Opposition Statement HB/SJ0001/HB0001

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We Strongly Oppose Senate Joint Resolution 0001/House Joint Resolution 0001

On behalf of the Board of Directors for Maryland Right to Life, I strongly oppose SJ1/HJ1 that attempt to incite executive fiat to force the failed Equal Rights Amendment (ERA) of 1972 into the Constitution of the United States. The ERA would not empower women but would empower the abortion industry to use taxpayer funds to wield a monopoly over women's reproductive health and deny women access to lifesaving alternatives to abortion violence. National Right to Life and its affiliates across all fifty states have consistently opposed the ERA on this basis and will continue to do so.

The 1972 Equal Rights Amendment (ERA) Resolution submitted to the states by Congress on March 22, 1972, contained a seven-year ratification deadline. The deadline expired on March 22, 1979 with the ERA short of the 38 states required for ratification.

Despite incontrovertible legal precedent and the rule of law, pro-abortion groups, seeking a replacement for *Roe v. Wad*e, are engaged in an intensive, long term effort to trample constitutional guardrails and ram the long-expired ERA into the U.S. Constitution. ERA revivalists have asserted that the ERA is already part of the Constitution—or at least, that it will become part of the Constitution if so declared by the Archivist of the United States, or by the Congress, or both.

We agree with Douglas Johnson, a researcher who has covered the ERA ratification process since 1983, who wrote:

> "ERA revivalism at this point is best recognized not as a serious constitutional theory or set of theories, but as an extended exercise in political theater, sustained mainly by a cooperative news media, and by principle-free political opportunism among many office holders and office seekers." ("*Federal Judges Scorn ERA Revival Legal Claims*," copyright 2024 Douglas Johnson).

The ERA-Abortion Connection: The Mask Comes Off

In the wake of the U.S. Supreme Court's June 24, 2022 ruling in *Dobbs v. Jackson Women's Health Organization*, overturning *Roe v. Wade*, pro-abortion activists now loudly proclaim as true a position that for decades they denied or deflected: The Equal Rights Amendment (ERA) in the form proposed by Congress in 1972, if it ever became part of the U.S. Constitution, could be employed as a strong legal foundation for challenges to (and in their view, invalidation of) virtually all state and federal limits on abortion, and to require funding of elective abortion at all levels of government.

National Right to Life has opposed the ERA for decades, recognizing that the ERA language proposed by Congress in 1972 could be construed to invalidate virtually all limitations on abortion, and to require government funding of abortion. In decades past, such pro-life objections were publicly rejected by most ERA advocates, who often derided assertions of an ERA-abortion link with such terms as "misleading," "scare tactic," and even "a big lie." Some prominent ERA advocates now acknowledge that such denials were merely a strategic deception.

By the latter half of 2020, ERA champions in and out of Congress were openly proclaiming that the ERA was urgently needed precisely to preserve federal constitutional "abortion rights." Since the Court's overturning of *Roe v. Wade*, these proclamations have only become louder and more insistent. A few examples:

- The National Organization for Women, in a monograph circa 2015, making numerous sweeping claims about the hoped-for pro-abortion legal effects of the ERA—stating, for example, that "an ERA—properly interpreted —could negate the hundreds of laws that have been passed restricting access to abortion care . . ."

- The Daily Beast (July 30, 2018) reported remarks by Jennifer Weiss-Wolf, vice president of the Brennan Center for Justice: "Both the basis of the privacy argument and even the technical, technological underpinnings of [Roe] always seemed likely to expire." …"Technology was always going to move us to a place where the trimester framework didn't make sense." She also said, "If you were rooted in an equality argument, those things would not matter."

- NARAL Pro-Choice America, in a national alert sent out on March 13, 2019, asserted that "the ERA would reinforce the constitutional right to abortion . . . [it] would require judges to strike down anti-abortion laws . . ."

- The Associated Press on January 1, 2020 reported that Emily Martin, general counsel for the National Women's Law Center, "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.'" ("*Lawmakers pledge ERA will pass in Virginia. Then what?*" by Sarah Rankin and David Crary, Associated Press, January 1, 2020.)

- National AP reporter David Crary wrote, "Abortion-rights supporters are eager to nullify the [ERA ratification] deadline and get the amendment ratified so it could be used to overturn state laws restricting abortion." (January 21, 2020).

- Kate Kelly, an attorney-activist who worked for Congresswoman Carolyn Maloney in 2021, was asked on January 24, 2021 whether the ERA would "codify Roe v. Wade." She answered, "My hope is that what we could get with the ERA is FAR BETTER than Roe."

- The ACLU, in a letter to the U.S. House of Representatives (March 16, 2021): "The Equal Rights Amendment could provide an additional layer of protection against restrictions on abortion... [it] could be an additional tool against further erosion of reproductive freedom..."

- On March 4, 2022, the Columbia Law School ERA Project sponsored a two-hour symposium panel about grounding "reproductive rights" in the Equal Rights Amendment.

- Kate Kelly also wrote in an essay titled "*The Equal Rights Amendment Is a Comprehensive Fix That Can Save Roe*": "Roe is on the brink of failing. So what is the comprehensive fix that can save Roe and perhaps even expand access to abortion? The Equal Rights Amendment." And: "Though some ERA advocates have shied away from making the connection between these issues in the past, they should be touted as the main reasons we still need the ERA today." (published March 22, 2022)

- "The Equal Rights Amendment…would protect the right to abortion and the full range of reproductive healthcare and is more critically needed now than ever before." (Columbia Law School, ERA Project May 3, 2022)

In addition to such predictive statements, ERAs that have been added to various state constitutions, containing language nearly identical to the proposed federal ERA, have actually been used as pro-abortion legal weapons. The following cases serve as examples:

- The New Mexico Supreme Court in 1998 unanimously struck down a state law restricting public funding of elective abortions, solely on the basis of the state ERA, in a lawsuit brought by affiliates of Planned Parenthood and NARAL (*New Mexico Right to Choose v. Johnson*).
- Moreover, on January 29, 2024, the Pennsylvania Supreme Court construed a state law limiting public funding of abortion to be a form of sex-based discrimination and therefore "presumptively unconstitutional" under the 1971 Pennsylvania Equal Rights Amendment, which contains language virtually identical to the 1972 federal ERA proposal (*Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services*).

Congress Has No Power to Revive an Amendment After Enacted Deadline

Article V of the Constitution spells out two possible methods of amending the Constitution. Only one of the methods has ever been employed: Congress, by a two-thirds vote of each house, adopts a joint resolution that proposes a constitutional amendment to the states. If three-quarters of the states (currently, 38) ratify the amendment, then the amendment becomes part of the Constitution.

The proposed text to be added to the Constitution is always preceded by a "Proposing Clause" specifying the "mode of ratification." The Proposing Clause is not a mere "preamble," but a constitutionally required element of every constitutional amendment submission, which instructs the states on what method of ratification to employ. In the case of the ERA, Congress included in the proposing clause, a seven-year deadline for ratification by the states, making operable the March 23, 1979 expiration date.

The second method, as yet unemployed, is a Constitutional Convention, which under Article V may be convened by a call of two-thirds of the state legislatures.

After the ERA failed to be ratified by 1979, the only constitutionally sound option for ERA supporters was to re-start the process by seeking congressional approval again. Democratic leaders in Congress attempted to do just that in 1983. Democratic leaders and pro-ERA groups were stunned when the ERA went down to defeat on the House floor on November 15, 1983, in large part because of opposition from National Right to Life and other pro-life groups.

Despite obvious Constitutional impediments, ERA revivalists, including President Biden, have urged that Congress adopt a joint resolution purporting to retroactively "remove" the seven-year ratification deadline enacted through the Proposing Clause of the ERA. Such a measure failed in the U.S. Senate in April 2023 and has no prospect of success in the House of Representatives during 2024.

Although the real ERA proposed by Congress ceased to exist in the constitutional sense on March 22, 1979, the ERA re-emerged as a political construct in 1993, with the development of what came to be called "the three-state strategy." Under a federal statute enacted in 1984, when a state legislature ratifies a proposed constitutional amendment, it sends notification to the Archivist of the United States. When an

Archivist receives 38 valid ratifications, he or she publishes the amendment in the Federal Register, which is a formal notification that the text of the U.S. Constitution has been revised.

On January 6, 2020, Assistant Attorney General for the Office of Legal Counsel (OLC) Steven A. Engel issued a 38-page legal opinion, noting that a unanimous 1921 Supreme Court opinion held that Congress had power to include a binding ratification deadline in a constitutional amendment resolution before submitting it to the states—an element of Congress's power to set the "mode of ratification." Because the ERA Resolution contained such a deadline, it was no longer before the state legislatures after that deadline, and had not been ratified, the opinion argued. The OLC opinion also said that once Congress submits a constitutional amendment proposal to the states, the role of Congress has ended—it may not retroactively modify that proposal, including any deadline. Therefore, the OLC opinion concluded, the only constitutional course for ERA supporters was to re-start the entire process (as Democrats in Congress had tried but failed to achieve in 1983). Two days after OLC issued the opinion, the National Archives and Records Administration (NARA), the agency headed by the Archivist, posted a statement: "NARA defers to DOJ on this issue and will abide by the OLC opinion, unless otherwise directed by a final court order." That remains the NARA position to this day.

Still Democrats in Congress and state legislatures like the Maryland General Assembly, continue to demand that the Archivist of the United States certify the ERA without waiting for congressional action, or that the President order her to do so. The tension between objective requirements for amending the Constitution and political gamesmanship are illustrated by the fact that President Biden has endorsed the unsuccessful congressional proposals to proclaim the ERA as having been ratified, even though his Justice Department has recognized in federal court that the ERA has not been ratified—a position affirmed in a 42-year unbroken string of federal court decisions.

Federal Courts Affirm Ratification Deadline

There is no judicial authority to support any claim that the ERA continued to exist as a viable proposal after March 22, 1979. Despite numerous legal challenges over the past four decades, the Supreme Court and federal judges of every political stripe have rebuffed the politically contrived, legally untenable claims of the ERA revivalists and affirmed that the ERA has in fact expired.

Since 1981, pro-ERA litigants have presented six federal courts with one or more legal theories under which the ERA remains viable. A total of 29 federal judges and justices have had an opportunity to act or vote to advance one or more of those claims. The ERA-revival litigants have yet to obtain a single affirmative vote or action, from a single federal judge, on a single one of their essential legal claims. Every judge who reached the merits of a key legal premise of the ERA-is alive movement rejected the claim. Of the 29 judges, 15 were appointed by Republicans, 14 by Democrats. In the most recent cases, most of the judges have been Democrat-appointed.

The most recent major judicial blow to ERA deadline-denialism occurred on February 28, 2023, when a unanimous three-judge panel of the U.S. Court of Appeals for the District of Columbia rejected a lawsuit by the attorneys general of Illinois and Nevada. Those two states had asked that the court order the Archivist of the United States to certify ("publish") the ERA as part of the Constitution. The Court, by a unanimous three-judge panel rejected the claim that the Archivist must publish the ERA, gave no credence whatever to the ERA-revivalist claim that the placement of the deadline in the Proposing Clause

rendered it non-binding. The panel noted that "[I]f that were the case, then the specification of the mode of ratification in every amendment in our nation's history would also be inoperative." The appeals panel ruling was written by Judge Robert Wilkins, appointed by President Obama; he was joined by Judge Michelle Childs, appointed by President Biden, and Neimo Rao, appointed by President Trump.

The questions surrounding the constitutional status of the ERA are purely questions of law, and it is the role of the judiciary "to say what the law is." Yet many ERA advocates have been engaged in strenuous attempts to short-circuit judicial review of those constitutional questions, or even to assert that the federal courts do not have authority to decide whether the ERA has been ratified or is long expired.

Doublethink by Democrats on Rescissions

Four state legislatures (Nebraska, Tennessee, Idaho, and Kentucky) ratified the 1972 ERA, but then, before the ratification deadline of March 22, 1979, adopted new resolutions rescinding their previous ratifications. The South Dakota legislature did something different: On March 5, 1979, it adopted a resolution making it clear that its original ratification would expire on March 22, 1979, which arguably would have been the case anyway, but South Dakota sometimes appears on lists of "rescinding" states.

Nearly all Democratic state attorneys general have now explicitly argued in briefs submitted to federal courts in ERA-related litigation, or elsewhere, that Article V does not mention rescissions and therefore rescissions must be rejected as unconstitutional. All or nearly all current Democratic members of Congress have also rejected the constitutionality of rescissions, by cosponsoring and/or voting for resolutions that implicitly or explicitly disavow the rescissions on the ERA.

Yet, many of these same Democratic office holders—for example, prominent **Congressman Jamie Raskin (MD)**, the ranking Democrat on the House Oversight Committee—have supported rescissions on other constitutional amendments, and/or have supported state legislatures' rescissions of applications for a constitutional convention, which is the alternative method of amending the Constitution under Article V.

This hypocrisy is further proof that ERA revivalists are employing political gamesmanship to contravene the law in wanton disregard of the objective requirements for amending the Constitution and of the duties of their elected offices.

For these reasons we strongly oppose SB1/HJ1 and urge you to uphold your oath of office to defend the Constitution of the United States by issuing an unfavorable report.

(Source: "*The State of Abortion in the United States*" 11th Edition, 2024 National Right to Life.)