MEMORANDUM

TO: The Honorable Members of the Missouri General Assembly
Steve Rupp, President

FROM: Gerard Nieters, Legislative Director
Susan Klein, Executive Director and Legislative Liaison

DATE: January 9, 2019

RE: Why you should **oppose** any resolution purporting to ratify the 1972 federal "Equal Rights Amendment"

SUMMARY: According to various press reports, during the 2019 legislative session, certain activist groups intend to press the General Assembly to adopt a resolution purporting to ratify the "Equal Rights Amendment" (ERA) that Congress submitted to the states in 1972. The National Right to Life Committee (NRLC) and Missouri Right to Life, the state NRLC affiliate, strongly urge legislators to oppose any such resolution for two reasons:

- The language of the ERA that was approved by Congress in 1972, which is locked-in and cannot now be revised, 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 (e.g., to mandate tax funding of abortion)
- Any proposal to "ratify" the 1972 ERA is constitutionally illegitimate – an attempt to engage in *ex post facto* manipulations of the ratification process to achieve a political goal. When Congress proposed the ERA to the states in 1972, it attached a seven-year deadline -- a deadline that 24 of the ratifying states *explicitly referred to* in their ratification resolutions.

On October 4, 1982, the U.S. Supreme Court explicitly declared that the key legal issues surrounding ratification of the 1972 ERA (including the validity of rescissions passed by five ratifying state legislatures prior to the deadline, and a 1978 action by Congress that purported to extend the deadline by 39 months) were "moot" (moot because, as the Acting Solicitor General of the U.S. explained, the ERA "has failed of adoption no matter what the resolution of the legal issues presented here."). In subsequent years, ERA supporters in Congress have repeatedly introduced proposals to begin the entire amendment process anew,
implicitly recognizing that the 1972 ERA is long dead. For example, such new ERAs have been introduced in the 115th Congress (2017-2018) as S.J. Res. 6 and H.J. Res. 33.

HOW THE RESOLUTION IGNORES CONSTITUTIONAL REQUIREMENTS

When Congress submitted the ERA to the states in 1972, it included a seven-year deadline which expired in 1979 with only 35 state legislatures having ever acted to ratify. Of the 35, 24 *explicitly referred to the deadline* in their ratification resolutions; moreover, five *rescinded* their ratifications prior to the deadline.

The U.S. Supreme Court had previously recognized that "Congress had the power to fix a reasonable time for ratification," and indicated that such a deadline would be effective (*Coleman v. Miller*, 1939). The Supreme Court had also said, "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 is to say, determined at the time a proposed amendment is submitted to the states. (*Dillon v. Gloss*, 1921, emphasis added).

In a highly controversial move, Congress in 1978 passed (by *majority* vote, not two-thirds) a resolution that purported to extend the deadline to June 1982, but when this disputed second "deadline" arrived, no additional states had ratified. A federal district court ruled that the deadline extension was unconstitutional *and* that the five rescissions were valid. (*Idaho v. Freedman*, 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 the rescissions were valid -- and in 1982 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 1983 the majority leadership of the U.S. House of Representatives (then Democrat-controlled), also recognizing that the 1972 ERA was dead, attempted to send that the same ERA language out to the states again – but the House voted down this do-over ERA, because the House leadership would not allow consideration of the abortion-neutral amendment or other amendments. Fourteen co-sponsors voted "no." (Nov. 15, 1983)

Nevertheless, beginning in 1994, some ERA advocates have claimed that the 1972 ERA could still be ratified -- because the "Madison Amendment" (also known as the "Congressional Pay Amendment") was deemed ratified in 1992, 203 years after Congress proposed it. However, Congress did not attach any deadline when it submitted the Madison Amendment to the states, nor did any state take action to rescind ratification of the Madison Amendment.

THE ERA-ABORTION CONNECTION

Leading pro-abortion groups – including NARAL, the ACLU, and Planned Parenthood -- have strongly urged state courts to construe state ERAs, containing language virtually identical to the 1972 federal ERA proposal, to invalidate any laws that treat abortion differently from other "medical procedures," including laws restricting tax-funding of abortion, and laws requiring parental notification or consent for minors' abortions.

Consider, for example, what occurred in New Mexico, which 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 federal language that the Virginia resolutions now purport to insert into the U.S. Constitution. Subsequently, the state affiliates of Planned Parenthood and NARAL relied on this state ERA in a legal attack on the state version of the "Hyde Amendment," prohibiting Medicaid funding of elective abortions. The case was *NM Right to Choose / NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998), *cert. denied*, 526 U.S. 1020 (1999). In its 1998 ruling, every justice on the New Mexico Supreme Court 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.

Writing for the *unanimous* court, 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." *Id.* at 856.

It should be noted that the New Mexico Supreme Court based its ruling *solely* on the state ERA, and 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.

Moreover, similar arguments based on equal-protection arguments applied to tax funding of abortion have been accepted by some courts in other states. *See, e.g., State v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 909 (Alaska, 2001) (equal protection clause); *Simat Corp. v. AHCCCS,* 56 P.3d 28 (Ariz. 2002) (equal protection clause); and *Doe v. Maher*, 515 A.2d 134 (Conn. Super. 1986) (state ERA).

It should be obvious that this same analysis – that limits specific to abortion are by definition a form of sex discrimination and therefore impermissible under ERA – could be used to invalidate any federal or state restrictions 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 -- including religiously affiliated hospitals -- to refuse to participate in abortions; and parental notification and consent laws. Indeed, the ACLU "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.

When questioned about the New Mexico ruling and other such rulings, some ERA proponents reply that the U.S. Supreme Court has previously reviewed abortion-related restrictions under a "privacy right" analysis, and ruled (5-4, in 1980) that this "privacy right" does not invalidate a law (the Hyde Amendment) restricting federal Medicaid funding of abortion. They go on to assert that the proposed federal ERA would not "change" these past "privacy" rulings. But this argument is transparently evasive, entirely begging the question. Obviously, past U.S. Supreme Court rulings on abortion issues have dealt only with the *current* U.S. Constitution – *without* the ERA's absolute prohibition on abridgement of "rights . . . on account of sex." Whatever one
thinks of the Supreme Court's "privacy" doctrine, the privacy doctrine is *irrelevant* to the question of what legal impact the ERA itself – as a new constitutional provision -- would have on future cases involving abortion-related laws, when *ERA-based* challenges come before judges.

THE ABORTION-NEUTRALIZATION AMENDMENT

Beginning in 1983, pro-life members of Congress have proposed the addition of a simple "abortion-neutralization" clause to any *new* ERA before it is sent out to the states. The proposed revision – which cannot be added to the already-fixed language of the 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 revision would simply make the ERA itself neutral regarding abortion policy. However, leading ERA proponents have adamantly refused to accept such an abortion-neutral revision – and it is pretty clear why that is. That refusal is one major reason why neither house of Congress has voted on any ERA since 1983.

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For more information on the abortion-neutralization proposal, see examples of letters from National Right to Life to members of Congress, such as the one posted here: http://www.nrlc.org/federal/era/nrlc-letter-to-u-s-house-era030515/

For additional documentation on the ERA-abortion connection, see the NRLC website at http://www.nrlc.org/federal/era. For further information, contact Federal Legislation Department, National Right to Life Committee, (202) 626-8820 or federallegislation@nrlc.org.
Or, contact the Missouri Right to Life State Office at (573) 635-5110.