

February 8, 2023

202-378-8863

Re: In opposition to S.J. Res. 4 (Cardin), purporting to retroactively “remove” the ratification deadline and pre-deadline rescissions for long-expired 1972 Equal Rights Amendment

Dear Senator:

The National Right to Life Committee (NRLC), the federation of state right-to-life organizations, urges you to oppose S.J. Res. 4, a measure that purports to retroactively revive the 1972 Equal Rights Amendment and insert it into the text of the U.S. Constitution – even though multiple federal court decisions have held that the ERA expired over 50 years ago.

As summarized below, NRLC believes that the vague and sweeping language of the 1972 ERA could be employed to invalidate even the most modest limits on abortion, including late abortions, and to require unlimited government funding of elective abortion. Moreover, even a senator who is not troubled by those prospects should oppose S.J. Res. 4, because the joint resolution is based on premises that, if embraced, would flatten guardrails that protect the entire text of the Constitution, and would forever fundamentally damage the integrity of the constitutional amendment process itself.

The language of the 1972 ERA would easily lend itself to use as a powerful pro-abortion legal weapon, potentially invalidating all laws or government policies that protect unborn members of the human family, at any stage of development, or that even indirectly impede access to abortion, including any limits on government funding of elective abortion. Leaders of prominent pro-abortion and pro-ERA advocacy groups now openly proclaim that they believe the 1972 ERA must be construed in this way. For decades, leading ERA advocates denied or deflected such interpretations, but those denials and deflections were merely “[a strategic decision](#),” we are now told (i.e., a deception). The mask has now been [discarded](#). All Members who support any limits on abortion or government funding of elective abortion would be well advised to take the pro-abortion advocacy groups at their current word as to how they intend to employ the vague 1972 language, if it ever becomes part of the Constitution.

S.J. Res. 4 is an exercise in political theater that shows contempt for the courts and for long-established constitutional requirements. The 92nd Congress included a seven-year ratification deadline in the ERA Resolution. On March 5, 2021, federal District Judge Rudolph Contreras (an appointee of President Obama) [ruled](#) that Congress had the constitutional power to impose such a deadline, that it would have been “absurd” for the Archivist to disregard the deadline, and that legislative actions that occurred in Nevada (2017), Illinois (2018), and Virginia (2020) “came too late to count.” Illinois and Nevada appealed that ruling. Oral arguments were presented to a three-judge panel (Judges Wilkins, Childs, and Rao) on September 28, 2022, and a ruling is expected in the months immediately ahead. As the *Washington Post* pointed out in [a February 9, 2022 fact check](#), over [the past 40 years](#), “Every time the issue has been litigated in federal court, most recently in 2021, the pro-ERA side has lost, no matter whether the judge was appointed by a Democrat or Republican.”

S.J. Res. 4 is similar to retroactive “deadline removal” measures that passed the House of Representatives on February 13, 2020, and March 17, 2021. However, the language of S.J. Res. 4 goes further than those earlier measures, so even Members who endorsed the previous versions should look afresh at the new formulation. S.J. Res. 4 is based on an amalgam of unconstitutional novelties. The legitimate constitutional role of Congress in the amendment process ended when it submitted the ERA Resolution to the states on March 22, 1972. As Deputy Assistant Attorney General Sarah Harrington [asserted](#) before the D.C. Circuit on September 28, 2022, “The Constitution doesn’t

contemplate any role for Congress at the back end. Congress proposes the amendment, it goes out into the world, and the states do what they’re going to do.” Article V does not allow Congress to engage in a “bait-and-switch.” As Judge Contreras observed in his 2021 ruling upholding the deadline, “Inclusion of a deadline was a compromise that helped Congress successfully propose the ERA where previous attempts to pass a proposal had failed.” The current Congress lacks power to retroactively edit that legislative compromise, while simultaneously claiming the congressional super-majorities and subsequent state ratifications that flowed from it. Judge Contreras noted that 30 of the states that ratified the ERA specifically quoted or referred to the deadline in their ratification instruments.

(If Congress actually possessed bait-and-switch powers, those powers could as easily be abused to *undercut* an amendment properly submitted to the states, if simple majorities of a later Congress disliked it— for example, by retroactively *shortening* a deadline in order to head off anticipated ratification, or by retroactively changing the mode of ratification from *state legislatures* to *state conventions* mid-way through the ratification process. Such manipulations are incompatible with Article V.)

Moreover, even if Congress somehow did hold power to execute a retroactive bait-and-switch, the authors of S.J. Res. 4 have formally declared the resolution to be an exercise of Congress’ Article V powers. That means *approval* would require a *two-thirds* vote. This is one of the two grounds on which the only federal court ever to review the purported 1978 “deadline extension” ruled that it was unconstitutional. (*Idaho v. Freeman*, 1981)

Finally, even setting aside the specific requirements of Article V, no Congress has power to act on any measure after it has *expired*. The Senate cannot today take up and pass the “deadline removal” measure passed by the House on March 17, 2021, because it has expired. The current Congress cannot override a veto by President G.H.W. Bush; his veto messages have expired. Certainly, Congress has the power to again submit the same proposed amendment text to the states, with or without a ratification deadline, but it must do so by the procedures spelled out in Article V, including the requirement for two-thirds approval by each house, and all within a single Congress. As the late Justice Ginsburg said (2-10-20):

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"?

National Right to Life will heavily weigh any action by which any senator would seek to advance this manifestly unconstitutional joint resolution-- a measure openly declared by its backers as intended to erect a constitutional barrier against any protections for unborn members of the human family. The recent history of judicial, executive, and legislative actions on the Equal Rights Amendment is documented in detail, with links to primary sources, in the [NRLC Special Report on the Equal Rights Amendment](#) (January 23, 2023). For further information, please contact us at (202) 378-8863, or via e-mail at djohnson@nrlc.org. Thank you for your consideration of NRLC’s position on this vital matter.

Respectfully submitted,



Senior Policy Advisor
Director, *ERA Project*



Jennifer Popik, J.D.
Legislative Director