersey, Colorado, West Virginia, Wisconsin, New York, Michigan, Maryland, Massachusetts, Kentucky, Pennsylvania, and California. The total number of ratifications reached 35 by the end of 1977, as Wyoming, South Dakota, Oregon, Minnesota, New Mexico, Vermont, Connecticut, Washington, Maine, Montana, Ohio, North Dakota, and Indiana each ratified the amendment.

B. Recent Ratifications by Nevada, Illinois, and Virginia Bring the Total Number of Ratifying States to 38

32. In recent years, three more States have ratified the Equal Rights Amendment.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

COMMONWEALTH OF VIRGINIA, STATE OF ILLINOIS, and STATE OF NEVADA,

Plaintiffs,

v.

DAVID S. FERRIERO, in his official capacity as Archivist of the United States,

Defendant,

ALABAMA, LOUISIANA, NEBRASKA, SOUTH DAKOTA, and TENNESSEE,

Intervenor-Defendants.

Case No. 1:20-cv-242-RC

BRIEF FOR THE STATES OF NEW YORK, COLORADO, CONNECTICUT, DELAWARE, HAWAI'I, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, WASHINGTON AND WISCONSIN, AND THE GOVERNOR OF KANSAS AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS

LETITIA JAMES
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(*Complete counsel listing appears on signature pages.*)

Dated: June 29, 2020

INTEREST OF AMICI CURIAE

Amici are the States of New York, Colorado, Connecticut, Delaware, Hawai‘i, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington and Wisconsin ("amici States"), as well as the Governor of Kansas and the District of Columbia. Amici submit this brief under Local Civil Rule 7(o)(1) to support the plaintiffs, the States of Virginia, Illinois and Nevada, in opposing the motion to dismiss filed by the defendant Archivist of the United States.

Amici have two distinct interests in this litigation. First, amici States have a strong interest in vindicating their role as sovereign participants in the constitutional amendment process. Article V of the U.S. Constitution confers on the States the plenary power to ratify proposed amendments to the Constitution. Like plaintiffs, seventeen of the amici States have exercised that power in voting to ratify the Equal Rights Amendment ("ERA"). And because a total of thirty-eight—or three-quarters—of the States have now ratified the ERA, Article V commands that it "shall be valid to all intents and purposes, as part of this Constitution." By refusing to perform his ministerial duty to certify the ERA as a valid amendment, the Archivist undermines the States' role in the constitutional amendment process. Amici States have a strong interest in vindicating that role and maintaining the effectiveness of their ratifications. Indeed, that strong interest, combined with the fact that plaintiffs cast the last three votes needed to ratify the ERA, is precisely what gives plaintiffs standing here.

Second, all amici here have an interest in ensuring that their residents receive the highest level of protection from discrimination on the basis of sex, both when they interact with the federal government and when they travel to other States. While many amici have passed their own laws and some amici States have passed their own constitutional amendments guaranteeing equality on

EQUAL RIGHTS AMENDMENT - PROPOSED MARCH 22, 1972
LIST OF STATE RATIFICATION ACTIONS

The following dates reflect the date of the state legislature's passage, the date of filing with the Governor or Secretary of State, or the date of certification by the Governor or Secretary of State, whichever is the earliest date included in the official documents sent to the NARA, Office of the Federal Register. (Updated as of: 03/24/2020)

STATE	RATIFICATION	STATE	RATIFICATION
Alabama	not ratified	Montana	Jan. 25, 1974
Alaska	April 5, 1972	Nebraska*	March 29, 1972
Arizona	not ratified	Nevada**	March 22, 2017
Arkansas	not ratified	New Hampshire	March 23, 1972
California	Nov. 13, 1972	New Jersey	April 17, 1972
Colorado	April 21, 1972	New Mexico	Feb. 28, 1973
Connecticut	March 15, 1973	New York	May 18, 1972
Delaware	March 23, 1972	North Carolina	not ratified
Florida	not ratified	North Dakota	Feb. 3, 1975
Georgia	not ratified	Ohio	Feb. 7, 1974
Hawaii	March 22, 1972	Oklahoma	not ratified
Idaho*	March 24, 1972	Oregon	Feb. 8, 1973
Illinois**	May 30, 2018	Pennsylvania	Sept. 26, 1972
Indiana	Jan. 24, 1977	Rhode Island	April 14, 1972
Iowa	March 24, 1972	South Carolina	not ratified
Kansas	March 28, 1972	South Dakota*	Feb. 5, 1973
Kentucky*	June 27, 1972	Tennessee*	April 4, 1972
Louisiana	not ratified	Texas	March 30, 1972
Maine	Jan 18, 1974	Utah	not ratified
Maryland	May 26, 1972	Vermont	March 1, 1973
Massachusetts	June 21, 1972	Virginia**	January 27, 2020
Michigan	May 22, 1972	Washington	March 22, 1973
Minnesota	Feb. 8, 1973	West Virginia	April 22, 1972
Mississippi	not ratified	Wisconsin	April 26, 1972
Missouri	not ratified	Wyoming	Jan. 26, 1973

* Purported Rescission

Nebraska	March 15, 1973
Tennessee	April 23, 1974
Idaho	Feb. 8, 1977
Kentucky	March 20, 1978
South Dakota	March 5, 1979

** Ratification actions occurred after Congress's deadline expired. *See* U.S. Dep't of Justice, Office of Legal Counsel, *Ratification of the Equal Rights Amendment*, 44 Op. O.L.C. __, Slip Op. (Jan. 6, 2020).